THE EXHAUSTION RULE

A CONSTITUTIONAL COMPASS FOR DISTRIBUTING POWER IN THE PRESENCE OF EU PRODUCT LEGISLATION?

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(I) GENERAL INTRODUCTION

1. The free movement of goods has been hailed as 'one of the success stories' of the internal market, and the EU more generally.[1] From an economic perspective, this means that the goods market is, generally, established and functioning properly, as major barriers to movement are (largely) eliminated, and appropriate regulation is – or has potential to be – in place.[2] Member States also accept, promote and enforce the principle that goods must be able to move freely throughout the EU. In this context, and considering the 'dramatically incomplete'[3] and often-contested internal market for services and labour, goods account for approximately 75% of intra-EU trade,[4] with EU citizens accessing a large range of products and believing in the positive impact of this freedom.[5]

2. This is not to say that the internal market for goods is complete, or that every aspect of its regime remains undisputed. To the contrary, the project stands as a permanent work in progress,[6] with laws being continually adopted and updated to accommodate legal gaps, new challenges and changing priorities.[7] This unsettled status is reinforced by a fundamental constitutional ambiguity that underlies the internal market, where questions regarding how the market should balance diversity and uniformity, reconcile regulation and integration, and divide power, are left open.[8] Any prevailing consensus on these points can therefore be legitimately renegotiated and adapted. Yet key to the strength of the legal framework, as laid down in the EU's Treaties[9] and interpreted by the Court of Justice (the Court),[10] is that it allows gaps to be filled, challenges met and tensions resolved in a manner that is both Treaty-compliant and

[1] European Commission, *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods,* Ares (2013) 3759436 – 18/12/2013, p. 8.
[2] For analysis, see J. Pelkmans, 'Economic Approaches of the Internal Market', *Bruges European Economic Research Papers*, no. 13, April 2008.
[3] *Ibid*., p. 10.
[4] European Commission, *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods, op. cit.*, p. 8.
[5] Three in four EU citizens believe in the positive impact of the internal market for goods, while 81% agree that it leads to a bigger choice of products. *Internal Market: Awareness – Perceptions – Impacts*, Analytical Report, Flash Eurobarometer, no. 263, 2010.
[6] S. Weatherill, *The Internal Market as a Legal Concept*, Oxford University Press, 2017, p. 233.
[7] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, Cheltenham & Northampton, Edward Elgar, 2013, p. 46. The Court also accepts the possibility of such evolution. See ex. *BAT*, C-491/01, EU:C:2002:74, paragraph 78.
[8] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 1.
[9] The EU Treaties include the Treaty of the European Union (hereinafter TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU) (Together, the Lisbon Treaty).
[10] According to Article 19 (1) TEU, the Court of Justice is a constituent court of the Court of the Justice of the European Union (CJEU).

politically acceptable. One core element of this process is the room given to Member States to, directly and indirectly, impact the contours of the free movement of goods, without undermining the hierarchy of norms or the Court's role in interpreting and applying EU law.

3. Much academic commentary is devoted to assessing the negative integration part of this story, that is, the framework governing the free movement of goods under Articles 34 – 36 TFEU.[11] As is well documented, the Court will, in general, bring the impugned national measure within the scope of the prohibition on trade barriers under Articles 34 – 35 TFEU, before assessing whether it can be justified for pursuing a public interest in a proportionate manner, as authorised under Article 36 TFEU or by invoking a mandatory requirement. Such 'Treaty-based discretion'[12] ensures that certain national public interest rules can survive, depending on the strength and authenticity of Member State arguments.[13] And it is this capacity for survival that prompts the adoption of secondary legislation to remove outstanding barriers to trade and set regulatory standards. However, this process of completing the internal market can also serve a further purpose, which is to allow Member States to air national preferences at EU level, thus expressing the EU's 'inner Voice',[14] namely via the Council. When resulting legislative acts trigger disputes, they must be interpreted and enforced in a manner that respects both the EU legislator's intention and the free movement of goods.

4. Many such secondary rules comprehensively regulate the public interest at issue by instituting 'exhaustive' or 'total' harmonisation. And when a national measure is challenged on this basis, the Court will often invoke (what this research refers to as) the 'Exhaustion Rule' to resolve the dispute. According to longstanding jurisprudence, this Rule provides that exhaustive EU legislation will become the Court's sole norm of reference against which to assess the impugned national measure, to the exclusion of Articles 34 – 36 TFEU.[15] From one perspective,

[11] Formerly Articles 30 – 36 EEC (the Treaty Establishing the European Economic Community, otherwise known as the Treaty of Rome) and Articles 28 – 30 EC (the Treaty Establishing the European Community). To avoid confusion, this research relies almost exclusively on the current numbering under the Lisbon Treaty, that is, Articles 34 – 36 TFEU.

[12] The term 'Treaty-based discretion' has been formulated by this research and is part of the proposed framework to describe and assess the relationship between secondary and national law. See Part III (Chapter Two).

[13] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., Chapter 8.

[14] In using this term, Maletic relies on Weiler's reference to 'Increased Voice' as 'a code for a phenomenon of the Member States jointly and severally taking control of decision-making'. See I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., p. 26 and J. Weiler, 'The Transformation of Europe', *Yale Law Journal*, vol. 100, no. 8, 1991, pp. 2403 – 2483 at p. 2424.

[15] For a typical pronouncement of the Exhaustion Rule, see ex. *Commission v France (Excise Duty on Tobacco)*, C-216/11, EU:C:2013:162, paragraph 27, which states 'where a particular sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty'.

it can be classified simply as a procedural tool that assigns to the Court its normative framework of reference. Yet a comprehensive study of this Rule, as invoked (or refuted) by disputing parties and applied (or excluded) by the Court, reveals it as playing a more substantive role in determining how power is distributed in the internal market for goods. Specifically, and as outlined in Part I, the Exhaustion Rule enforces the primacy of EU law by precluding national regulatory competence in the presence of harmonisation. Yet by displacing direct application of Articles 34 – 35 TFEU in favour of the EU legislative act, the Rule also implies judicial deference to the EU legislator, which enjoys a degree of discretion to set standards and determine how power is shared with the Member States. At the same time, the exercise of such discretion remains subject to the hierarchy of norms, which the Court must enforce notwithstanding the Rule. In other words, the Exhaustion Rule 'cannot have the effect of excluding the application of the fundamental freedoms guaranteed by the Treaty'.[16] For to do so would challenge the Court's repeated findings that secondary law must comply with the fundamental freedoms and be interpreted in light of primary law.[17]

5. Such observations bring us to our main research question, which is to assess the impact of EU secondary legislation on regulating the internal market for goods. This task is achieved by exploring how the Court interprets and enforces such legislation through its application (or exclusion) of the Exhaustion Rule. As noted, the Rule ousts national Treaty-based discretion, on the one hand, and direct reliance on Articles 34 – 35 TFEU, on the other. Its application (or not) will therefore engage the relationship between national, secondary and primary law and, by extension, the Member States, EU legislator and Court. Exploring relevant jurisprudence can, in this context, shed light on the power dynamics that underlie the process of regulating the internal market for goods. This, in turn, leads us to identify a more nuanced picture of secondary product legislation than often appears in the general 'harmonisation' discourse. Indeed, by exploring national options gained through the positive integration process, the research acknowledges that the internal market for goods accommodates a more complex vertical distribution of power than what is often assumed by the Court and in academic commentary. The research further contends that, as long as the Court reflects this complexity both in its *language* and its *practice*, it can rely on the Exhaustion Rule to help build a consensual Treaty-compliant regulatory system for the free movement of goods. To this end,

[16] Opinion in *Commission v France (Excise Duty on Tobacco)*, C-216/11, EU:C:2012:819, paragraphs 39 – 41.
[17] *Ibid*.

the research proposes a new framework to describe and assess the relationship between national and EU law in the presence of secondary legislation.

6. This introductory Chapter provides the first building blocks to make such insights, by introducing the internal market and the evolving role played by secondary legislation in its achievement (1). It then presents the EU legislative process as a potential outlet for national Voice that must, however, comply with primary law, including the free movement of goods. The Court can, in this context, rely on the Exhaustion Rule as a constitutional compass to ensure respect for both the principle of institutional balance and the hierarchy of norms (2). The third section gives an outline of the research (3).

1. REGULATING THE INTERNAL MARKET FOR GOODS

7. The EU is required, under Article 3(3) TEU, to 'establish an internal market', that is, 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[18] And to this end, the Treaty provides the necessary tools to eliminate existing or potential national trade barriers (negative integration) and adopt market regulation for the internal market to function properly (positive integration).[19] Yet in terms of the *substance* of internal market rules, the Treaty supports both neo-liberal[20] and non-market goals.[21] The Treaty is similarly non-committal with respect to question of 'who decides', as it seeks to centralise power in the EU institutions, while also requiring respect for national autonomy.[22] There is, in other words, a 'constitutional ambiguity at the heart of the law of the internal market', including the internal market for goods.[23]

[18] Article 26 (2) TFEU.
[19] J. Pelkmans, 'Economic Approaches of the Internal Market', *op. cit.*, pp. 2 – 3.
[20] Ex. The principles of free movement and competition could be relied upon to protect the economic freedoms from public intervention. See M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution,* Oxford, Hart Publishing, 1998, pp. 129 – 131 and M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *EuR*, 2002, pp. 322 – 350. (The latter article was translated from German to English by professional translators).
[21] Ex. Public interest concerns are protected under Articles 36, 45 (3 – 4), 52, Article 114 (3) TFEU and the sectoral and mainstreaming provisions. See J. Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, Oxford, Oxford University Press, 2002, p. 165 and S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 233.
[22] Ex. While Article 114 TFEU grants wide power to the EU legislator, this power is, in principle, curtailed by Article 114 (4 – 5) TFEU, the principle of conferral and the principle of subsidiarity. For a discussion about the different models that are relied upon to attain the internal market, see C. Barnard, *The Substantive Law of the EU – The Four Freedoms,* Oxford, Oxford University Press, Fifth Edition, 2016, pp. 17 – 28 and M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, *op. cit.*, Chapter 4.
[23] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 1.

8. Establishing, and ensuring the functioning of, the internal market for goods is, largely, concerned with resolving this ambiguity through national and EU political regulation,[24] and, ultimately, judicial interpretation of relevant legal provisions. One goal of our research is to explore how secondary legislation contributes to this process, insofar as it is interpreted and enforced by the Court. Following a presentation of the negative and positive integration processes (section 1.1), this Chapter explores the latter in more depth, by tracing the concept of 'harmonisation' as understood before (section 1.2) and after (section 1.3) the adoption of the Single European Act (SEA).

1.1 The 'How' of the Internal Market for Goods

9. The negative integration process seeks to ensure intra-EU market access through de-regulation – understood as *eliminating* national barriers to trade. Its application to the free movement of goods is encapsulated under Articles 34 – 35 TFEU, which prohibit, between Member States, quantitative restrictions on imports and exports, as well as all 'measures having equivalent effect' to such quantitative restrictions (MEEQR). In *Dassonville*, the Court famously interpreted 'measures having equivalent effect' as covering any national measure that was 'capable of hindering, directly or indirectly, actually or potentially, intra-community trade'.[25] By emphasising the *effect* of the national measure as the 'key jurisdictional trigger', [26] this broad definition had a profound effect on the scope of EU free movement law, with virtually any national trade rule being 'capable' of constituting a 'potential' barrier to trade. *Dassonville*'s integrationist pull was reinforced five years later, when the Court, in *Cassis de Dijon*, introduced the principle of mutual recognition for products produced lawfully in one

[24] For the purposes of this research, the term 'regulation' is understood as the adoption of traditional 'command and control' rules such as formal legislation. Thus, insofar as EU legislation is concerned, 'regulation' constitutes the adoption of, mainly, regulations and directives, defined under Article 288 TFEU as follows: 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. As for a directive, it 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. We acknowledge, however, that the term 'regulation' can also incorporate a broader range of instruments that seek to 'steer the flow of events and behaviour' according to 'defined standards or purposes with the intention of producing a broadly defined outcome or outcomes'. See, respectively, J. Braithwaite, C. Coglianese & D. Levi-Faur, 'Can Regulation and Governance Make a Difference?', *Regulation & Governance*, vol. 1, no. 1, 2007, at p. 3 and J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Selfregulation in a 'Post-Regulatory' World', *Current Legal Problems*, 2001, pp. 103 – 47 at p. 142. This wider definition is not, however, adopted by this research.
[25] *Dassonville,* Case 8/74, EU:C:1974:82, paragraph 5.
[26] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 52.

Member State. Accordingly, such products could enjoy EU-wide market access, free from having to comply with domestic rules in the host Member State. [27]

10. Together, these two judgements consolidated a vertical transfer of regulatory power from Member States to the EU by limiting the scope for national trade rules. Yet this transfer remained incomplete, given the possibility for national public interest rules to persist under Article 36 TFEU. This Article, which lies at the heart of our research, provides as follows:

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

11. Originally based on Article XX (General Exceptions) of the GATT,[28] the content of Article 36 TFEU has not altered substantively since it was first laid down in the Treaty of Rome under Article 36 EEC.[29] It allows Member States to derogate from the free movement of goods insofar as such measures are neither discriminatory nor constitute a disguised restriction, and that are justified to protect public morality, public policy or public security; health and life of humans, animals or plants; national treasures and/or intellectual property. In other words, Member States retain a residual Treaty-based competence to curtail the fundamental freedom to move goods, once such action is justified in the public interest. This scope for national-based trade regulation was judicially extended in *Cassis de Dijon*, which, while confirming the notion of mutual recognition, also rendered such recognition 'non-absolute'.[30]Specifically, the Court stated that Member States could, in the absence of harmonisation, regulate matters relating to the marketing of products if 'necessary in order to satisfy mandatory requirements relating in

[27] *Cassis de Dijon*, Case 120/78, EU:C:1979:42, paragraph 14. For recent analysis of this case, see R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, Oxford, Oxford University Press, 2017, Chapter 5.

[28]The General Agreement on Tariffs and Trade, 1947. See www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

[29] Article 36 EEC stated: 'The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life, the protection of national treasures of artistic, historical or archaeological value or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

[30] *Cassis de Dijon*, note 27. The term 'non-absolute mutual recognition' is frequently used by Weatherill in his writings. See ex. S. Weatherill, *EU Consumer Law and Policy*, Second Edition, Cheltenham, Elgar European Law, 2013, pp. 60 – 61.

particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.[31] Obstacles to free movement resulting from such justified national regulation would be, in principle, accepted. [32]

12. Referred to collectively by this research as 'Treaty-based discretion', Article 36 TFEU and the notion of 'mandatory requirements' allow disparate national rules to persist, or at the very least, create a potential for future regulatory divergence. Moreover, legal uncertainty regarding the validity of national rules may incite traders to adapt to host country rules, despite the principle of mutual recognition.[33] In both instances, the goal of market integration can be undermined. At the same time, when interpreting and applying free movement law, 'the method that the Court (still) applies does privilege free movement as the overriding objective, against which justification arguments on different grounds of public interest must then be measured or compete'.[34] Reflecting an ordoliberal understanding of the internal market, under which the economic constitution must 'protect the market economy',[35] this approach casts pursuit of public interest goals as an exception to the higher value of free trade, as enforced through a strict proportionality test. [36] And thanks to *Dassonville*'s definition of 'measure having equivalent effect', the resulting deregulatory dynamic can then 'spill over' into vast areas of national law.[37] As such, from the perspective of achieving high regulatory standards, the negative integration regime is also unsatisfactory.

13. To move beyond such limits, the Treaty foresees a positive integration process, whereby the EU legislator can complete the internal market to the extent not possible under Articles 34

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[31] *Cassis de Dijon*, paragraph 8. The Court subsequently extended the list of mandatory requirements, a list of which can be found in European Commission, *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods, op. cit.*, pp. 28 – 30.
[32] *Ibid*.
[33] For an account of the difficulties in applying mutual recognition, see J. Pelkmans, 'Mutual Recognition in Goods. On Promises and Disillusions', Journal of European Public Policy, vol. 14, no. 5, 2007, pp. 699 –716.
[34] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford, Oxford University Press, 2013, p. 46.
[35] See D. Chalmers, 'The Single Market: From Prima Donna to Journeyman', in J. Shaw & G. More (eds.), *New Legal Dynamics of European Union*, Oxford, Clarendon Press, 1995, pp. 55 – 72 at pp. 56 – 66 and M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution, op. cit.*, pp. 126 – 121.
[36] The Court has confirmed this strict scrutiny in numerous cases, in line with its early decisions in *De Peijper*, Case 104/75, EU:C:1976:67, paragraphs 16 – 17 and *Eggers*, Case 13/78, EU:C:1978:182, paragraph 30. For more recent examples, see *Commission v France (homeopathic medicines)*, C-212/03, EU:C:2005:313, paragraph 43 and *Commission v Germany (hospital pharmacies)*, C-141/07, EU:C:2008:492, paragraph 50. For discussion see S. Enchelmaier, 'Article 36 TFEU', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union*, Fifth Edition, Oxford, Hart Publishing, 2010, Chapter 8, pp. 215 – 312.
[37] M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution, op. cit.*, p. 17. See also Part II (Chapter Two), section 3.1.

– 35 TFEU.[38] To this end, Article 114 TFEU provides the EU legislator with the core legal basis to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'. Accordingly, and relying on a legislative technique known as 'harmonisation', the EU legislator can seek to change, replace or supplement divergent national rules with an EU rule or standard. [39] Indeed, a directive finds the necessary 'internal market objective' to trigger Article 114 TFEU by removing rules that can (or could) survive under the negative integration regime. Yet while (necessarily) contributing towards market integration, Article 114 directives are not exclusively concerned with this latter goal. To the contrary, and in line with Article 114 (3) TFEU, they must also (re)regulate the market with common EU standards, for example, to protect health, the consumer or the environment. Reflecting the firm, pre-existing history of national interventionist activities,[40] and reinforced by horizontal and sectoral clauses, as well as the Charter of Fundamental Rights,[41] the regulatory function of EU internal market legislation precludes the free movement of goods from being realised at the expense of public interest goals.[42] This is not to say that Article 114 TFEU grants a general power to harmonise diverse national rules. In line with the principle of conferral under Article 5 TEU, and as confirmed in *Tobacco Advertising I*, such competence only exists where regulatory diversity poses a threat to the internal market.[43] In practice, however, once the 'internal market lever is pulled', the EU legislator enjoys extensive authority to regulate that field.[44] In other words, a directive that achieves a gain for the internal market can pursue a public interest goal as 'a decisive factor' in the choices made thereunder,[45] since it, by definition, replaces disparate national measures with a single EU rule. What emerges

[38] G. Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, Oxford and Portland, Oregon, Hart Publishing, 2006, pp. 218 – 239 at p. 219.
[39] E. Vos, 'Differentiation, Harmonisation and Governance', in B. De Witte, D. Hanf & E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, Antwerp – Oxford – New York, Intersentia, 2001, pp. 145 – 179 at pp. 147 – 148.
[40] T. Heller & J. Pelkmans, 'The Federal Economy: Law and Economic Integration and the Positive State – The U.S.A. and Europe Compared in an Economic Perspective', in M. Cappelletti, M. Seccombe & J. Weiler (eds.), *Integration Through Law*, vol. I (Methods, Tools and Institutions), Book One (A Political, Legal and Economic Overview), Berlin – New York, Walter de Gruyter, 1986, pp. 245 – 412 at pp. 246 – 247.
[41] See ex. Article 3 (3) TEU, Articles 11, 12 and 168 TFEU and Articles 35, 37 and 38 of the EU Charter of Fundamental Rights.
[42] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit*. See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 155.
[43] *Germany v European Council and Parliament*, C-376/98, EU:C:2000:544 (*Tobacco Advertising I*). See also S. Weatherill, *ibid.*, p. 11. For a discussion of this case, see *infra,* section 2.2. (Exercising and Controlling EU Legislative Power).
[44] *Ibid*. See also M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit*.
[45] *Tobacco Advertising I*, note 43, paragraph 88.

therefore, is a dual process of deregulation and re-regulation, whereby the EU legislator 'distils diverse national rules into a single common rule', while simultaneously establishing a new EU regulatory standard.[46] As Unberath and Johnston note, 'if certain trade restrictions are allowed to persist they should at least be uniform across the Community'.[47] In this context, the impact of EU regulation on national competence, and the EU standard set, should be irrelevant.[48]

14. In principle, the negative and positive integration regimes allow market integration and regulation to be achieved in tandem. As noted by Davies, 'either the state achieves its public interest objective in a way that permits free movement, or, if this is not possible, the EU is granted authorisation to begin harmonisation, with the goal of a legislative reconciliation of free movement with the public interest at stake'.[49] The effectiveness of the positive integration process depends, however, on Member State willingness to transfer power to EU level, whether by providing the necessary legal basis in the Treaty or by agreeing to legislate. In some situations, Member States – whether acting directly to amend the Treaty or indirectly through the Council – might refuse or limit such a transfer, not only to preserve (higher) national standards, but also to retain national control. In this context, it should be recalled that the 'internal market' remains as a shared competence, with national measures persisting in the field, to the extent that the EU has not acted (Article 4 (2)(a) TFEU). It can, as a result, accommodate both EU and national rules, with the former setting common standards and facilitating free movement, while the latter ensures respect for national regulatory choices. At the same time, under the principles of EU primacy and pre-emption, adopted EU legislation will oust scope for national rules, to the extent that there is conflict between the two norms.[50] The question for the legislator (and the Court in the context of a regulatory dispute) is whether the EU can, and should, adopt common rules in the first place, and if so, whether – and to what extent - these rules should preclude national action.

15. The response to this question has evolved over time, with the presumption of total harmonisation progressively giving way to a 'complex system of multi-level governance

[46] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 28. See also I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., p. 25.
[47] H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *Common Market Law Review*, vol. 44, no. 5, 2007, pp. 1237 – 1284 at p. 1241.
[48] Opinion in *Tobacco Advertising I*, C-376/98, EU:C:2000:324, paragraph 66. At the same time, the standard set will always be reviewable by reference to fundamental rights. See M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit*.
[49] G. Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests', *op. cit*., p. 219.
[50] See Part I (Chapter One), section 1.1.

characterised by a diversity of policies'.[51] The next section traces this evolution by presenting how 'harmonisation' was understood in the early Community years,[52] and how this understanding subsequently developed, before and after the SEA.

1.2 'Harmonisation' Before the Single European Act

16. Community harmonisation was, until the early to mid-1980s, broad in scope, with a far-reaching impact on national regulatory competence.[53] As will be outlined in Part I (Chapter One), such harmonisation often operated under the logic of 'field pre-emption', which meant that the simple existence of a Community measure excluded national competence over the regulated field.[54] Encapsulated in the notion of 'complete', 'total' or 'exhaustive' harmonisation, such measures were presumed to comprehensively regulate the relevant public interest, thereby removing any need for national protections. They were often adopted to regulate agricultural products, via common organisations of the market, and industrial products through the General Programme on the removal of obstacles to trade.[55] Far from the highly nuanced conception of harmonisation that exists today,[56] the latter General Programme aimed to replace divergent national regulations with Community rules wherever possible and regardless of the particular need.[57] Specifically, it sought to harmonise technical aspects of products as opposed to promoting market access[58] with a 'distinct preference for detailed measures designed to govern exhaustively the matters in question'.[59]

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[51] M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*. pp. 853 – 854.
[52] While this research generally relies on the term EU (European Union), this section relies on the term 'European Economic Community', or 'Community', as it was known at the time.
[53] For a general overview of harmonisation as it was considered in the early Community years, see A. Dashwood, 'Hastening Slowly: The Community's Path towards Harmonisation', in H. Wallace, W. Wallace & C. Webb, (eds.), *Policy-Making in the European Community*, Second Edition, Chichester, Wiley, 1983, pp.177 – 208.
[54] The pre-emption principle governs the question of whether, and the extent to which, Member States can continue to regulate in an area of shared competence, such as the internal market, in the presence of secondary legislation. 'Field pre-emption' is one pre-emption type that displaces all state regulation in a specific area, thus even in the absence of any actual or direct conflict. For discussion, see Part I (Chapter One), section 1.2 and relevant citations. See also R. Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption', *Common Market Law Review*, vol. 43, no. 4, 2006, pp. 1023 – 1048.
[55] General Programme for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States, OJ C. 76, 17 June 1969, pp. 1 – 10. For discussion, see J. Pelkmans, 'The New Approach to Technical harmonisation and Standardisation', *Journal of Common Market Studies,* vol. XXV, no. 3, 1987, pp. 249 – 269.
[56] See Part III (Chapter One), Section 1 (The Traditional Categorisation) for detailed discussion of the current conception of 'harmonisation'.
[57] A. Dashwood, 'Hastening Slowly: The Community's Path towards Harmonisation', *op. cit.*, p. 184.
[58] J. Pelkmans, 'The New Approach to Technical Harmonisation and Standardisation', *op. cit.*, p. 251.
[59] A. Dashwood, 'Hastening Slowly: The Community's Path towards Harmonisation', *op. cit.*, p. 194.

17. This early regulatory approach reflected the Commission's view that harmonisation was 'not so much to resolve concrete problems encountered in the course of constructing the common market as to drive forward the general process of integration'.[60] This vision reinforced the original 'ordo-liberal' conception of the Community as a fundamentally economic project, which aimed to achieve free movement and impose 'a "level-playing-field" with respect to competition.[61] Accordingly, national regulatory discretion, considered as undesirable almost by definition, was to be eliminated,[62] while public interest objectives were seen as 'the ultimate but indirect beneficiaries of the Community's primarily economic achievements'.[63] The Court enforced this vision by taking, what Waelbroeck termed, a 'conceptualist-federalist approach' to interpretation.[64] Mirroring the notion of field pre-emption just discussed, this approach considered that Community rules ousted all national competence, regardless of the existence of regulatory conflict.[65] Its *locus classicus*, insofar as cross-border situations are concerned, is the *Ratti* judgement. At issue in this case were Italian packaging rules, which differed from the Solvents Directive,[66] being more stringent on some aspects and less so in others.[67] When Mr. Ratti was prosecuted for failing to comply with these national rules, he argued*, inter alia*, that they were contrary to the Solvents Directive. The Court agreed. Having established that Member States could not maintain parallel national rules for its domestic market,[68] it set out its vision regarding the impact of Community harmonisation on national discretion:

> '…a Member State may not introduce into its national legislation conditions which are *more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different*, as regards the classification, packaging and labelling of solvents and that this prohibition on the imposition of restrictions not

[60] *Ibid*.
[61] See *supra*, note 35.
[62] In assessing early years, Schütze, identifies the underlying federal philosophy as one of dual federalism, whereby the Community and national levels operated independently from each other, and where the possibility for national measures to coexist in the presence of Community measures was excluded *per se*. See R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, Oxford, Oxford University Press, 2009, pp. 199 – 204.
[63] M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*., p. 857.
[64] According to Waelbroeck, 'The essential problem is to define the scope of the Community's competence. Once this is done, the consequence – i.e. the absence of power for the Member States to deal with the subject-matter included within the Community's competence – automatically follows. In other words, the Community's competence is construed as being necessarily exclusive'. M. Waelbroeck, 'The Emergent Doctrine of Community pre-emption – Consent and redelegation', in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, vol. II, Oxford, Oxford University Press, 1982, pp. 548 – 580, at p. 551.
[65] Ex. *Bollmann*, Case 40/69, EU:C:1970:12; *Fleischkontor,* Case 39/70, EU:C:1971:1 and *Granaira,* Case 18/72, EU:C:1972:108 and *Galli,* Case 31/74, EU:C:1975:8. See also Part I (Chapter One), section 1.2.3.
[66] Council Directive 73/173/EEC of 4 June 1973 on the approximation of Member States' laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations, OJ L. 189, 11 July 1973, pp. 7 – 29.
[67] *Ratti*, Case 148/78, EU:C:1979:110.
[68] *Ibid*., paragraph 26.

provided for applies both to the direct marketing of the products on the home market and to imported products'.[69]

18. This rigid understanding of harmonisation, while contributing to market integration, ultimately failed to achieve the prized goal of market integration.[70] The practicalities of such an extensive programme exceeded the resources, and legitimacy, of the Commission, and it was dogged by problems such as cumbersome procedures, excessive uniformity, over-emphasis on harmonising detailed technical specification and low output relative to national measures.[71] Legislative progress was also stalled by unanimous decision-making in the Council, and Member State reluctance to transfer what was a shared competence to the Community's exclusive control. These problems were compounded by the accession of Denmark and the United Kingdom to the Community in 1973, which brought a visceral hostility to such federalist tendencies.[72] Legislative stagnation ensued, leaving Member States free to rely on Article 36 to protect public interests, for example, in the market for industrial products.[73]

19. By the early 1980s it had become clear that radical change would be needed before any hope of an internal market could be nurtured, with the Commission itself acknowledging that the 'present method of harmonisation all too often (proved) unequal to the task of producing a true internal market'.[74] And such radical change did in fact come, through major initiatives such as the Community's new approach to harmonisation (NAH),[75] the Commission's White Paper on Completing the Internal Market in 1985,[76] and the SEA in 1986. As has been documented, these political and institutional developments contributed to a renewed regulatory role for both the Community and the Member States, and a reinforced impetus to complete the internal market.[77] Yet they did not spring from nowhere. Rather, despite the often-dominant logic of 'field pre-emption' during the early Community years, the Court and Community legislator also sowed at least some seeds for change, by redirecting the scope, intensity and regulatory balance

[69] *Ibid*., paragraph 27. (Emphasis added).
[70] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit.*, pp. 200 – 204.
[71] J. Pelkmans, 'The New Approach to Technical Harmonisation and Standardisation', *op. cit.*, p. 252.
[72] A. Dashwood, 'Hastening Slowly: The Community's Path towards Harmonisation', *op. cit.*, pp. 196 – 197.
[73] See ex. Commission White Paper on completing the internal market, COM (85) 310 final, 14 June 1985, paragraph 60.
[74] Bulletin of the European Communities, No. 1, 1985, p. 15 at paragraph 1.3.2.
[75] Council Resolution on a new approach to technical harmonization and standards, OJ C. 136, 4 June 1985, pp. 1 – 9.
[76] Commission White Paper on completing the internal market, *op. cit*.
[77] Ex. R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., pp. 207 – 214. See also S. Weatherill, *Law and Integration in the European Union*, Oxford, Clarendon Press, 1995, Chapter 5.

of the Community's legislative programme, and in accepting a different vision of what a 'true internal market' would in fact entail.

1.2.1 A Nuanced Reality

20. Turning first to the quality of the regulatory standard, the 1970s saw an increasing awareness that the common market, as it was referred to at that time,[78] should accommodate public interest goals as ends in themselves. As *Cassis de Dijon* emphasised national regulatory options in the absence of harmonisation, a political commitment to protect policy concerns at Community level also began to formulate. This included initiatives such as the 1975 Council Resolution for a consumer protection and information policy[79] and the 1973 European Council declaration setting out a programme of action on the environment.[80] A number of legislative acts followed, which regulated matters such as waste oil, air pollution from industrial plants and wild birds,[81] as well as foodstuffs, vehicles and animal health.[82] The Court, for its part, recognised consumer protection as a mandatory requirement[83] and 'environmental protection' as one of the Community's essential objectives.[84] It also accepted that Member States could protect public interest objectives not covered by common agricultural rules, even if such national action impacted the functioning of the latter.[85]

21. As for the relationship between Community and national law, the Community accepted, at least in practice, that national regulatory options could sometimes persist in the presence of harmonisation. For example, even within the exhaustive framework of early Community rules,

[78] The terms 'common', 'single' and 'internal' market are largely seen as synonymous, with the difference between them having minimal legal effect. See C. Barnard, *The Substantive Law of the EU – The Four Freedoms, op. cit.*, p. 12. This research relies, by default, on the term 'internal market', although may refer to the term 'common market' when discussing the early years.
[79] Ex. Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C. 92, 25 April 1975, pp. 1 – 1. For discussion of this and other early consumer protection initiatives, see S. Weatherill, *EU Consumer Law and Policy*, *op. cit.*, pp. 5 – 10.
[80] See in particular the Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States on the programme of action of the European Communities on the environment, OJ C. 112/1, 22 November 1973, pp 1 - 2. For discussion of this and other early political initiatives in the field of environmental protection, see J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, Fourth Edition, Groningen, Europa Law Publishing, 2012, pp. 3 – 4.
[81] For a comprehensive list of early environmental directives, see J. Jans & H. Vedder, *ibid*., pp. 4 – 5.
[82] See S. Weatherill, *EU Consumer Law and Policy, op. cit.*, pp. 5 – 10.
[83] *Casssis de Dijon*, note 27.
[84] *ADBHU*, Case 240/83, EU:C:1985:59, paragraph 15.
[85] *Holdijk & Others*, Joined Cases 141 to 143/81, EU:C:1982:122.

Member States retained leeway to adopt safeguard measures,[86] implement ambiguous directive provisions,[87] or sometimes, to negotiate an individual derogation.[88] And in some cases, the Community legislator explicitly legislated below the threshold of total harmonisation by partially regulating a particular field,[89] allowing more stringent national measures than the Community standard (minimum harmonisation)[90] or accepting, usually more lenient, national standards for domestic production (optional harmonisation).[91] The Court, in turn, authorised these practices, as it confirmed the lawfulness of the safeguard mechanism,[92] the possibility for individual national derogations[93] and the practice of setting minimum standards.[94] It also started accepting that non-exclusive powers must be shared with the Member States, once the national law did not jeopardise, impede or undermine the objectives or functioning of the Community measure.[95] Member States could, as a result, regulate matters falling outside the sphere of exhaustive regulation, or, in some cases, above the Community standard, subject to Treaty compliance.[96]

[86] Ex. Article 5 of Council Directive 74/63/EEC on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs, OJ L. 38, 11 February 1974, pp. 31 – 36.
[87] Ex. Article 5 of Directive 75/439/EEC on the disposal of waste oils, OJ L. 194, 25 July 1975, pp. 23 – 25.
[88] Ex. Ireland enjoyed a temporary derogation from the common rules on the lead content for petrol as laid down under Council Directive 78/611/EEC on the approximation of the laws of the Member States concerning the lead content of petrol, OJ L. 197, 22 July 1978, pp. 19 – 21. An extensive list of differentiating legislation adopted under ex. Articles 100 EEC can be found in C. D. Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"', *Michigan Law Review*, vol. 82, 1983 – 1984, pp. 1274 – 1293, particularly at pp. 1283 – 1285 and G. de Búrca, 'Differentiation within the Core: The Case of the Common Market', in G. de Búrca & J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Oxford and Portland, Oregon, Hart Publishing, 2000, pp. 133 – 171 at pp. 151 – 171.
[89] Ex. Council Directive 65/65/EEC on the harmonisation of laws relating to proprietary medicinal products, OJ L. 22, 9 February 1965, pp. 369-373, did not extend to the regulation of certain vitamins.
[90] Ex. Article 2 (2) of Council Directive 64/54 EEC on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption, OJ, English Special Edition 1963 – 1964, p. 99; Article 9 of Council Directive 70/357 on the approximation of the laws of the Member States concerning antioxidants authorized for use in foodstuffs intended for human consumption, OJ, English Special Edition 1970 (II), pp. 429-433 and Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L. 33, 8 February 1979, pp. 1 – 14, insofar as it applied to advertising.
[91] For early examples of optional harmonisation, see J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *Yearbook of European Law*, vol. 4, no. 1, 1984, pp. 169 – 205 at p. 179 (note 41).
[92] *Tedeschi*, Case 5/77, EU:C:1977:144.
[93] *Kind,* Case 106/81, EU:C:1982:291.
[94] *Grunert,* Case 88/79, EU:C:1980:152.
[95] Ex. *Le Campion,* Case 218/85, EU:C:1986:440 paragraph 13 and *Danisco Sugar*, C-27/96, EU:C:1997:563 paragraph 24. For discussion see M. Waelbroeck, 'The emergent doctrine of Community pre-emption – Consent and Redelegation', *op. cit.*, and Part I (Chapter One), point 41.
[96] Ex. *Grunert,* note 94; *Eyssen*, Case 53/80, EU:C:1981:35; *Van Bennekom,* Case 227/82, EU:C:1983:354 and *Campus Oil*, Case 72/83, EU:C:1984:256.

22. The scope for Community legislative action was also influenced by the Court's judgements in *Cassis de Dijon*[97] and *Tedeschi*.[98] As regards the former case, the principle of mutual recognition reduced the scope of the Community's harmonisation programme, as liberalisation through negative integration freed the Commission from its cumbersome 'traditional approach'.[99] Yet as also discussed, the Court in *Cassis* accepted that host Member States could adopt protective national rules under Treaty-based discretion, rendering mutual recognition ultimately insufficient to fully integrate national goods markets. This is where the Court's second ruling, *Tedeschi*, stepped in to confirm the Community legislator's key role in completing the integration process. In particular, and as extensively discussed in Part I (Chapter Two), this case found that exhaustive harmonisation would oust national Treaty-based competence, thus confirming that Community action could remove justifiable national trade barriers. However, *Tedeschi* also seemed to imply that the Community regulatory standard, and national measures adopted thereunder, could avoid systematic review under Articles 34 – 35 TFEU, thanks to a (rebuttable) presumption that common rules reconcile (or justifiably balance) the dual requirements of integration and regulation.[100] And insofar as such reconciliation (or justified balance) was achieved, the Community legislator could adopt high regulatory standards.[101] The common market was not, as such, concerned with deregulation, but rather sought to impose a regulatory system that secured a cross-border market.[102]

23. This vision of the Community legislator as 'reconciler' underlies the Court's earlier *Bahuis* judgement.[103] Here, the Court assessed whether charges imposed by the Netherlands for the health inspections of animal exports, adopted under Directive 64/432 on bovine and swine health problems,[104] constituted a charge having an equivalent effect to a customs duty on exports. Responding in the negative, the Court found that even though the Community obligations imposed 'unusually strict methods of supervision', these methods, being of 'universal application'[105] did not constitute unilateral trade barriers measures. To put it another

[97] *Cassis de Dijon*, note 27.
[98] *Tedeschi*, note 92.
[99] As confirmed by the Commission in its 'Communication concerning the consequences of the judgement given by the Court of Justice on 20 February 1979 in Case 120/78 (« Cassis de Dijon »)', OJ C. 256/2, 3 October 1980.
[100] For analysis, see Part I (Chapter Two), section 1.1.3 (The *Tedeschi* Deal).
[101] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit*.
[102] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 232. See also R. Barents, 'The Community and the Unity of the Common Market', *German Yearbook of International Law*, 1990, pp. 9 – 36.
[103] *Bauhuis*, Case 46/76, EU:C:1977:6. See also Part I (Chapter Two), section 2.2.3, at points 105 – 109.
[104] Council Directive 64/432/EEC on animal health problems affecting intra-Community trade in bovine animals and swine, OJ 121, 29 July 1964, pp. 1977 – 2012.
[105] *Bauhuis*, note 103, paragraph 23.

way, the inspections had not been established in the interests of one Member State, but, rather, 'in the general interest of the Community'.[106] Thus, far from being classified as an obstacle to trade, the Community system 'intended to promote the free movement of goods, in particular by rendering ineffective the obstacles to this free movement which might be created by the measures for veterinary and public health inspections adopted pursuant to Article 36'.[107] The directive was therefore fully compatible with the free movement of goods.[108]

24. These judicial developments fed into the abovementioned NAH, which redirected the harmonisation agenda 'mainly at national laws having an impact on the functioning of the common market where barriers to trade to be removed arise from national provisions which are admissible under the criteria set by the Court'.[109] Specifically, the NAH focused on harmonising those 'essential' national standards and requirements that would otherwise survive under the negative integration regime.[110] It also mandated that technical specifications should be left in the hands of standardisation bodies, which, if complied with, would trigger a presumption of compatibility and market access for products concerned. Products that did not adopt the voluntary standards would have to issue separate proof of compliance. A product that met all applicable regulatory requirements would be affixed with a CE marking and, on this basis, enjoy free movement throughout the Community. Accordingly, the NAH could guarantee free movement while reassuring Member States that regulatory standards were protected under the harmonised essential requirements, at least in principle.[111] NAH directives would achieve these goals, first, by allowing only compliant products to be placed on the market (the 'exclusivity clause')[112] and second, by precluding Member States from impeding, prohibiting or restricting the placing on the market of such products (the market access clause).[113] The

[106] *Ibid*, paragraph 29.
[107] *Ibid*., paragraph 30.
[108] *Ibid*., paragraph 20.
[109] Commission Communication concerning the consequences of *Cassis de Dijon*, *op. cit*.
[110] See Commission White Paper on completing the internal market, *op. cit*., paragraph 68 and Council Resolution on a new approach to technical harmonization and standards, OJ. C. 136, 4 June 1985, pp. 1 – 9, Sections B II.1 and B IV.2. See also J. Pelkmans, 'The New Approach to Technical Harmonization and Standardization', *op. cit*., p. 250.
[111] For a criticism of the NAH, see A. McGee & S. Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation?', *Modern Law Review*, vol. 53, no. 5, 1990, pp. 578 – 596.
[112] See ex. Article 3 of Council Directive 89/336/EEC on the approximation of the laws of the Member States relating to electromagnetic compatibility, OJ L. 139, 23 May 1989, pp. 19 – 26, which states: 'Member States shall take all appropriate measures to ensure that apparatus as referred to in Article 2 may be placed on the market or taken into service only if it complies with the requirements laid down by this Directive when it is properly installed and maintained and when it is used for the purposes for which it is intended'.
[113] See ex. Article 5 of Council Directive 89/336/EEC, *ibid.,* which states: 'Member States shall not impede for reasons relating to electromagnetic compatibility the placing on the market and the taking into service on their territory of apparatus covered by this Directive which satisfies the requirements thereof.

NAH also reduced the scope and generality of the Commission's traditional harmonisation programme by combining '*total harmonisation* of the objectives at issue (safety etc.) with a *flexible approach* of the means (standardisation).'[114] Optional harmonisation also emerged as an acceptable alternative in some circumstances.[115]

1.2.2 A Growing Need for Concrete Change

25. These developments highlighted two important, interlinked, realities for the integration process: On the one hand, Member States, and by association, the Council, would not allow a 'level-paying field' to be created at the cost of de-regulation or bad regulation. Rather, harmonisation would have to take into account 'the competing societal concerns which had prompted the original domestic action now being pre-empted'.[116] This concern to protect public interest goals lies at the heart of various developments often associated with market integration – those being the *Cassis* principle of *non-absolute* mutual recognition, the *Tedeschi* requirement that harmonisation could only preclude national regulation if the Community standard met the *necessary* threshold,[117] the resulting regulatory emphasis of the NAH and the presumption of constitutionality enjoyed by Community measures, and national rules adopted thereunder. On the other hand, protection of national regulatory diversity started to emerge as a goal in itself - not only to ensure high regulatory standards, but also to respect national competences. As the Commission started grasping the importance, and sensitivity, of these issues, Member States began to accept Community regulation, not simply as an authoritative force to override national preferences, but also as a means to express those preferences and grant them Community status.[118] The Court, for its part, reflected and reinforced this complexity, by allowing (justified) national trade rules in the absence of harmonisation, accepting alternative harmonisation models and deferring to the Community standard, in the presence of harmonisation.

26. Still, the scope for Community legislation to protect regulatory concerns, and regulatory diversity remained limited under the Treaty of Rome, given its economic focus and the absence

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[114] J. Pelkmans, 'The New Approach to Technical Harmonization and Standardization', *op. cit.*, p. 257. (Emphasis in original).
[115] A. Dashwood, 'Hastening Slowly: The Community's Path towards Harmonisation', *op. cit.*, p. 195.
[116] M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*., p. 858.
[117] See Part I (Chapter Two), points 196 – 199.
[118] G. Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests', *op. cit.*, p. 228. See also K. Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians in the European Community', *The University of Chicago Legal Forum*, vol. 1992, no. 1, pp. 93 – 133 at pp. 110 – 111.

of legal bases to pursue sectoral goals. For example, the new approach did not, in itself, challenge the presumption that Community legislation would pre-empt all national competence over a particular field. Indeed, while covering a more limited sphere, the goal of ensuring market access for compliant products required NAH directives to oust all national competence over the relevant field.[119] Even with optional harmonisation, products subject to cross-border trade had to comply with the Community standard. And where harmonisation did coexist with national regulation, this was often seen as an interim situation to be tolerated until the aim of ousting all such rules had been achieved.[120] This perspective was reflected in the temporary and constrained nature of safeguard measures and individual derogations,[121] while reliance on partial, optional and minimum harmonisation techniques was subject to 'the principle of progressiveness', 'which materializes essentially in the transitional period and its different stages'.[122] Thus, the Court justified residual national competences in the presence of Community legislation, by referring to the need to harmonise progressively. This need was sometimes explicitly stated in the relevant directive.[123] Or it was implied by the Community's failure to adopt necessary implementing measures to render certain harmonising standards effective.[124] The underlying presumption in both scenarios was that incomplete secondary rules, and accompanying national discretion (or national derogations), would eventually transform into a comprehensive Community system.[125] Any philosophical departure from the orthodoxy of total harmonisation remained largely confined to environmental directives with limited impact on the common market.[126] The most significant restriction of all, however, was

[119] *Ibid*. See also Weatherill, *Law and Integration in the European Union*, *op. cit.*, p. 146.
[120] C. D. Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"', *op. cit*., particularly at pp. 1291 – 1292.
[121] G. de Búrca, 'Differentiation within the Core: The Case of the Common Market', *op. cit.,* p. 144 and pp. 151 – 171.
[122] C. D. Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"', *op. cit.*, p. 1279.
[123] *Van Bennekom*, note 96, paragraphs 11 and 31; *Eyssen,* note 96, paragraphs 15 and 17 and *Grunert,* note 94, paragraph 6. See also C. D. Ehlermann, *ibid.*
[124] Ex. *Jongeneel Kaas*, Case 237/82, EU:C:1984:44.
[125] The Commission articulated this approach by stating, on the one hand, that the principle of universality (whereby the Community's legal system was comprised of 'a single body of secondary legislation') did 'not imply the uniformity of Community law', while on the other, insisting that 'the unity of the common market should not be put at risk' and that any deferred or differentiated application of Community law should cease as soon as circumstances allow'. European Commission, *Enlargement of the Community: Transitional Period and Institutional Implications*, Bulletin of the European Communities, 1978/2, paragraph 52. This logic also applied to optional harmonisation, which was seen as 'only a step on the way towards total harmonisation, when economic and technical conditions permit'. J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *op. cit.*, p. 179.
[126] Ex. Article 7 (2) of Council Directive 76/160/EEC concerning the quality of bathing water, OJ L 31, 5 February 1976, pp. 1 – 7 and Article 9 of Council Directive 79/923/EEC on the quality required of shellfish waters, OJ L. 281, 10 November 1979, pp. 47 – 52. As such, the principal harmonisation models relied upon at that time were

the principle of unanimous voting at the Council,[127] as this prevented the necessary legislation from being adopted in the first place. An 'absence of harmonisation' often prevailed as a result, leaving market integration to be, largely, pursued under Articles 34 – 36 TFEU.

1.3 A New Vision for the Internal Market

27. It was in this context that the SEA emerged to revolutionise decision-making,[128] as it shifted regulatory power to the Community through qualified majority voting rules (under ex. Article 100a EEC), and by expanding its competences, most notably to include environmental protection under Title VII. By defining the internal market in ex. Article 8a EEC as 'an area without frontiers', in which 'the free movement of goods, persons, services and capital is ensured, the SEA also confirmed that such frontiers could extend beyond customs to fiscal and regulatory barriers.[129] However, given the 'established notions of pre-emption' that accompanied Community harmonisation, Member States did not allow this shift to take place without limits.[130] To the contrary, they sought to constitutionalise the Community legislator's ability – and obligation – to ensure high standards, on the one hand, and to protect regulatory diversity, on the other. Relevant provisions included: ex. Article 100a (3) EEC (now Article 114 (3) TFEU), which required Commission proposals for internal market directives to 'take as a base a high level of protection'; ex. Article 8c EEC (now Article 27 TFEU), which required such proposals to also accommodate (temporary) differentiation between the Member States; ex. Article 118a (3) EEC (now Article 153 (2) TFEU), which introduced the concept of minimum harmonisation in the field of the working environment; and, most radically perhaps, the possibility for national derogations in the presence of harmonisation, under ex. Articles 100a (4 – 5) EEC (now Article 114 (4 – 5) TFEU) with respect to internal market measures, and ex. Article 130t (now Article 193 TFEU) with respect to environmental protection measures.[131]

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total and optional harmonisation. See R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit.,* p. 200.

[127] M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*. pp. 857 – 858.

[128] Pelkmans also links the SEA's success to the fact it 'coincided, and not by chance, with several reforms which had the double dividend of improving the quality of regulation and facilitating 'lighter' regulation, without undermining objectives…', including the NAH, more horizontal food regulation, mutual recognition of professional qualifications, reforms in transport policy, cross-border movement of financial capital. See J. Pelkmans, 'The Single Market: Logic and Progress of EU's Core Business', presented at a workshop on Rethinking European Integration, EUI Robert Schuman Centre for Advanced Studies, June 2014.

[129] J. Pelkmans, 'Economic Approaches of the Internal Market', *op. cit*., p. 5.

[130] S. Weatherill, *Law and Integration in the European Union*, *op. cit.*, p. 150.

[131] See Part II (Chapter Two), section 2.3.3 (Treaty-Based Derogations).

28. Over the following two decades, successive Treaties sought to build on, and refine, the changes initiated under the SEA. This included expanding EU competences to cover, for example, consumer policy (Maastricht Treaty), health policy and employee protection (Amsterdam Treaty), with each policy governed by a sectoral legal basis[132] and reinforced by mainstreaming provisions.[133] Such regulatory protections are further cemented by the Charter of Fundamental Rights, which became legally binding under the Lisbon Treaty.[134] At the same time, Member States have also tried to restrict EU action by subjecting it to the principle of conferral, and requiring any exercise of competence to comply with the principles of subsidiarity and proportionality.[135] More specifically, sectoral legal bases governing consumer and health protection, as well as social policy, limit EU action to minimum harmonisation,[136] while there are opt outs from the Economic and Monetary Union, Social Policy Protocol (Maastricht Treaty) and Schengen co-operation (Amsterdam Treaty).[137] The Lisbon Treaty has further refined the vertical division of powers both generally, for example by classifying and delimiting respective competences and bolstering the role of national parliaments, and by protecting specific national interests such as free movement of workers (Article 48 TFEU), health policy (Article 187 (7) TFEU) and social partner autonomy (Article 152 TFEU). [138]

29. Without undermining pre-existing practice, such Treaty changes mark a gradual 'shift at least in the acknowledged or explicit paradigm of EU governance'.[139] Accordingly, the EU legislator is both 'constitutionally bound to pay attention to the content and quality of the rules … being set at EU level'[140] and authorised to pursue regulatory diversity as part of an optimum regulatory solution. What is more, such possibilities do not exist simply to facilitate compromise on the road to total harmonisation, but, rather, ensure political and national

[132] *Supra*, note 41.
[133] That is, the requirement for various public interests to be taken into account when defining and implementing other EU policies. See ex. Articles 7 – 13 TFEU.
[134] For relevant provisions, see *supra*, note 41. The Charter was signed at the Nice European Council in 2001.
[135] Currently enshrined in Article 5 TEU.
[136] Respectively, Article 169 (4) (consumer protection) and Article 153 (4) (social policy).
[137] See D. Hanf, 'Flexibility Clauses in the Founding Treaties, from Rome to Nice', in B. De Witte, D. Hanf & E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, *op. cit*., pp. 3 – 26.
[138] N. Nic Shuibhne, 'Primary Laws: Judging Free Movement Restrictions after Lisbon', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.*, pp. 297 – 318 at pp. 303 – 304.
[139] G. de Búrca, 'Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity', in B. De Witte, D. Hanf & E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, *op. cit.*, pp. 131 – 144 at p. 132.
[140] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, p. 155.

diversity 'as an ideological concern and independent value in the internal market'.[141] The Court, for its part, accepts that the EU is not simply an economic Union, but must also accommodate social objectives.[142] This vision is exemplified in the 'competence enhancing' elements[143] of *Tobacco Advertising I*, which confirmed that an Article 114 directive could pursue public interest goals 'with as much intensity as (it) wishes', provided the conditions to trigger that legal basis were fulfilled.[144] As previously noted, the EU legislature need not disguise the re-regulatory dimension of its initiatives but simply tie that dimension sufficiently tightly to the market-making function of harmonisation, i.e. by eliminating national disparities, and/or equalising conditions of competition.[145] In practice, this means that the EU measure must have a certain pre-emptive effect on national regulatory competence often by ousting national Treaty-based discretion, for example via a market access clause.[146] However, once this 'internal market threshold' is met, and assuming compliance with other primary law provisions,[147] the Court will generally defer to the legislative balance achieved between regulatory and integrative goals, regardless of the actual standard set.[148]

30. This broad interpretation of Article 114 TFEU has allowed a substantive EU public policy to emerge with respect to a variety of public interest goals, notwithstanding the 'carefully drawn restrictions' in the sector-specific provisions.[149] Indeed, the narrow nature of the latter is what drives recourse to Article 114 TFEU in the first place, [150] with most harmonising product rules based thereunder (and on its predecessors, being ex. Articles 100 and 100(a) EEC and ex. Article 95 EC). That being said, product rules can also be found in directives, and regulations,

[141] N. Boeger, 'Minimum Harmonisation, Free Movement and Proportionality', in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, pp. 62 – 91 at p. 67.
[142] Ex. *Deutsche Post*, C-270/97, EU:C:2000:7, paragraph 57.
[143] D. Wyatt, 'The Community Competence to Regulate the Internal Market', University of Oxford, Faculty of Law, *Legal Studies Research Paper Series*, Working Paper No. 9/2007, July 2007.
[144] Opinion in *Tobacco Advertising I*, note 48, paragraph 66. See also *BAT*, note 7, paragraphs 60 – 61.
[145] S. Weatherill, 'The Limits of Legislative Harmonisation Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"', *German Law Journal*, 2011, vol. 12, no. 3, pp. 827 – 864, at p. 834.
[146] As noted above, a 'market access clause' precludes Member States from imposing national standards on products that comply with the harmonised EU standard. Indeed, one key reason for finding that the Tobacco Advertising Directive was invalidly based on Article 114 TFEU was that it did not contain such a clause for compliant products. See *Tobacco Advertising I*, note 43, paragraphs 101 – 105 and Directive 98/43/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L. 213, 30 July 1998, pp. 9 – 12.
[147] See *infra*, section 2.2. (Exercising and Controlling EU Legislative Power).
[148] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit.*
[149] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 171.
[150] *Ibid.*, p. 188.

adopted under other legal bases such as Article 192 TFEU (environmental protection)[151] and as part of the Common Agricultural Policy (CAP).[152] What is more, the Court accepts that Article 114 directives can facilitate regulatory diversity, for example by instituting minimum harmonisation[153] or granting Member States a defined margin of regulatory manoeuvre within an exhaustive regulatory framework[154] (referred to by this research as 'legislation-based discretion'[155]). This observation leads us to consider EU legislation, not only as a means to integrate and regulate national product markets, but also as providing an avenue for Member States to voice their preferences through the EU decision-making process.

2. REPRESENTATION AND CONTROL WITHIN THE TREATY FRAMEWORK

31. By accepting national regulatory diversity as a permanent feature, the internal market can more easily achieve high regulatory standards. There is, in other words, a link between accommodating national regulatory input and instituting protective public policy. Noting this correlation, Dougan casts minimum harmonisation as a means to resolve the 'tension between an economic and social Community (and thus between a uniform and differentiated normative landscape')'.[156] That said, the EU's expanding regulatory role also challenges the simple divide 'between the Community's interest in promoting integration and the Member States' responsibility to citizens to select appropriate levels of social and economic regulation'.[157] Indeed, while sometimes precluding protective national standards, harmonisation can also exert upward pressure on Member States,[158] which can be resisted, for example, by questioning the EU's competence to act. As highlighted in *Tobacco Advertising I,* such objections can be motivated, not by a desire to ensure high standards but by a drive to maintain control at national

[151] Ex. Council Directive 91/628/EEC on the protection of animals during transport, OJ L. 340, 11 December 1991, pp. 17 – 27.
[152] Ex. Council Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L. 30, 6 February 1993 pp. 1 – 28.
[153] Ex. Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ L. 372, 31 December 1985, pp. 31–33, as interpreted in *Buet,* Case 382/87, EU:C:1989:198.
[154] Ex. Article 6 (3) of Council Directive 76/768/EEC on the approximation of national laws relating to cosmetic products, OJ L. 262, 27 September 1976, pp. 169 – 200, obliges Member States to adopt *all measures necessary* to prevent misleading labels on cosmetics, without specifying when exactly such necessity would arise.
[155] For an explanation of this phenomenon, as distinct from Treaty-based discretion, see Part III (Chapter Two), section 1.4 (Legislation-Based Discretion).
[156] M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit.*, p. 854.
[157] S. Weatherill, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *Common Market Law Review*, vol. 36, no. 1, 1999, pp. 51 – 85 at p. 59.
[158] Ex. *Leitner*, C-168/00, EU:C:2002:163 and *Heinrich Heine*, C-511/08, EU:C:2010:189.

level.[159] This observation, which points to an important distinction between the 'who' and 'what' of EU regulation, is illustrated by considering the 'unusual paradox' inherent to Article 114 TFEU. As Maletic notes, the latter imposes a 'quality guarantee' on EU legislation that should restrict the need to trigger the derogation mechanism, and that can explain its limited impact. Yet 'it is precisely because of the perceived incursion into areas traditionally seen as within the exclusive remit of Member States and the concomitant fear that harmonisation under Article 114 TFEU may ultimately entail the demise of certain national priorities, that safeguards have been sought within the internal market harmonisation model'.[160]

32. Representation of national interests in the EU's decision-making process, as distinct from what standard to set, thus becomes a focal point. This focus is all the more pressing, given the internal market's underlying constitutional ambiguity, on the one hand, and the limited scope for national regulation under Treaty-based discretion, on the other. By reinforcing their 'Voice' at EU level, Member States can help to clarify this ambiguity while also compensating for their diminished role in the absence of harmonisation (2.1). Yet they cannot rely on the EU decision-making process to undermine the Treaty's free movement goals. Secondary legislation remains subject to EU primary law (2.2). It is in this context that the Exhaustion Rule emerges as a constitutional compass, to guide the Court in respecting this hierarchy of norms, while also protecting the legislator's function (2.3).

2.1 Member States in the EU Decision-Making Process

33. The internal market is a shared competence that allows the Member States to regulate as long as the EU has not acted. Accordingly, national power generally exists *outside* the harmonisation process, whether to regulate outside the scope of Article 34 TFEU, justify a rule under Treaty-based discretion[161] or invoke a Treaty-based derogation.[162] In practice, however, these legal avenues provide limited room for national regulatory autonomy. Indeed, we have already noted that the Court's broad interpretation of Article 34 TFEU subjects virtually any national measure to EU supervision, while also limiting the scope to justify national product rules or derogate from harmonised standards.

[159] Ex. *Tobacco Advertising I*, note 43, stemmed from a German challenge the Community's competence to adopt the first Tobacco Advertising Directive, after being out-voted in the Council under qualified majority voting rules. See Directive 98/43/EC, *op. cit*.
[160] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., p. 93.
[161] I.e. under Article 36 TFEU or by invoking a mandatory requirement.
[162] I.e. under Article 114 (4 – 5) TFEU or Article 193 TFEU.

34. Much commentary has been devoted to explaining, justifying and in some cases, criticising the Court's interpretation Article 34 TFEU, leading to a certain narrative regarding the scope of this provision[163] (2.1.1). This narrative does not, however, fully clarify a question of specific interest to our research, that being *why* Member States accept such a far-reaching incursion into their discretion, and, by extension, into the 'shared' character of the internal market for goods. This question weighs all the more heavily, given that the Treaty does not mandate this broad approach. In response, we suggest that such national acceptability is at least partly linked to the existence of effective re-regulatory competence at EU level, and, crucially, to the Member States' role in this latter process (2.1.2).

2.1.1 Article 34 TFEU and 'Market Access'

35. Given its open, ambiguous character, the Treaty neither mandates nor precludes a broad interpretation of Article 34 TFEU. This silence has triggered decades of debate over the actual and preferred scope of the free movement of goods, its relationship to other fundamental freedoms and the wider power dynamics that are, and should be, at play.[164] One early contributor to this discussion was M. P. Maduro.[165] As a young academic, and subsequently as AG, he tried to redefine a normative basis for, and ultimately limit, the Court's approach.[166] Maduro's starting point was that traditional normative justifications could not explain the EU

[163] Ex. C. Barnard, *The Substantive Law of the EU – The Four Freedoms, op. cit*., pp. 17 – 27; M. Derlén & J. Lindholm, 'Article 28 E.C. and Rules on Use: A Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions', *Columbia Journal of European Law*, vol. 16, no. 2, 2010, pp. 191 – 231; M. Fallon & D. Gerard, 'Trailing the Trailers in Search for a Typology of Barriers: Sketching a Scale of Relative Gravity and Exploring its Implications', *European Journal of Consumer Law*, no. 6, 2012, pp. 249 – 267; N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit.*, Chapter 7; D. Ritleng, « Critère de l'entrave aux libertés de circulation », in E. Dubout & A. Maitrot de la Motte (eds), *L'unité des libertés de circulation – In varietate concordia*, Bruxelles, Bruylant – Collection droit de L'Union européenne, 2013, at pp. 159 – 183; R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit*., 2017, Chapter 5; E. Spaventa, 'Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos', *European Law Review*, vol. 34, no. 6, 2009, pp. 914 – 932 and S. Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification', *Common Market Law Review*, vol. 33, 1996, pp. 885 – 906. For a critique of the 'market access' approach, see ex. G. Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles', *European Journal of Consumer Law*, no. 2, 2012, pp. 25 – 39. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129758 (last accessed 1 September 2019), P. Oliver & S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law', *Common Market Law Review*, vol. 44, 2007, pp. 649 – 704 and J. Snell, 'The Notion of Market Access: A Concept or a Slogan ?', *Common Market Law Review,* 2010, vol. 47, pp. 437 – 472 at p. 468.

[164] *Ibid.*

[165] While Maduro is far from the only voice to be considered on the scope of Article 34 TFEU, his writings provide a useful entry point to the debate, particularly given his subsequent role as Advocate General.

[166] M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, *op. cit.*, and M. P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', *European Law Journal*, 1997, vol. 3, no. 1, pp. 52 – 82.

and its legal order: On the one hand, anti-protectionist concepts, which focused on discrimination, were overly narrow, too easy to circumvent and insufficient to explain the case-law. On the other, considering Article 34 TFEU as a constitutional right to trade would imply a level of hostility to regulation that found 'no reflection' in Member States' traditions or the Treaties themselves. Rather, Maduro considered the Court's activist approach to be *majoritarian*, as it sought to protect **'**the rights and policies of the larger European political community (the majority) against the "selfish" or autonomous (depending on the point of view) decisions of national polities (the minorities)'.[167] Maduro then argued that such balance could be achieved at national level, in the absence of harmonisation, by enhancing 'the representation of the interests of nationals of other Member States within national political processes'.[168] And insofar as there was no 'under-representation' of such interests,[169] national policy decisions would be presumed legitimate, without being second-guessed by the Court. As he sums up as AG, '… the task of the Court is not to call into question as a matter of course Member States' economic policies. It is instead responsible for satisfying itself that those States do not adopt measures which, in actual fact, lead to *cross-border situations being treated less favourably than purely national situations*'.[170]

36. Maduro thus appears to link the scope of Article 34 TFEU to measures that discriminate, directly or indirectly, against transnational situations when compared to the purely national,[171] with Member States free to protect genuine public concerns, once they consider non-domestic interests.[172] As such, he promotes a 'tolerance ethos' between Member States,[173] similar to the Commission's understanding of mutual recognition[174] and the Court's own position in some

[167] M. P. Maduro, *We the Court*, *ibid*., p. 11. This, Maduro posits, 'explains why the regulatory balance set by the Court normally corresponds to the view of the Commission, and to the legislation in the majority of the Member States', *ibid*., p. 78. Schütze, however, criticises this majoritarian thesis, which he considers to be 'empirically unproven, theoretically weak, and … practically unworkable'. See R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit.*, pp. 290 – 300.
[168] M. P. Maduro, 'Reforming the Market or the State?', *op. cit*., p. 72. See also C. Joerges, 'A Renaissance of the European Economic Constitution?', in U. Neergaard, R. Nielsen & L. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, Copenhagen, Djøf Publishing, 2009, pp. 29 – 52.
[169] *Ibid*., p. 173. See also M. P. Maduro, 'Reforming the Market or the State?', *op. cit*., p. 78.
[170] Opinion in *Alfa Vita*, C-158/04, EU:C:2006:212, paragraph 41. (Emphasis in original).
[171] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., p. 237.
[172] On this understanding, the *Keck* judgement, which excluded certain non-discriminatory selling arrangements from the scope of Article 34 TFEU, remains intact. Opinion in *Alfa Vita*, note 170, paragraphs 34 – 35.
[173] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., p. 199.
[174] Specifically, the Commission held in its response to Cassis de Dijon that the principle of mutual recognition precluded Member States from taking an 'exclusively national viewpoint' when regulating the free movement of goods, but, rather, had to 'give consideration to the legitimate requirements of the other Member States'. Commission Communication on *Cassis de Dijon*, *op. cit.*

cases.[175] Yet Maduro also goes further than mere tolerance. As evidenced in his academic and AG writings, he considers Article 34 TFEU (and the fundamental freedoms in general[176]), not as a 'market freedom', but rather as a *political* right, grounded in the Treaty-based concept of EU citizenship,[177] and granting 'rights of participation and representation … in the national political processes'.[178]

37. By considering market actors as having a right of representation in national political processes, Article 34 TFEU must also presume that such actors enjoy a *prime facie* right to access the national market in the first place. Accordingly, Maduro's citizen-based vision (shared in some shape or form by the Court[179] and other commentators[180]) both reflected and influenced the wider trend of interpreting the freedoms as granting EU economic actors a right to *access the markets* of EU Member States, whether to trade in goods and services, reside and work or set up a business.[181] As Barnard notes, '(t)he market access approach … looks at the

[175] Ex. In *Doc Morris*, C-322/01, EU:C:2003:664, a national prohibition on the sale of medicines by mail order was held to be a measure having equivalent effect because it could impede market access for imports more than for domestic products. See paragraph 74.
[176] Ex. Opinion in *Marks & Spencers,* C-446/03, EU:C:2005:201, paragraphs 37 – 40 (in relation to the freedom of establishment) and Opinion in *Macrino & Capodarte*, C-202/04, EU:C:2006:76, paragraphs 55 – 59 (in relation to the freedom to provide services).
[177] M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, *op. cit.*, p. 175. It is true that Article 34 TFEU can be invoked, not only by EU citizens, but also by third country nationals. Indeed, as long as the good in question comes within material scope of Article 34 TFEU, the nationality of the trader is immaterial. See P. Oliver & S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law', *op. cit.*, p. 677. That said, the figure of the EU citizen plays a key metaphorical role in conceiving the fundamental freedoms as transcending national legal orders, by providing a subjective imputation point, or a category of an EU subject, outside the national context. See L. Azoulai, 'Le sujet des libertés de circuler', in E. Dubout & A. Maitrot de la Motte (éds.), *L'unité des libertés de circulation – In varietate concordia*, Bruylant – Collection droit de L'Union européenne – Bruxelles, 2013, pp. 385 – 411 at p. 389.
[178] M. P. Maduro, *We the* Court, *ibid*., and M. P. Maduro, 'Reforming the Market or the State?', *op. cit.*, pp. 72 – 73.
[179] *Supra*, note 175.
[180] Ex. Joerges takes a 'political rights' interpretation of fundamental freedoms in general, and the freedom of establishment in particular, by considering that '(the) ECJ did not foster a process of regulatory competition which would replace constitutional deliberation by market processes. European citizens were instead granted a 'right to justification', which obliges their governments to explain the reasonableness of regulatory interventions and to subject these reasons to the supervision of the ECJ'. What is more, this citizen-based right to justification can extend to Member States' own nationals, insofar as the impugned rule impacts on cross-border activity. C. Joerges, 'A Renaissance of the European Economic Constitution?', *op. cit.,* p. 46. See also C. Joerges, 'On the Legitimacy of Europeanising Europe's Private Law: Considerations on a Justice-Making Law for the EU Multi-Level System', vol 7.3, *Electronic Journal of Comparative Law*, September 2003. Available at https://www.ejcl.org/73/art73-3.html. Last accessed 13 September 2019. By the same token, Weatherill notes that the EU's internal market rules 'are aimed at national practices which obstruct cross-border trade, not simply commercial freedom, and even those rules are not forbidden: rather, *they are put to the test of justification'*. S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 232 (emphasis added). Azoulai reaches a similar conclusion by considering the EU citizen as the subject of free movement, which transcends national legal orders and imposes an obligation on Member States to ensure that a situation with multiple legal and fiscal attachments is not disadvantaged. See L. Azoulai, 'Le sujet des libertés de circuler', *op, cit*., p. 389.
[181] Ex. the Court relied on the notion of citizenship-based market access to 'explode the boundaries' of the free movement of workers, establishment and services by accepting to review non-discriminatory regulatory barriers

national rule solely from the perspective of the (usually out-of-state) claimants: does the national rule prevent or hinder their market access'.[182] Maduro's vision also reflected, and influenced the related drive to converge the fundamental freedoms into 'a general right for Union citizens to pursue an economic activity in a cross-border context'.[183]

38. A detailed analysis of this complex and dynamic area of law, which continues to animate controversy and debate, lies outside the scope of our research. Suffice to note, for our purposes, that the notion of market access is increasingly accepted as the criterion to assess respect for free movement, and can help to both explain and justify the Court's free movement case-law, at least from an EU citizen's perspective. As Nic Shuibhne observes: 'neither the Treaty nor its framing case law expressly establishes access as the regulatory paradigm of free movement law. But the open way in which restrictions have been conceived – again, in both the Treaty and case law – clearly positions access as a credible market philosophy'.[184] However, if legitimacy relates to the notion of acceptability,[185] one must acknowledge that, at the EU level, acceptability does not only relate to citizens, but must also include the Member States as subjects of the EU legal order.

39. One could, from one perspective, expect Member States to object to such a judicial narrative. First, despite Maduro's desire to protect the national sphere, his approach ultimately

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to such movement. See E. Spaventa, *Free Movement of Persons in the European Union – Barriers to Movement in their Constitutional Context*, Kluwer Law International, 2007, Chapters 2 and 3. Relevant case-law includes *Bosman,* C- 415/93, EU:C:1995:463, *Alpine Investments,* C-384/93, EU:C:1995:126 and *Gebhard,* C- 55/94, EU:C:1995:411. A similar market access approach was subsequently accepted in relation to the free movement of goods with cases such as *Commission v Italy (Trailers),* C-110/05, EU:C:2009:66 and *Mickelsson,* C-142/05, EU:C:2009:336. For a detailed discussion of this case-law, see N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., pp. 224 – 234. For a discussion of the market access approach in general, see *infra*, note 188.

[182] C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit.*, p. 19.

[183] A. Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms', *European Law Review*, vol. 35, no. 1, pp. 36-56, at p. 39. See also L. Azoulai, 'Le sujet des libertés de circuler', *op. cit.*; C. Barnard, *The Substantive Law of the EU: The Four Freedoms, op. cit.*; D. Ritleng, 'Critère de l'entrave aux libertés de circulation', *op. cit*., and E. Spaventa, 'From Gebhard to Carpenter: towards a (non-)Economic European Constitution », *Common Market Law Review*, vol. 41, no. 3, 2004, pp. 743-773, at p. 743. Advocate Generals have expressed similar views in Opinions in *Alfa Vita*, note 170, paragraph 51, in *Commission v Italy (Trailers)*, C-110/05, EU:C:2006:646, paragraphs 83 and 118 and in *Bosman*, C-415/93, EU:C:1995:293, paragraphs 200 et seq. It should be noted, however, that the drive to converge is also driven by practical concerns, given the need to rationalise what had become a very complex field. See H. D. Jarass, 'A Unified Approach to the Fundamental Freedoms', in M. Andenas & W-H. Roth (eds.), *Services and Free Movement in EU Law*, Oxford, Oxford University Press, 2002, pp. 141 – 163. At the same time, and as noted by Nic Shuibhne, '(t)he need to take difference considerations into account in personal and trade contexts sits uneasily with the idea of convergence'. See N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., p. 35.

[184] N. Nic Shuibhne, *ibid.*, p. 209.

[185] F. Ost & M. van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002, p. 398.

justifies its 'Europeanisation', and thus limitation. This is because Member States must now 'take into account the extent to which the rules they adopt are liable to affect the position of nationals from other Member States'.[186] And as a necessary corollary, scope for regulatory discretion, while persisting, remains restricted, which could potentially trigger deregulation.[187] Second, commentators have long bemoaned the 'definitional ambiguity' of market access, which 'when pressed, collapses into economic freedom or anti-protectionism and obscures the need to choose between the two competing paradigms of free movement law'.[188] This elasticity not only undermines the principle of legal certainty. It could also trigger EU overreach, with judicial reliance on Article 34 TFEU ultimately encouraging the 'unhindered pursuit of commerce'.[189] Indeed, 'a case can be made that almost any national rule has some effect on inter-state movement, even if that was never the intention of the rule and the effect on inter-state trade is slight'.[190] One way to protect against this latter risk would be to restrict Article 34 TFEU to discriminatory national measures, as Maduro appears to suggest. Yet such a move could allow certain barriers to movement, such as genuinely non-discriminatory product bans, to escape, notwithstanding their impact on importers.[191] Absent any concrete limitations, however, and the notion of EU citizenship, with its related rights of representation and justification, simply makes the Court's broad approach more palatable, without restricting the scope of Article 34 TFEU in practice.[192] It is true that this broad interpretation need not prevent genuine and proportionate national trade rule from surviving. The point, however, is that it is the Court that enjoys this final power of assessment, which Member States must wait for and accept. Finally, the fact that Member States *could* reject the above 'judicial narrative' is evidenced if we consider other fundamental freedoms, and in particular the free movement of

[186] Opinion in *Alfa Vita*, note 170, paragraph 51.
[187] G. Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles', *op. cit*., pp. 28 – 30.
[188] J. Snell, 'The Notion of Market Access: A Concept or a Slogan?', *op. cit*., p. 468. See also N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., pp. 234 – 249, E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non)-Economic European Constitution', *op. cit.*, pp. 757 – 758 and E. Spaventa, *Free Movement of Persons in the European Union*, *op. cit*., Chapter 5.
[189] Opinion in Hünermund, C-292/92, EU:C:1993:863, paragraph 1. For a discussion of this risk, see N. Nic Shuibhne, *ibid.*
[190] C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit.*, p. 21.
[191] For an outline of the drawbacks to relying on 'discrimination' as the framework principle to determine the scope of Article 34 TFEU, see C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit.*, p. 19 and N. Nic Shuibhne, *ibid*., pp. 205 – 208.
[192] It is on this basis that Nic Shuibhne seeks to refine the notion of market access by considering how it can be 'credibly defended, defined and applied as a framework principle of free movement law'. To this end, she suggests that the principle of 'access' embodied under the fundamental freedoms should not be tied to the market, but rather, should protect 'access to the exercise of free movement rights'. N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit.*, pp. 210, 241 and, more generally, Chapter 7. See also Schütze, who considers Maduro's suggestion of 'virtual representation' as a matter of 'constitutional stupidity'. See R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit.*, p. 299.

workers. Specifically, and as discussed in our conclusion, similar citizen-based justifications for a broad interpretation of Article 45 TFEU have not garnered the same degree of acceptance (or even tolerance) but, to the contrary, seemed to exacerbate the tensions between law and politics.[193] The reasons for such tensions are varied and complex but include one specific feature of the free movement of workers legal regime, being that the latter removes practically all national *and EU* regulatory discretion over market access and rights of EU workers in host Member States. This feature is exceptional when compared to the regulation of the free movement of goods, which grants genuine scope for the EU legislator to regulate public interest concerns, often to a high standard. This latter regulatory avenue remains key to compensating Member States for the loss of national control in the absence of harmonisation.

2.1.2 An Avenue for National Voice

40. Maduro refers to the EU's (re)regulatory competence to undermine an ordoliberal reading of the Treaty, noting, first, its reinforcement over successive Treaty changes, and, second, that the Court generally defers to common standards, unlike its strict scrutiny of national rules.[194] Indeed, he relies on these features to classify the Treaty as 'an open constitution' and build his own 'majoritarian' conception of the Court's Article 34 case-law.[195] Yet the developments cited by Maduro also empowered the *Member States*, which remain, through the Council, at the 'focal point of the public power constituted by the Treaties'.[196] In other words, bolstering the EU's regulatory powers also provides an avenue for national Voice, whether this concerns the initial decision to harmonise, which EU standard to set and whether this standard ousts, or can coexist with, alternative national rules. This claim provides an important counterbalance to the impression of (exhaustive) EU legislation as operating exclusively to *pre-empt* national regulatory options.[197] It also leads us to consider that Member

[193] See E. Ni Chaoimh, 'What's Wrong with the Legal Regime Governing the Free Movement of Workers', in H. Mercenier, E. Ni Chaoimh, L. Damay & G. Delledonne (eds.), *La libre circulation sous pression. Régulation et dérégulation des mobilités dans l'Union européenne,* Bruxelles, Bruylant, 2018, pp. 71 – 87.
[194] M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution*, *op. cit.*, pp. 76 – 78 and M. P. Maduro, 'Reforming the Market or the State?', *op. cit.*, pp. 65 – 66. See also Part I (Chapter One), section 2.2.3 (Empowering the Legislator).
[195] *Ibid*. See also I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., pp. 11 – 12 and, for an important critique of this thesis, R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit.*, pp. 290 – 300.
[196] A. Von Bogdandy & J. Bast, 'The European Union's Vertical Order of Competence: The Current Law and Proposals for its Reform', *Common Market Law Review*, 2002, vol. 39, no. 2, pp. 227 – 268 at p. 231.
[197] As explained in detail throughout this research, exhaustive EU product rules do, necessarily, pre-empt Member States from exercising Treaty-based discretion. However, such rules can also support national regulatory programmes, encourage high regulatory standards and, in some cases, grant Member States regulatory options by providing for 'legislation-based discretion'. See in particular Part II for an outline of the case-law.

States do not accept the Court's broad approach, simply because it has a more solid normative justification. Rather, such acceptance is also linked, at least in part, to the existence of effective re-regulatory competence at EU level,[198] and to the Member States' central involvement in this latter process.[199]

41. Weiler highlighted this unique feature of Community decision-making in his thesis on the dual character of supranationalism, namely by insisting that the supranational legal structure was necessarily linked to its intergovernmental political process, the latter being dominated by Member States 'filling in the normative framework'.[200] At the same time, decision-making remained subject to supranational elements, and in particular to the superior Community legal order.[201] Weiler then notes 'a cyclical interaction', and resulting 'equilibrium', between the judicial-normative and political-decisional processes, which helps 'explain the overall stability of the system and its resilience to recurring crises generated within and outside'.[202] As summed up by Joerges, the 'involvement of national political actors in the Community's decision-making process, and recognition of their political interests, remained 'indispensable for the stabilisation and expansion of supranational legal structures.[203] Weiler subsequently relied on Hirschman's theory on Exit and Voice[204] to explain how this equilibrium was reached in the EEC's foundational period.[205]

42. Hirschman's original thesis identifies Exit and Voice as two reactions to market malperformance, with the former representing the 'simplified world of economics' and the latter corresponding to the messy world of politics[206]: Specifically, Exit (via market forces) allows for organisational abandonment in the face of unsatisfactory performance, while Voice (or the political process) enables intra-organisational correction and recuperation. Given the

[198] As Schütze observes, the relationship between negative and positive integration 'becomes absolutely vital'. See R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit*., p. 311.
[199] Indeed, this could help explain why 'the potentially significant tolerance ethos of mutual recognition … never established deep roots in the free movement case law outwith consideration of specific legislative frameworks'. N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit.*, p. 199.
[200] J. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law*, 1981, vol. 1, no. 1, pp. 267–306 at p. 280.
[201] *Ibid.*
[202] *Ibid.*, p. 292.
[203] C. Joerges, 'The Market Without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics', *European Integration online Papers (EIoP),* vol. 1, no. 19, 1997, pp. 1 – 35 at p. 6. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=302710 . Last accessed 11 July 2019.
[204] A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organisations and States,* Cambridge, MA, Harvard University Press, 1970.
[205] J. Weiler, 'The Transformation of Europe', *op. cit*., pp. 2410 – 2431.
[206] *Ibid*., p. 2411.

need for balance between these two forces of equal importance, increased possibilities for Voice (via the political process) reduce the pressure on Exit (via market forces). By the same token, closure of Exit leads to increased demands for Voice. Hirschman developed his concepts to deal with behaviour in the marketplace but also highlighted their relevance to membership behaviour in any organisational setting. Which brings us to Weiler's thesis. Essentially, Weiler presents the doctrines of direct effect, supremacy, implied powers and human rights control, together with the Community system of judicial review, as foreclosing national ability to selectively Exit from legal obligations. As a counterbalance, Member States sought increase their Voice by taking control of the political decision-making process, via intergovernmental bodies, the resurgence of the national veto and the European Council. In other words, acceptance of the EU's Rule of Law was premised on Member State ability to determine what this law was. In this context, Weiler relies on the term 'Increased Voice' as 'a code for a phenomenon of the Member States jointly and severally taking control of decision-making'.[207] Balance between law and politics ensued, bringing with it an institutional mutual trust, without which the subsequent integration process could not have succeeded.

43. Weiler's model can fall short as a general legal theory of EU integration, namely by failing to accommodate legislative policy activism outside the control of the Member States, or the multitude of other policies that affect non-State actors.[208] To put it another way, not all policies and regulatory developments are at the mercy of the Member States' bargaining processes. This is all the more given institutional developments such as qualified majority voting, the growing role of the European Parliament, particularly through co-decision, and the enlargement of the EU. That said, Member States remain a key force in legitimising and ensuring the acceptability of EU rules – not just in times of crises, but also as part of the general legislative procedure. Maletic illustrates this point by casting Article 114 (4 – 5) TFEU as a means to police the boundaries between EU and national competence in the presence of common rules. Specifically, she finds that respect for national autonomy via this derogation mechanism within 'an increasingly centralised harmonisation system' is not only in accordance with the Treaty, but also reflective of the 'Inner Voice' of the EU. She concludes the Member States 'in this redefined, attentive legal order, … have the task of helping the EU to meet

[207] *Ibid.*, p. 2424. See also I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., pp. 25 – 27.
[208] C. Joerges, 'The Market Without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics', *op. cit*., pp. 5 – 6.

emerging scientific challenges and of deploying the harmonisation tools in a diligent and trustworthy way conducive to further European integration'.[209]

44. Our research of the free movement of goods regime follows in a similar vein: On the one hand, it acknowledges that EU secondary legislation can have a far-reaching pre-emptive effect on national regulatory competence. Yet it also highlights that Member States have scope to express regulatory preferences through the positive integration process, the results of which can enjoy a degree of deference before the Court. This dynamic, which is facilitated by the Exhaustion Rule, helps to counteract, and render acceptable, the preclusion of national regulatory options, both in the absence of harmonisation (under the Court's broad interpretation of Article 34 – 36 TFEU) and in its presence (given that exhaustive EU rules oust Treaty-based discretion). In other words, and relying on Hirschman's language, the foreclosure of Member State's ability to selectively Exit from EU product rules (both in the absence and presence of harmonisation) is counterbalanced by the increased options for national Voice in the EU legislative procedure.[210] At the same time, the EU legislator, and its inner Voice, remains fully subject to the Union's primary law.

2.2. Exercising and Controlling EU Legislative Power

45. The internal market is, in many ways, hardwired to accept regulatory diversity. This is because Member States enjoy a key policy-making role in the absence of harmonisation, under Treaty-based discretion, and in its presence, via the EU decision-making process. As regards the latter, the Treaty provides multiple avenues for Member States to voice their regulatory preferences. Most significant of all is the existence of a broad capacity to (re)regulate in the first place, as well as a political willingness to activate relevant legal bases. National leeway is also evident under Article 114 TFEU, with its 'constitutionally imperative compromise' between the EU's legislative competence and Member States' residual regulatory autonomy.[211] This same compromise permeates other examples of national input, with the possibility for minimum standards explicitly recognised under Article 169 (4) TFEU (consumer protection),

[209] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, p. 26.
[210] See also Schütze, who links the legitimacy of the Court's 'activist' approach to creating the common market, on the one hand, to the existence of 'the *possibility* of subsequent Union legislation', on the other. 'Thus whenever the Union's legislative powers expands, the Union's legislative powers (and activities) must also expand into ever-wider fields'. R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit*., p. 310 – 311. (Emphasis in original.)
[211] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, p. 3.

Article 153 (4) TFEU (social policy) and Article 193 TFEU (environmental protection), and accepted by the Court under Article 114 TFEU.[212] National authorities, and courts, can also express national preferences, in line with their specific domestic systems, when implementing, interpreting and enforcing EU measures, even when the latter imposes an exhaustive regulatory regime. Indeed, such leeway is implicit both in the nature of directives[213] and under the principle of national procedural autonomy, notwithstanding the obligation to achieve the directive's goal, and ensure the effectiveness and equivalence of protection for EU rights. Further potential for leeway can be found in, what this research calls, 'legislation-based discretion'. As detailed throughout this research, legislation-based discretion refers to the defined margin of regulatory manoeuvre authorised by an exhaustive EU rule to the Member States. It is thus distinct from Treaty-based discretion, which refers to Member States power to regulate under Article 36 TFEU, or by invoking a mandatory requirement.

46. Such regulatory options notwithstanding, the EU legislator, and its inner Voice, must comply with primary law, which can only be altered following a difficult Treaty-based procedure. [214] This 'simultaneous exclusion and inclusion' of the 'masters of the Treaty' corresponds to the Member States' foundation of constitutional legality, where parliaments represent the sovereign but remain bound by their constitutions and legislative procedures.[215] The question considered by this research is how EU legislation, as interpreted by the Court, can impact the internal market for goods, and give voice to national concerns, while also respecting free movement.

47. On the one hand, EU secondary legislation should achieve both goals without difficulty. Indeed, as illustrated in *Bahuis*, the EU legislator can, at least in principle, *reconcile* the interests of free movement (by instituting a common standard) with the interests of public policy goals (by setting the level of regulation), without instituting an obstacle to trade.[216] From this perspective, it pursues and protects integrative and regulatory goals to the extent not possible in the absence of harmonisation, and 'all good things can be had together within the framework

[212] *Supra*, note 153.
[213] As defined under Article 288 TFEU.
[214] A. Von Bogdandy & J. Bast, 'The European Union's Vertical Order of Competence: The Current Law and Proposals for its Reform', *op. cit*., p. 231.
[215] *Ibid*.
[216] *Bauhuis,* note 103. See also G. Davies, 'Free Movement, the Quality of Life and the Myth that the Court Balances Interests', *op. cit*., p. 219 and section VI.

of the Treaty'.[217] In reality, however, the EU legislator must often balance different interests,[218] for example by promoting the freedom aspect of free movement at the expense of its justification (or regulatory) aspect,[219] or *vice versa*. Grounded in the regulatory function of the EU legislator, the latter possibility is illustrated in numerous cases, where EU rules were found to *restrict* free movement of goods.[220] The EU legislator might also leave it to *Member States* to reconcile, or balance, free movement with certain aspects of the policy goal. For example, under minimum or partial harmonisation, Member States retain *Treaty-based discretion* to regulate in the public interest.[221] They may also retain, *legislation-based discretion* – that is, a defined margin of regulatory manoeuvre *within the framework* of an exhaustive EU rule.

48. EU product rules can thus reflect a regulatory choice, the interpretation of which can be disputed. For example, parties can question the scope of such rules, their impact on national regulatory competence and the meaning of specific legislative provisions. At the heart of some disputes can be a desire to clarify or challenge the regulatory or power balance achieved by the underlying EU rule. It is in this context that risks associated with an absence of harmonisation, such as protectionist trade rules, can resurface, particularly where Member States enjoy a degree of regulatory discretion. For example, a Member State may rely on an ambiguous provision in an otherwise 'exhaustive' secondary measure to reinstate a potential trade barrier.[222] The Court must therefore remain vigilant in reviewing and interpreting secondary legislation, to decipher the legislator's intention in a manner that respects the hierarchy of norms. It must also review any national act of discretion, whether directly under Articles 34 – 35 TFEU (as with Treaty-based discretion) or by reference to the exhaustive EU framework under the Exhaustion Rule (as with legislation-based discretion).[223] Considering the 'principle of constitutional legality', this judicial task should be relatively straightforward: secondary legislation must be validly

[217] *Ibid*.
[218] *Ibid*., p, 233.
[219] Opinion in *College van Burgemeester en Wethouders van de gemeente Amersfoort*, Joined Cases C-360/15 and C-31/16, EU:C:2017:397, paragraph 99.
[220] Ex. *Alliance for Natural Health & Others*, Joined Cases 154/04 & 155/04, EU:C:2005:449, paragraph 49, where the Court held: 'The provisions of Article 3 in conjunction with those of Article 4 (1) and 15 (b) of Directive 2002/46 constitute a restriction covered by Article 28 EC. By prohibiting the marketing in the Community of food supplements containing vitamins and minerals, or vitamin and mineral substances, not included on the positive lists, those provisions are capable of restricting the free movement of food supplements within the Community'. The Court subsequently found that the restriction was necessary and proportionate to protect human health. For a discussion of this and other relevant case-law, see Part II (Chapter One), points 110 – 116.
[221] See Part III (Chapter Two), section 1.1 (Treaty-Based Discretion).
[222] Ex. Article 6 (2) of Council Directive 76/768/EEC, *op. cit*., (the Cosmetics Directive), as interpreted in *Clinique,* C-315/92, EU:C:1993:823.
[223] See Part III (Chapter Two), section 1.4 (Legislation-Based Discretion).

based on a legal basis (positive legality) and comply with primary law (negative legality).[224] Central to the former is the principle of conferral, whereby the EU can only exercise the competences granted to it by the Treaties. As for negative legality, this principle subjects the exercise of such power to the hierarchy of norms, that is, 'the totality of the current Treaty norms as well as those general principles of law to be found at the same level'.[225]

49. So far, so clear. The practice, however, is often less so, with the Court treading a fine line between controlling the EU legislator, in line with the principle of constitutional legality, and enforcing policy decisions expressed in secondary legislation. What is more, Horsley argues that this legislative function is itself protected from undue interference by the principle of 'mutual sincere cooperation' across the Union institutions, as laid down under Article 13 (2) TEU.[226] In particular, he considers that the latter should place 'key limits on the Court's freedom to adjust, supplement or simply ignore the Union legislature's policy choices regarding the scope of EU law'.[227] While not challenging the Court's authority to interpret EU law, Article 13(2) TEU should oblige it 'to engage appropriately with the policy choices of the EU legislature in the same substance area'.[228] This obligation is reinforced by the principle of institutional balance,[229] which embraces all legal rules concerning horizontal conflicts of functions and competences between the EU institutions,[230] including the Courts.[231] Recognised in early case-law,[232] this principle is disrupted whenever 'the ultimate deciding body differs

[224] A. Von Bogdandy & J. Bast, 'The European Union's Vertical Order of Competence: The Current Law and Proposals for its Reform', *op. cit*., p. 229. For an outline, and visual representation, of the EU legislator's obligations with respect to primary law insofar as it regulates the fundamental freedoms, see A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur*, Bruylant, Bruxelles, 2009, p. 577 and paragraphs 1569 – 1617.
[225] A. Von Bogdandy & J. Bast, *ibid*., p. 230.
[226] Specifically, Article 13 (2) TEU states; 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.
[227] T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *Common Market Law Review*, vol. 50, no. 4, 2013, pp. 931 – 964 at p. 948.
[228] *Ibid*., p. 960.
[229] The exact source of the principle of institutional balance in EU law is left open. Some authors consider it as part of Article 13 (2) TEU, while others view it as a general principle of Community law, rooted in the separation of powers. See A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *Common Market Law Review*, vol. 47, 2010, pp. 361 – 403 at pp. 384 – 385. See also K. Lenaerts & A. Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance', in C. Joerges & R. Dehousse (eds.), *Good Governance in Europe's Integrated Market*, Oxford, Oxford University Press, 2002, Chapter Two, pp. 44 – 49 and P. Craig, *EU Law and Administration*', Second Edition, Oxford, Oxford University Press, 2012, pp. 253 – 256.
[230] A. Fritzsche*, ibid.*, section 5.
[231] *Ibid*. See in particular, *Commission v Ireland (Value Added Tax)*, Case 415/85, EU:C:1988:320, paragraphs 8 – 9; *European Parliament v Council (Chernobyl),* C-70/88, EU:C:1991:373, paragraph 23 and Opinion in *Austria v Commission (State Aid)*, C-99/98, EU:C:2000:396, paragraph 143.
[232] *Ibid.*, section 5.1.1. See ex. *Meroni*, Case 9/56, EU:C:1958:7, p. 152; *Roquette Frères*, Case 138/79, EU:C:1980:249, paragraph 33 and *European Parliament v Council (Chernobyl), ibid*., paragraphs 21 – 23. As

from the institution declared to be responsible by the Treaties', thereby usurping their discretionary powers.[233] Accordingly, while enforcing the principle of legality through judicial review and interpretation, the Court should not substitute judgement for that of the legislator on issues of fact and discretion.[234] As noted by Lenaerts, 'when interpreting the law of the EU, the ECJ must strike the right balance between, on the one hand, the principle of effective judicial protection, and, on the other, the principles of institutional balance and mutual sincere cooperation'. [235] That said, striking the right balance between these goals can lead to tensions between the respective roles of the judiciary and legislator. [236] This is all the more, given the Court's interpretative approaches, which often go beyond 'textualism' to seeking compatibility between an individual legislative provisions and the general scheme of which it forms part (contextual or systemic interpretation), as well as with the Treaty's objectives.[237] Under the latter 'teleological approach', the Court deciphers the Treaty objectives, which are of 'paramount constitutional importance',[238] by considering the 'spirit, … general scheme and wording' of its provisions.[239] In other words, it considers 'the whole purpose, the aims and objectives of the Community and the Union'.[240] As illustrated throughout this research, the Court frequently relies on both approaches[241] when interpreting EU legislative provisions to ensure harmony with the legislative context and objectives, [242] and with the Treaty's

noted by Craig, these early cases illustrate judicial reliance on 'the background principle of institutional balance' to shape the principles of EU administrative law. P. Craig, *EU Law and Administration*', *op. cit.*, p. 255.

[233] See A. Fritzsche, *ibid*., p. 382.

[234] *Ibid.* See also P. Craig, *EU Law and Administration*', *op. cit.*, Chapter 15 and J. Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, Oxford, Oxford University Press, 2002, pp. 159 – 167.

[235] K. Lenaerts & J. A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *Columbia Journal of European Law*, vol. 20, no. 2, 2013 – 2014, pp. 3 – 61 at p. 5., looking in particular at *Les Verts*, Case 294/83, EU:C:1986:166 and *UPA,* C-50/00*,* EU:C:2002:462.

[236] See Part I (Chapter One), section 2.1 (The Relationship between the Judiciary and Legislator).

[237] K. Lenaerts & J. A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *op. cit.*, section II. See also *CILFIT*, Case 283/81, EU:C:1982:335.

[238] P. Pescatore, « Les objectifs de la Communauté européenne comme principe d'interprétation dans la jurisprudence de la Cour de justice », *in Miscellanea W. J. Ganshof van der Meersch*, no. 2, Bruxelles, Bruylant, 1972, pp. 325 – 363 at p. 325.

[239] *Van Gend en Loos*, Case 26/62, EU:C:1963:1, p. 12.

[240] H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, 2011, p. 57. Available at: openaccess.leidenuniv.nl/bitstream/handle/1887/18033/Manuscript%20H.%20Senden.pdf?sequence=2. Last accessed 31 August 2019.

[241] Both approaches are often interlinked, since 'it is only by examining the normative context in which the EU provision is placed that one can choose the interpretation that best preserves the effectiveness of that provision'. K. Lenaerts & J. A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *op. cit*., p. 32.

[242] See, recently, *Scotch Whisky Association*, C-44/17, EU:C:2018:415, paragraph 27.

objectives.[243] In doing so, it can give preference to the validity of that measure (consistent interpretation) and the principle of effectiveness.[244] The risk, however, is that an active Court could rely on a teleological approach in particular, to favour market integration over regulatory diversity, or free movement over high regulatory standards, in a manner that undermines the legislative intention, and the principle of institutional balance.[245] Indeed, in the absence of any clear means to ascertain the Treaty's objectives, the judge enjoys potentially wide latitude to enforce its vision of European integration over that of the EU legislator.[246]

50. The Court's approach to policing the hierarchical relationship between primary and secondary EU law can be illustrated by considering its interpretation of Article 114 TFEU. As noted earlier, the latter confers a functionally broad competence to harmonise, yet under the principle of conferral, remains tied to the process of market-making.[247] In *Tobacco Advertising I*, the Court famously emphasised this latter condition by requiring Article 114 directives to 'improve the conditions for the establishment and functioning of the internal market' and have as a genuine objective the improvement of the internal market.[248] This not being the case for the impugned directive, the Court invalidated it, thus revealing its willingness to enforce the principle of attributed competences (primary law) 'at the expense of majoritarian policy preferences'[249] (secondary law). In subsequent challenges to EU legislation, however, the Court has been less willing to strictly enforce the conditions to trigger Article 114 TFEU.[250] Rather, it has emphasised the regulatory role of the EU legislator, and the fact that public interest goals can be 'a decisive factor in the choices to be made'[251] (secondary law). As a result, and contrary to certain assumptions following *Tobacco Advertising I*,[252] the Court now accepts, *inter alia*, that obstacles to trade can be removed by imposing a product ban,[253] that hypothetical barriers

[243] See ex. the Court's interpretation of Article 5 (1) of Council Directive 79/112/EEC on the approximation of laws relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L. 33, 8 February 1979, pp. 1–14, discussed in Part I (Chapter One), points 98 – 99.
[244] K. Lenaerts & J. A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *op. cit*., p. 20.
[245] For discussion of this risk, see Part I (Chapter One), point 53. See also Part II (Chapter Two), section 3.1 (An Integration or Free Trade Bias?).
[246] H. Senden, *Interpretation of Fundamental Rights in a Multilevel Legal system – An Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, *op. cit.*, sections 4.3.2 and 5.3.1.
[247] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 166. See also S. Weatherill, 'Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation', in N. Nic Shuibhne (ed.), *Regulating the Internal Market*, Edward Elgar, 2006, pp. 29 – 60.
[248] *Tobacco Advertising I*, note 43, paragraphs 83 – 84.
[249] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., ps. 170 and 169.
[250] *Ibid*., pp. 170 – 175.
[251] *Ibid.*, paragraph 88.
[252] See D. Wyatt, 'The Community Competence to Regulate the Internal Market', *op. cit.*, section 6.
[253] *Swedish Match*, C-210/03, EU:C:2004:802.

to trade can trigger Article 114 TFEU[254] and that a directive can regulate situations with no link to free movement, once its make a contribution to the internal market.[255] This approach, while supporting the EU's regulatory agenda, has been criticised for undermining the primary law notion of conferral, as well as the restrictive essence of certain sector-specific provisions enshrined in the Treaty.[256]

51. Similar difficulties emerge with the *exercise* of EU competences, which must comply with superior EU norms such as the principles of subsidiarity and proportionality, and the Charter of Fundamental Rights. As with the notion of limited competences, the first two principles were introduced to protect the national sphere. Specifically, subsidiarity restricts EU action to regulating for objectives that cannot be sufficiently achieved by the Member States.[257] As for the proportionality principle, Article 5(4) TFEU states that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty'. Neither, however, has succeeded in significantly limiting EU regulation of the internal market in practice.[258] As Weatherill notes, 'the remarkably ambiguous character of these principles … tends to mean that if there is adequate support for political action it is improbable that the Court will be persuaded to intervene'.[259]

52. Political agreement or not, the content of such action must also comply with the Charter of Fundamental Rights, [260] which protects, *inter alia*, property rights (Article 17), communication rights (Article 11), the freedom to choose an occupation (Article 15) and the freedom to pursue a business (Article 16), as well as public interest goals such as health,

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[254] *BAT*, note 7.
[255] *Rundfunk*, Joined Cases C-465/00, C-138/01 & C-139/01, EU:C:2003:294.
[256] See D. Wyatt, 'The Community Competence to Regulate the Internal Market', *op. cit.* See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., pp. 171 – 175.
[257] Article 5 (3) TFEU.
[258] See Part I (Chapter Two) for an outline of the Court's deferential proportionality review of EU secondary product rules. By the same token, it generally adopts a narrow approach to subsidiarity. Ex. *BAT*, note 7, paragraphs 177 – 185. See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., pp. 177 – 78 and G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', *Common Market Law Review,* 2006, vol. 43, pp. 63 – 84. However, the principle of subsidiarity could also provide 'a new approach to the judicial control of subsidiarity' by relying on procedural tests of competence. See X. Groussot & S. Bogojevic, 'Subsidiarity as a Procedural Safeguard of Federalism', in L. Azoulai (ed.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, pp. 234 – 252 and K. Lenaerts, 'The European Court of Justice and Process-Oriented Review', *Research Paper in Law,* College of Europe – European Legal Studies, 1/2012.
[259] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 176.
[260] Article 2 TEU. See ex. *Wachauf*, Case 5/88, EU:C:1989:321, where the Court confirmed that it would strike down as unconstitutional any acts of Community institutions that infringed these fundamental rights.

environmental and consumer protection.[261] We recall, in this context, that Article 114 directives can pursue non-economic goals as a 'decisive' objective, once they contribute to achieving the internal market. What is more, the pursuit of such goals can restrict national regulatory competence and individual economic freedoms, yet, insofar as the 'internal market object' is achieved, cannot be challenged for violating a general right to trade under the fundamental freedoms.[262] Indeed, while certain authors consider that fundamental freedoms constitute fundamental rights, employed to protect the EU's 'founding principle of economic liberalism',[263] we adhere to the view that they should not expand to include a general guarantee of economic freedom.[264] Rather, it is the Charter that provides the benchmark to assess whether the EU standard is overly lax or disproportionately strict,[265] with the latter engaging the right to choose an occupation, conduct business, hold property or hold an opinion with regard to expressions in advertisements. And, as with its approach to the principles of conferral, subsidiarity and proportionality, the Court will generally defer to the EU legislative balance achieved between, for example, protecting the consumer or public health, on the one hand, and the right to engage in work and conduct business, on the other.[266] Yet it is also willing to invalidate an EU rule for violating the Charter, if deemed necessary.[267] While rare, such occasions put the legislator on notice that its regulatory discretion is not unlimited.

53. Enforcing the principle of constitutional legality as against the EU legislator thus engages the Court in the complex debate over the distribution, exercise and limitation of public power in the EU, as well as the Court's own role in the mix. Similar questions underlie our specific field of study – that being the relationship between secondary legislation and the free

[261] Respectively, Articles 35, 37 and 38 of the Charter.
[262] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit*.
[263] Ex. E. U. Petersman, 'National Constitutions, Foreign Trade Policy and European Community Law', *European Journal of International Law*, vol. 3, 1992, pp. 1 – 35. See also U. Di Fabio, 'Werbeverbote – Bewährungsprobe für europäische Grundfreiheiten und Grundrechte [Advertising Bans – A test of European fundamental freedoms and rights], *AfP,* 1998, p. 564 ff., as cited by M. Möstl, *ibid.*
[264] Ex. R. Barents, 'The Community and the Unity of the Common Market', *op. cit*.; F. de Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law', *German Law Journal*, vol. 15, no. 3, 2014, pp. 283 – 406; K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market – Towards a Concordance Rule', *Common Market Law Review*, vol. 39, no. 6, 2002, pp. 1303 – 1346 at pp. 1315 – 1316 (and citations); M. Möstl, *ibid*., and J. Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, *op. cit*. For a more general discussion on the relationship between the fundamental freedoms and rights, including in the absence of harmonisation, see A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire. Essai sur la figure du juge traducteur*, *op. cit*.
[265] A. Bailleux, *ibid*., paragraphs 1578 – 1579. See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., pp. 157 – 159.
[266] Ex. *Deutsches Weintor,* C-544/10, EU:C:2012:526; *McDonagh*, C-12/11, EU:C:2013:43; *Schaible,* C-101/12, EU:C:2013:661 and *Neptune Distributions,* C-157/14, EU:C:2015:823.
[267] *Digital Rights Ireland & Others*, Joined Cases C-293/12 and C-594/12, EU:C:2014:238.

movement of goods. For example, by interpreting such legislation so as to privilege market integration at the expense of a higher regulatory standard (or *vice versa*), the Court may conflict either with the EU legislator, or with primary law. Similarly, by deciding whether, and the extent to which, secondary legislation ousts national discretion, the Court also pronounces on the vertical distribution of power, and the related question of how much diversity the internal market can tolerate, without undermining the goals of free trade and undistorted competition.[268] That the Court takes such decisions is implicit to its task of interpreting and applying EU law, yet could also involve an element of choice, given the ambiguous nature of the internal market. The challenge for the Court, in such circumstances, is to enforce the rule of law in a manner that does not undermine the principle of institutional balance or lead to unwarranted judicial activism. In our view, the Exhaustion Rule can help the Court to achieve this goal.

2.3 Introducing the Exhaustion Rule

54. The so-called 'Exhaustion Rule' is a judge-made rule that establishes which norm(s) of reference the Court should rely on to assess an impugned national measure, adopted in the presence of harmonisation.[269] Specifically, it provides that an EU secondary measure that exhaustively regulates the field becomes the sole norm to resolve the dispute, to the exclusion of Articles 34 – 36 TFEU. In practice, this latter exclusion gives the Exhaustion Rule two interlinked but distinct elements, referred to by the research as the two 'legs' of the Rule. Specifically, the first leg of the Rule prevents national trade rules from being justified by reference to Article 36 TFEU or a mandatory requirement (Treaty-based discretion), while under the second leg, such national rules are no longer reviewed directly under Articles 34 – 35 TFEU.

55. By privileging (exhaustive) secondary legislation as the norm of reference, the Exhaustion Rule consolidates the vertical shift in power to the EU, as initiated under the negative integration process. Specifically, its first leg pre-empts the adoption of national trade rules that were justifiable in the absence of harmonisation, thereby satisfying the 'internal market objective' required to trigger Article 114 TFEU. This, in turn, precludes non-conforming products from circulating and renders the EU rule as the sole lawful standard. The potential for national trade restrictions is thus reduced, and with it, the potential for violating

[268] For discussion, see M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*., section 3.2.
[269] See ex. *Commission v France (Excise Duty on Tobacco)*, note 15, paragraph 27.

the free movement of goods (the *Bahuis* approach). This absence of national barriers offers one explanation for the Exhaustion Rule's second leg, which ousts direct application of Articles 34 – 35 TFEU. Yet it can only hold if the 'pre-empting' EU act also complies with primary law, and specifically the free movement of goods. Rather than systematically assessing whether this is the case however, the second leg grants a presumption of constitutionality to the exhaustive secondary measures, where it presumes that the latter either reconciles the requirements of integration and regulation, or justifies any obstacle that is imposed on free trade. This presumption extends to the Court's assessment of national rules adopted thereunder. In particular, while deviant national measures are automatically pre-empted under the first leg, those that comply with the exhaustive EU rule are presumed to comply with the Treaty, without direct reference to Articles 34 – 35 TFEU. What is more, since the EU legislator can pursue regulatory aims to a high standard, once the internal market threshold is met, it has scope to displace the traditional principle/derogation between free movement and public interest goals. Member States might therefore rely on the EU standard – either directly or through the exercise of 'legislation-based discretion' – to implement a regulatory system that could have been unacceptable in the absence of harmonisation.

56. In this way, the Exhaustion Rule can also facilitate a horizontal transfer of power from judiciary to legislator, and in some cases of legislation-based discretion, a vertical transfer back to the Member States. Recalling the Exit/Voice thesis outlined above, such openings for the EU's inner Voice can contribute to the stability of the overall legal regime, including the acceptability of the Court's interpretation of Articles 34 – 36 TFEU. This is all the more given the increasing responsiveness of EU decision-making process to non-economic concerns.[270] Yet as previously noted, the presumption of constitutionality upon which this transfer is based cannot be relied upon to reinstate unlawful obstacles to trade, for example, by imposing unjustified import controls or authorising national barriers through the exercise of legislation-based discretion. In other words, the presumption must remain rebuttable to the extent that it could impinge on the hierarchy of norms. To this end, the Court will consistently interpret exhaustive EU measures in line with the Treaty, or, where necessary, review them directly by reference to primary law, before triggering the Exhaustion Rule. In addition, the presumption

[270] Thym observes this link between the Court's interpretation of Articles 34 – 36 TFEU and the EU's re-regulatory competence by noting a more hands-off review of national trade rules in fields not yet subject to harmonisation. See D. Thym, 'The Constitutional Dimension of Public Policy Justifications', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis, (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.*, pp. 170 – 189.

of constitutionality is reserved for the EU legislator and cannot extend to unilateral national acts. As such, while the Court can invoke the second leg to automatically validate national measures that correctly implement a non-discretionary EU standard, national acts of legislation-based discretion must be separately reviewed by reference to the exhaustive, Treaty-compliant legislative framework.

57. These and other issues highlight that while the Exhaustion Rule is solely concerned with determining the normative framework to assess a national measure, the consequences flowing from its invocation and application are not necessarily value-free. Indeed, the Rule itself can be invoked to support conflicting aims. For example, free movers can rely on its first leg to pre-empt national trade rules, thereby enforcing the integrative effect of EU legislation. However, the (national) regulator often invokes the second leg to shield national implementing measures, and the regulatory effect they promote, from direct scrutiny under the Treaty's free movement principles. Questions can also arise over the constitutionality of the secondary measure itself, whether that measure is in fact exhaustive and how to assess national acts of discretion that are authorised thereunder. As noted, the Court's response to these questions could impact on the balance between market integration and public intervention, and on the vertical and horizontal distribution of power. Our research is devoted to exploring how the Exhaustion Rule can act as its 'constitutional compass', ensuring that Court judgments, and interpretative choices, respect both the principle of institutional balance and the free movement of goods.

3. OUTLINE OF THE RESEARCH

58. Following a brief presentation of the research methodology, Part I explores how the Court interprets and enforces relevant EU legislation by analysing the meaning and development of the Exhaustion Rule. Chapter One looks at the constitutional principles underlying the Rule, which govern the relationships between national, secondary and primary law. As outlined, these principles include the principle of pre-emption, under which exhaustive secondary legislation ousts national competence to regulate under Treaty-based discretion, and the (rebuttable) presumption of constitutionality, which directs the Court to defer to EU legislative decisions by presuming that such measures comply with Articles 34 – 35 TFEU. Chapter Two then traces the Rule's origins and development, outlining how – and why – it evolved from an *ad hoc* guideline into a systematic tool to resolve regulatory disputes, and presenting the conditions to trigger the Rule in the first place. This analysis also highlights the

link between the principle of pre-emption and the presumption of constitutionality, whereby national acceptance of the pre-emptive effects of secondary legislation appears to have been contingent on such legislation enjoying deferential treatment before the Court. In doing so, the research draws a parallel between the Exhaustion Rule and Hirschman's theory on Exit and Voice, as relied upon by Weiler.[271] Specifically, the pre-emptive effect of EU legislation, as enforced by the first leg of the Rule, precludes Member States from Exiting from their obligations under harmonising measures. However, the Rule's second leg can compensate for this loss of national competence by allowing Member States to adopt and defend national rules by reference to an EU standard that they have drafted – in other words, by granting greater scope for Voice. This analogy underscores the key claim of the research, which is that the Exhaustion Rule can act as the Court's 'constitutional compass' when resolving disputes in the presence of EU product rules.

59. Part II reviews relevant case-law to test whether this claim holds up in practice. As a first step, Chapter One presents a range of cases where the Rule was successfully relied upon to enforce the integrative and regulatory effects of EU legislation, or dis-applied, because the conditions for application were not met. What emerges is a jurisprudence that oscillates between pre-empting national trade barriers and authorising EU compliant national regulation, and from imposing the EU standard under the Exhaustion Rule, to deciding that it does not apply. Far from signalling incoherence or subjectivity, Chapter Two concludes that this varied case-law generally reflects the varied legislative *acquis*, interpreted according to legitimate judicial discretion. As such, it confirms the conclusion reached in Part I regarding the role of the Exhaustion Rule. That said, there are a number of cases where reliance on the Rule can engender confusion, inconsistencies, and sometimes a risk that certain acts of national discretion could escape appropriate review. The risk of the latter is heightened when Member States exercise legislation-based discretion, particularly when the Court fails to identify that such discretion has been exercised, and/or that it needs to be reviewed.

60. Part III argues that such problems are not inherent to the Rule itself. Rather, they stem from a systemic confusion between the 'regulatory character'[272] of EU legislation (which, if

[271] *Supra*, section 2.1.2. (An Avenue for National Voice).
[272] This term is introduced by the research to describe the *regulatory framework* established by the EU legislative act. It can be *exhaustive*, thus triggering the Exhaustion Rule, or non-*exhaustive*, in which case Articles 34 – 36 TFEU persist as norms of reference for review.

exhaustive, will activate the Exhaustion Rule) and its specific 'regulatory impact' on national competence – that is, whether and the extent to which the EU measure pre-empts or authorises national action. This confusion is perpetuated by reliance on harmonisation models to understand the relationship between secondary and national law. At its core is an out-dated binary vision of EU regulation, which considers national discretion to be either ousted by a harmonising rule (i.e. under exhaustive/total harmonisation) or allowed to persist under the negative integration regime, because a certain element has not been harmonised (i.e. minimum or partial harmonisation). This vision is problematic because, by considering all regulatory discretion to flow directly from the Treaty, it presumes that pre-emption of regulatory competence under the Treaty (i.e. under Article 36 or by pursuing a mandatory requirement) is synonymous with pre-empting *all* national options over the field. In other words, a decision over total or minimum harmonisation definitely determines whether a field is subject to uniform rules, or whether regulatory diversity can persist. It also leads the Exhaustion Rule, which ousts such Treaty-based discretion, to being erroneously equated with exhaustive/total harmonisation.

61. In reality, the EU's regulatory programme is more nuanced than such a binary vision would suggest, as certain provisions in minimum harmonisation rules limit the scope for national action, while 'exhaustive' EU measures can have varied pre-emptive effects on national competence. Added to the mix is the unsettled and evolving nature of the internal market, reliance on ambiguous terminology and the fact that EU legislation must often apply to novel or unforeseen circumstances. When regulatory disputes inevitably arise, the Court must respond to this complex reality, which can include confirming the pre-emptive effect of 'minimum harmonisation' or authorising a national act of discretion under 'exhaustive harmonisation'. What is more, the Court often relies on the Exhaustion Rule to recognise and review national acts of 'legislation-based discretion' by exclusive reference to the EU legislative framework. In some cases, this framework might equalise the principle/derogation relationship between integration and regulation and allow for national rules that are not necessarily the least restrictive of trade. The scope for national action is therefore determined, not by the model of harmonisation, but, rather, the specific 'regulatory intensity' or 'impact' of relevant legislative provision(s).

62. A gap thus emerges between the discourse and reality of internal market regulation, triggering various difficulties, both outside and within the Courtroom. In particular, the Court

and various market actors are not systematically alerted to the existence and dangers of legislation-based discretion, which can lead to the misrepresentation and misinterpretation of EU legislation and of certain judgements, erroneous Court submissions and a risk that potential national trade barriers, adopted within the framework of an exhaustive EU measure, are not recognised or reviewed. Reliance on harmonisation models to understand how secondary and national laws interact can also impact on how the process of European integration is perceived. In particular, by focusing on the extent to which harmonisation limits national regulation, it reinforces a misplaced vision of such harmonisation (and application of the Exhaustion Rule) as being in conflict with national regulation and engendering lower standards. In reality, while internal market rules do restrict regulatory diversity, they also institute complex, diverse and collaborative systems that can also justify national regulatory programmes, thus reflecting Schütze's thesis that the EU and its Member States increasingly 'work together … as complementary parts in a shared legal sphere'.[273]

63. The understanding of EU internal market legislation, and its relationship with national law, has evolved considerably since the early days of integration, with national competence only being ousted if there is a regulatory conflict, and regulatory diversity representing a normative choice – not just a situation to be tolerated until (total) harmonisation is achieved. What is more, the national and EU level often pursue high standards in tandem, as illustrated by their increasing tendency to jointly defend a protective EU standard (and implementing national measure) against a challenge from a trader or other private actor. Member States might, in this context, enjoy a degree of discretion within an exhaustive legislative framework, to pursue high regulatory standards at the expense of market integration. While legitimate, resulting national acts must nonetheless be reviewed to avoid unlawful barriers to trade. It is to this end that Chapter Two proposes a new framework to describe and assess the complex relationship between national and EU law. As a first step, it introduces a new categorisation of national measures adopted in the presence of EU legislation, which specifically identifies the category of legislation-based discretion. In doing so, the framework acknowledges that national regulatory discretion can persist - regardless of the harmonisation model purportedly adopted and notwithstanding operation of the Exhaustion Rule. And in identifying such discretion, it also alerts the Court to the need for its exercise to be reviewed. This latter goal is then reinforced by the second element of the framework, which identifies *regulatory character* as a distinct

[273] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit.,* p. 346.

feature of an EU measure, thus decoupling the exercise of national discretion from the application, or not, of the Exhaustion Rule. This not only contributes to a more realistic understanding – and narrative – of EU regulation. It can also enhance the transparency of how the Court resolves regulatory disputes and provide a better framework to describe, assess and guide such judgements – including those that invoke the Exhaustion Rule. The Rule can, in this context, continue providing the Court with a useful framework to interpret and enforce secondary product rules, without undermining the hierarchy of norms.

64. As a general conclusion, the research considers that the interplay between the principle of pre-emption and the presumption of constitutionality, embodied in the Exhaustion Rule, helps ensure the stability of the free movement of goods regime. Specifically, it allows the EU legislator (and its inner Voice) to express regulatory preferences and distribute regulatory power, without undermining the free movement of goods. It is in this cooperative context that Member States can accept, promote and enforce the principle of free trade in goods, even if they sometimes disagree with its legal effects.

(II) METHODOLOGY

65. This PhD in Law was initially conceived of as part of a wider interdisciplinary project,[1] entitled 'Why Regulate? Regulation, Deregulation and the Legitimacy of the European Union: A Legal and Political Analysis.[2] Its original aim, set out in a Work Plan, was to analyse the relationship between free movement and harmonisation embodied in, what we now term, the 'Exhaustion Rule'. This Rule provides that exhaustive EU legislation will become the sole norm of reference for the Court of Justice (or Court)[3] to assess the impugned national measure, to the exclusion of Articles 34 – 36 TFEU.[4] It is, typically, pronounced as follows:

> Where a particular sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty. [5]

66. The original Work Plan had identified that the Court's application of the 'Exhaustion Rule' sometimes produced inconsistencies, for example, in the extent to which Articles 34 – 36 TFEU applied, despite the presence of harmonisation and notwithstanding a specific reference to the Treaty.[6] Further inconsistencies emerged over whether Member States could rely on justification grounds that had not been harmonised.[7] And given that the Exhaustion Rule sought to 'dis-apply' Articles 34 – 35 TFEU as norms of reference, it raised wider questions over the relationship between primary and secondary EU law. The Work Plan therefore proposed to explore the legitimacy, impact and consistency of the Exhaustion Rule, insofar as it was relied upon, or excluded, by the Court. It also aimed to reflect on how this case-law impacted on the primacy of primary law and to clarify the notion of 'regulatory intensity'.[8] The suggested methodology was to carry out a comprehensive examination of, and critically analyse, the Court's case-law relating to harmonisation and the free movement of goods.

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[1] This project was funded by the Belgium French Community - Actions de Recherche Concertées (ARC). The final year of the research was funded by Université Saint-Louis, Bruxelles.
[2] 'Why Regulate? Regulation, Deregulation and the Legitimacy of the European Union: A Legal and Political Analysis', *ARC – Call for Tenders (2012)*, Institute for European Studies, Université Saint-Louis, Bruxelles.
[3] According to Article 19(1) TEU, the Court of Justice is a constituent court of the Court of the Justice of the European Union (CJEU).
[4] The EU Treaties include the Treaty of the European Union (hereinafter TEU) and the Treaty on the Functioning of the European Union (hereinafter TFEU) (Together, the Lisbon Treaty).
[5] *Commission v France (Excise Duty on Tobacco)*, C-216/11, EU:C:2013:162, paragraph 27.
[6] Why Regulate? Regulation, Deregulation and the Legitimacy of the European Union: A Legal and Political Analysis', *op. cit.*, pp. 16 – 19.
[7] *Ibid*.
[8] This research understands the term 'regulatory intensity' as the degree to which secondary (EU) legislation impacts on national regulatory competence.

67. This Work Plan informed the initial focus and direction of the research, as well as the methodological approach. As a result, the research relies almost exclusively on the Court's jurisprudence to assess the relationship between relevant EU secondary legislation, national law and primary law. It also focuses on the harmonisation of national *product* rules and on the free movement of *goods*. This is not to deny the potential relevance of the 'Exhaustion Rule' for the other fundamental freedoms, particularly the free movement of services (Article 56 TFEU) and establishment (Article 49 TFEU).[9] Nor does it exclude that EU legislation examined by this research, such as consumer protection directives can also impact on national regulatory options *outside* the context of free movement. In this regard, the research sometimes refers, more generally, to the 'internal market' or 'internal market regulation', without distinguishing between the various fundamental freedoms at play and/or without specifying the cross-border dimension. However, when discussing the Exhaustion Rule as it is invoked to dis-apply Articles 34 – 36 TFEU, it will clearly refer to the free movement of goods. Finally, research of the subject matter has mostly relied on English literature, in addition to a select number of French references.[10] While professional translation of one key German article was obtained,[11] we unfortunately could not access the relevant and rich commentary in German, or indeed, in other European languages.

68. Taking the original Work Plan as the starting point, our first step was to systematically analyse cases in which the Exhaustion Rule was invoked by a disputing party and/or relied upon by the Court. To describe the method of selecting such case-law, a distinction is made between a *nominalist* method and a *conceptual* method of selection.[12] The former refers solely to judgements and decisions explicitly using specific words on the basis that such notions can only exist if the Court actually employs them. It is the most objective way of selecting judgements, and the easiest, since the search engine CURIA allows for a research of the full text. The conceptual method, on the other hand, searches for *an idea* delimited by an established definition and is not limited by the 'words' used by the Court.[13] A third option combines both the nominalist and conceptual method, with the former initiating the definition but without

[9] See ex. *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 63 and *Citroën Belux*, C-265/12, EU:C:2013:498, paragraph 31.
[10] For a full list of references, see the Annex – Bibliography.
[11] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *EuR*, 2002, pp. 322 – 350. We are grateful to the ARC project for financing this translation.
[12] S. Van Drooghenbroeck, *La proportionalité dans le droit de la convention europeénne des droits de l'homme : prendre l'idée simple au sérieux*, Publications des Facultés universitaires Saint-Louis, Bruylant – Bruxelles, 2001, pp. 29 – 30.
[13] *Ibid*.

closing it. In other words, this approach takes a nominalist starting point and, from the 'signifier' identified in certain cases, builds an approximate concept from which other relevant judgements can be identified and analysed.[14] A form of this latter approach is the most apt to describe our method of case selection.

69. Starting with a 'nominalist' approach, we searched for judgements on the CURIA website [15] that explicitly referred to the Exhaustion Rule, and specifically to the term 'exhaustive harmonisation'. This helped to build a first approximate concept of the Exhaustion Rule. It also identified that the Exhaustion Rule could be invoked and applied by relying on alternative terms such as 'complete', 'comprehensive', 'maximum' and 'full' harmonisation/regulation, as well as the term 'regulated/regulating' (or 'harmonising') in an 'exhaustive', 'complete', 'comprehensive' or 'full' manner. This opened a further 'nominalist' search based on these various additional formulations. The Exhaustion Rule case-law that started to emerge generally covered explicit disputes over which normative framework applied to assess and/or justify an impugned national measure. In some such cases, the parties disputed the exhaustive nature of the measure, without any obvious free movement element to the dispute.[16] Other cases, however, revealed a specific disagreement over whether or not the Exhaustion Rule applied.[17] In many (but not all) such cases, the Court responded with an explicit statement of the Rule.[18] Yet the Exhaustion Rule could also apply in an implicit manner, that is, without any direct reference to the Rule or to related terminology, as outlined above. This realisation prompted us to go beyond a purely nominalist approach in searching for and selecting relevant cases.

70. To do so, we selected approximately 30 harmonising measures[19] that had previously triggered the Rule (according to our signifier)[20] or that were known to have an exhaustive

[14] *Ibid*., p. 30.
[15] Available at: http://curia.europa.eu/juris/recherche.jsf?language=en.
[16] Ex. *Gintec,* C-374/05, EU:C:2007:654.
[17] *DaimlerChrysler,* C-324/99, EU:C:2001:682, paragraph 24.
[18] *Ibid*, paragraph 32.
[19] See Part II (Chapter One) and Annex – List of Legislation. It should be noted that while such measures mostly constitute directives based on Article 114 TFEU, they also include directives and EU regulations adopted under other legal bases such as Article 192 TFEU (environmental protection) and as part of the Common Agricultural Policy. And, depending on the legal basis and/or time period, the measure may have been adopted through unanimity or by qualified majority, by the ordinary or special legislative procedure.
[20] This category included directives that had been adopted under the new approach to harmonisation.

character[21] and examined all (relevant) cases arising thereunder.[22] This broader outlook helped us to catch judgements that, while not referring directly to the Exhaustion Rule, were based on its logic, or, indeed, cases that misapplied or wrongly excluded the Rule. In some such cases, the parties accepted that the EU measure triggered the Exhaustion Rule but disagreed over whether the matter fell within its scope.[23] Other cases stemmed from disputes of 'pure interpretation', where the parties sought an authoritative interpretation of one or more legislative provisions, without necessarily questioning the degree of harmonisation or normative framework of review. These cases can often stem from purely internal matters, which do not invoke Articles 34 – 36 TFEU (and thus the Exhaustion Rule).[24] Yet they can also cover situations where the parties accept that Article 36 TFEU no longer applies or where the (potential) cross-border element has not been identified.[25] This latter category of cases could trigger concerns over compatibility with the free movement of goods, for example, if the Court does not engage directly with the applicability of, and compliance with, Articles 34 – 36 TFEU in its interpretation. This is all the more if the Member State has exercised, what the research refers to as 'legislation-based discretion' – that is, a degree of regulatory leeway *within the exhaustive framework* of the EU legislative act.

71. This broad case-law review ensured a more comprehensive picture of how EU secondary legislation impacts on the internal market for goods. This, in turn, enabled us to highlight trends and pitfalls, not only with the Court's application of the Exhaustion Rule, but also regarding its assessment of EU harmonisation more generally. At the same time, the research does not purport to give an exhaustive summary of all case-law relating to all potentially relevant harmonising measures. Given the vast number of regulations and sectors covered by EU law, such an exercise is simply outside the scope of the research.

72. An initial review of this case-law triggered four key observations, which informed the subsequent research, and, ultimately, the PhD structure. First, it quickly transpired that the Exhaustion Rule has two interlinked but distinct elements, each based on a specific

[21] Ex. Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ L. 149, 11 June 2005, pp. 22 – 39.
[22] The cases analysed as part of this PhD research are regrouped by sector in Part II (Chapter One) and listed chronologically in the Annex – List of Cases.
[23] Ex. *Commission v Germany (Garlic Capsules)*, C-319/05, EU:C:2007:678.
[24] Ex. *Sziber*, C-483/16, EU:C:2018:367, paragraphs 56 – 59.
[25] Ex. *Berger,* C-636/11, EU:C:2013:227.

constitutional principle: On the one hand, and in line with the *principle of pre-emption*, the Rule prevents national trade rules from being justified under Article 36 TFEU or by invoking a mandatory requirement. On the other, relevant national rules are no longer directly reviewed under Articles 34 – 35 TFEU, thanks to the *presumption of constitutionality* enjoyed by secondary legislation. Part I (Chapter One) is devoted to describing these principles and explaining their relevance to the Exhaustion Rule. This assessment also contributes to our understanding of the Exhaustion Rule as a potential 'constitutional compass', which, if correctly applied, can guide the Court in respecting the principle of institutional balance and the free movement of goods. Second, the way in which the Exhaustion Rule has been invoked before, and applied by, the Court appears to change over time, which can help explain some of the (apparently) inconsistent case-law. Part I (Chapter Two) therefore focuses on outlining the Rule's development from the 1970s to the present day, analysing, in particular, its evolution from an *ad hoc* guideline into a systematic tool to resolve disputes in a Treaty-compliant manner. A third observation related to the apparent case-law 'inconsistencies', some of which were highlighted in the initial Work Plan. In this regard, we considered that many (apparent) inconsistencies were related to specific factors such as the interest being pursued, the way in which the question was framed to the Court and/or the question of time, without necessarily undermining the legislator's intention or the free movement of goods. Still, some cases did appear to engender confusion, incoherence and possibly even a risk that a national act of discretion could escape appropriate review. Part II (Chapter Two) presents and explains these potential difficulties, namely by assessing how displacement of (or reliance on) Articles 34 – 36 TFEU could impact on the Court's approach to review.

73. The final observation, which is dealt with in Part III, was the most troubling. Specifically, we considered that a number of problematic cases resulted, not from a flaw with the Exhaustion Rule, but from a wider misunderstanding of its function, and its relationship with national discretion. This misunderstanding stemmed, in turn, from a gap between the conditions to trigger the Exhaustion Rule (being total harmonisation) and the persistence of national discretion in practice, notwithstanding the Rule's application. This led us to question the appropriateness of relying on 'harmonisation models' to understand the relationship between relevant EU legislation and national law. It also prompted us to develop a more appropriate framework to describe and guide the Court's approach to review in the presence of potentially relevant EU legislation. The proposed framework is thus descriptive but with normative value. On the one hand, it rationalises the Court's teleological and contextual

approach to interpretation, which can enhance transparency and contribute to a more realistic vision of EU regulation. On the other, it can alert the Court, and other parties, to the potential for national discretion *within* an exhaustive regulatory framework, thereby securing against some of the difficulties highlighted in the research. The Exhaustion Rule can, in this context, continue to guide the Court in interpreting and enforcing secondary product rules, without undermining the free movement of goods.

(III) SUMMARY

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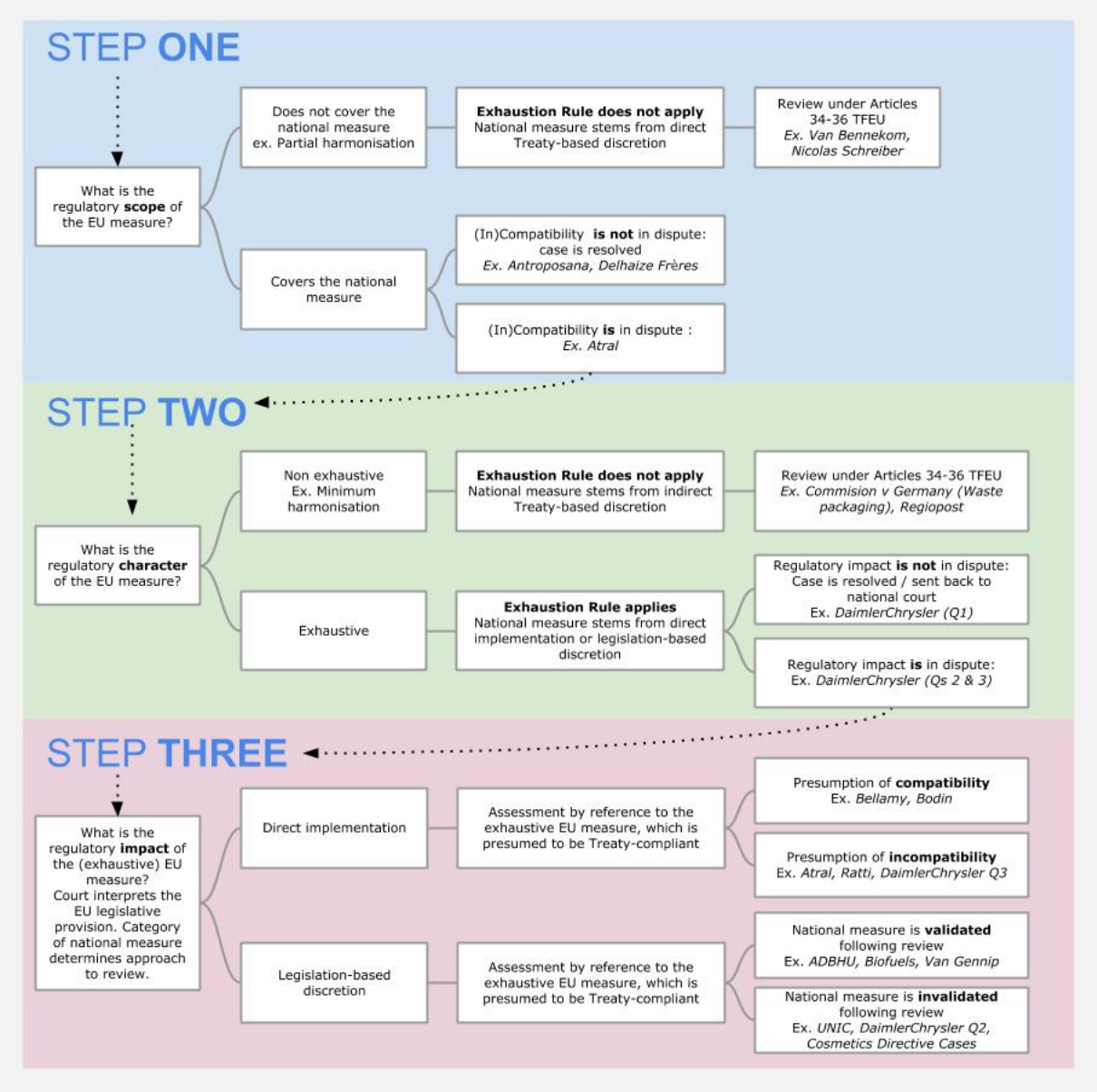
CONCLUSION

Figure 1


STEP ONE
What is the regulatory scope of the EU measure?
Does not cover the national measure ex. Partial harmonisation
Exhaustion Rule does not apply National measure stems from direct Treaty-based discretion
Review under Articles 34-36 TFEU Ex. Van Bennekom, Nicolas Schreiber
Covers the national measure
(In)Compatibility is not in dispute: case is resolved Ex. Antroposana, Delhaize Frères
(In)Compatibility is in dispute : Ex. Atral
STEP TWO
What is the regulatory character of the EU measure?
Non exhaustive Ex. Minimum harmonisation
Exhaustion Rule does not apply National measure stems from indirect Treaty-based discretion
Review under Articles 34-36 TFEU Ex. Commision v Germany (Waste packaging), Regiopost
Exhaustive
Exhaustion Rule applies National measure stems from direct implementation or legislation-based discretion
Regulatory impact is not in dispute: Case is resolved / sent back to national court Ex. DaimlerChrysler (Q1)
Regulatory impact is in dispute: Ex. DaimlerChrysler (Qs 2 & 3)
STEP THREE
What is the regulatory impact of the (exhaustive) EU measure? Court interprets the EU legislative provision. Category of national measure determines approach to review.
Direct implementation
Assessment by reference to the exhaustive EU measure, which is presumed to be Treaty-compliant
Presumption of compatibility Ex. Bellamy, Bodin
Presumption of incompatibility Ex. Atral, Ratti, DaimlerChrysler Q3
Legislation-based discretion
Assessment by reference to the exhaustive EU measure, which is presumed to be Treaty-compliant
National measure is validated following review Ex. ADBHU, Biofuels, Van Gennip
National measure is invalidated following review Ex. UNIC, DaimlerChrysler Q2, Cosmetics Directive Cases

PART I

UNDERSTANDING THE EXHAUSTION RULE

1. The Court must often assess the lawfulness of a national product rule that has been adopted in the presence of a potentially relevant EU secondary measure. To assess the matter, and resolve any related regulatory dispute, it must first establish the norm(s) of reference against which that national measure should be assessed. To this end, the Court often relies on the 'Exhaustion Rule', which states:

> Where a particular sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty.[1]

2. Specifically, the Rule requires the Court to rely exclusively on an exhaustive EU legislative act to resolve a regulatory dispute, to the exclusion of Articles 34 – 36 TFEU. The Rule's successful invocation will therefore preclude the national measure from being justified under, what the research calls, 'Treaty-based discretion' (i.e. Article 36 TFEU or a mandatory requirement – the first leg of the Rule) and scrutinised by direct reference to Articles 34 – 35 TFEU (the second leg of the Rule). These two elements, or 'legs' of the Rule allow the Court to enforce both the market integration and regulatory functions of the EU free movement regime, while also deferring to the EU legislator. As such, while the Exhaustion Rule is solely concerned with determining the normative framework to assess the national measure, its invocation and application can impact on the balance between market integration and public intervention, the (vertical) division of competences between the EU and its Member States, and the (horizontal) relationship between the Court and EU legislator.

3. The Court's approach to these fundamental questions, in situations where the EU legislator has spoken, forms the central question of this research. In some situations, the Court must establish whether the Member State can continue to regulate under Articles 34 – 36 TFEU, notwithstanding the EU secondary rule. If such discretion is found, the case becomes an 'in the

[1] *Commission v France (Excise Duty on Tobacco)*, C-216/11, EU:C:2013:162, paragraph 27. See also *Vanacker & Lesage*, C-37/92, EU:C:1993:836, paragraph 9; *DaimlerChrysler,* Case C-324/99, EU:C:2001:682, paragraph 32; *Doc Morris*, C-322/01, EU:C:2003:664, paragraph 64; *Commission* v *Germany (Waste Packaging)*, C-463/01, EU:C:2004:797, paragraph 36; *A.G.M.-COS.MET*, C-470/03, EU:C:2007:213, paragraph 50 and *Bonnarde,* C-443/10, EU:C:2011:641, paragraph 22.

absence of harmonisation' scenario. If not, the Court must decide whether the impugned national rule complies with or goes beyond/falls below the standard required (or authorised) by the EU regulatory framework. At the same time, by interpreting EU secondary legislation, the Court engages with the EU legislator, which is deemed to act in the general EU interest. It must therefore enforce the legislature's intention and ensure institutional balance, while safeguarding the supremacy of primary law, over which it has the ultimate power of interpretation. And to this end, it often relies on the Exhaustion Rule, whether to oust or confirm the validity of the impugned national rule. Understanding this Rule and assessing relevant case-law can therefore help to clarify the Court's approach. This may, in turn, provide insights into the regulatory dynamics underlying the internal market for goods. It will also reveal whether the Rule is simply a procedural tool invoked as a preliminary matter, or a device that can influence the Court's response.

4. The General Introduction provided some background to make such insights, by outlining the main principles underlying regulation of the internal market for goods. Part I represents the next step, by comprehensively analysing what exactly the Exhaustion Rule means. Chapter One examines the constitutional principles that are engaged when the Rule is activated and that underlie the relationships between secondary, national and primary law. It also explores what the Exhaustion Rule tells us about the relationship between the Member States, the EU legislator and the judiciary. Chapter Two then traces the Rule's origins and development, outlining how and why it evolved from an *ad hoc* guideline into a systematic tool to guide dispute resolution. Chapter Two also presents the conditions to be fulfilled to trigger the Rule.

CHAPTER ONE – THE FOUNDATIONS OF THE EXHAUSTION RULE

5. Harmonisation serves a dual function of market integration and regulation, which levels the playing field by precluding diverse national standards (de-regulation), while also setting regulatory standards to be adopted by all Member States (re-regulation).[2] As discussed throughout this research, these dual effects, while often achieved in tandem, can also conflict with one another. In this context, balancing – or reconciling – such effects can engage regulatory relationships on the vertical axis, that is, between the Member States and the EU and horizontally, between the EU institutions *inter se*. Leaving aside on-going debates over the exact nature of the EU,[3] these relationships, insofar as they interact to regulate the internal market, function to a degree that is generally acceptable. As a result, laws can be adopted by the EU, implemented by the Member States and enforced by the judiciary, as in any classical federal democracy subject to the rule of law. This regulatory system is, at least formally, bound by a hierarchy of norms that is 'typical of a non-unitary system'.[4] Sitting at the 'pinnacle' of this hierarchy is primary EU law, which includes the TEU, the TFEU, Declarations and Conventions, and various international agreements.[5] This primary law is also accompanied by the general principles of EU law and, since the Treaty of Lisbon, the EU's Charter of Fundamental Rights.[6] Both the Member States and EU institutions must therefore refrain from violating such rules when legislating or adopting administrative acts. The principle of EU primacy imposes an additional burden on Member States to comply with EU secondary law, being, for our purposes, regulations and directives (as defined in Article 288 TEU).

6. Considering this hierarchy, the Exhaustion Rule could emerge as a straightforward procedural tool to enforce the market integration and regulatory functions of EU legislation via

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[2] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, Cheltenham, Edward Elgar Publishing, 2013, p. 25 and S. Weatherill, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, p. 153.

[3] For an interdisciplinary presentation of the issues surrounding the political designation and legal nature of the EU, see A. Bailleux & H. Dumont, *Le pacte constitutionnel européen – Tome I. Fondements du droit institutionnel de l'Union*, Bruylant – Collection Idées d'Europe, Bruxelles, 2015, Title II. The authors consider that the EU, being neither a federation based on a constitution, nor a confederation stemming from a federal pact, could be described as a plurinational federation (thus, a community of nations) founded on a *constitutional* pact (as distinct from a Constitution) and inspired by the idea of cosmopolitan law. See, in particular, pp. 226 – 263.

[4] J. Weiler, 'The Transformation of Europe', *Yale Law Journal*, vol. 100, no. 8, 1991, pp. 2403 – 2483 at p. 2419. See also A. Von Bogdandy & J. Bast, 'The European Union's Vertical Order of Competence: The Current Law and Proposals for its Reform', *Common Market Law Review*, vol. 39, no. 2, 2002, pp. 227 – 268.

[5] Which technically are below the Treaties in the hierarchy of norms.

[6] K. Lenaerts & J. A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', *Common Market Law Review*, vol. 47, no. 6, 2010, pp. 1629 – 1669 at p. 1636.

its 'two legs'. We refer to the first leg of the Rule as the *Tedeschi* leg (or *Tedeschi* Rule), in line with the name of the judgement where it was pronounced (*Tedeschi v Denkavit* - 1977).[7] As discussed in section 1, this leg, which relates to the relationship between secondary and national law, is based on the principle of pre-emption as it ousts national competence to invoke Treaty-based discretion in the presence of exhaustive EU legislation. It is generally relied upon to pursue market integration and free movement by removing divergent national standards, and has an *integrative* effect. The second leg concerns the disapplication of Articles 34 and 35 TFEU and engages the relationship between secondary and primary law. As outlined in section 2, this relationship is based on a 'presumption of constitutionality', whereby the *regulatory* effect of the secondary measure is presumed to comply with Articles 34 – 35 TFEU. However, since the Court has the last word on what the Treaty means, it retains a potentially powerful position *vis-à-vis* the Member States and EU legislator, particularly given its propensity for a teleological approach to interpretation. As discussed in the General Introduction, this approach assumes that the Treaty seeks to achieve objectives of fundamental constitutional importance', which the Court deciphers by considering its 'spirit, … general scheme and wording'.[8] However, the absence of any clear means to ascertain this objective ensures much latitude for the judge. In particular, it allows the Court to privilege the goal of integration in the presence of harmonisation, consistently interpreting secondary legislation with primary law where necessary.

7. This dynamic is illustrated in many cases enforcing the integrative effect of EU secondary rules.[9] Yet it also highlights that these cases form part of a more complex reality that must engage with the inherent ambiguity and unresolved tensions underlying Articles 34 – 36 TFEU, and many EU product measures. Indeed, and as already discussed, the free movement of goods is not an absolute goal but must reconcile with other equally valid constitutional objectives, such as the environment, health and consumer protection. Thus, while the Court retains ultimate authority to interpret EU law, it must often tread a find line when monitoring the grey area between respecting the fundamental freedoms and enforcing certain policy decisions expressed in secondary law. In such cases, it may need to consider whether to interpret the EU secondary rule (and assess the impugned national rule) according to a 'new' legislative balance or recalibrate the matter in favour of free movement rights. This task may, depending

[7] *Tedeschi*, Case 5/77, EU:C:1977:144.
[8] *Van Gend en Loos*, Case 26/62, EU:C:1963:1.
[9] These cases, many of which are cited in Part I, are consolidated in the case-law review of Part II (Chapter One).

on the case, require it to enforce an integrative effect at the expense of a regulatory goal (or *vice versa*) and bring it into conflict, either with the EU legislator, or with primary law. What is more, in establishing whether the Exhaustion Rule applies in the first place – and the extent to which an exhaustive measure ousts national regulatory discretion, the Court may need to engage with the delicate balance between EU and national competences, and with it, the scope for national regulatory diversity.

8. In our view, the Exhaustion Rule facilitates the Court in navigating such potential minefields. In particular, it provides a framework to resolve regulatory disputes that arise in the presence of exhaustive harmonisation in a balanced, Treaty-compliant and largely coherent manner.[10] First, while preserving the Court's authority, the Rule also allows for a degree of deference to the EU legislature and persisting regulatory diversity. Thus, the pre-emptive effect embodied in the Rule's first leg must contend with the constitutional principles of attributed competences and subsidiarity. By the same token, the presumption of constitutionality that underlies the second leg can both limit the power of the EU legislator, through consistent interpretation with the Treaty, and grant it respect, in line with the principles of mutual sincere cooperation and institutional balance. This respect can extend to national acts of legislation-based discretion, which, under the Exhaustion Rule, are reviewed by reference to the exhaustive legislative framework, as opposed to Articles 34 – 36 TFEU. Second, the framework provided by the Exhaustion Rule requires the Court to explain, where necessary, why it triggers (or not) the Rule, interprets an EU measure to enforce an integrative effect over a national regulatory standard (or an EU regulatory effect over free movement) or rebuts the presumption of constitutionality enjoyed by secondary legislation.[11]

9. One final point to mention is that the first and second legs of the Rule are intrinsically linked – forming, ultimately, two sides of the same coin. On the one hand, the pre-emptive effect triggered by the *Tedeschi* leg can only apply because the EU regulatory standard is deemed to comply with primary law. This view was articulated by AG Capotorti in *Cassis de Dijon*, who said 'it is clear that when the approximation of laws is undertaken, (ex.) Article 30 is rendered inoperative simply on the grounds that the directives adopted pursuant to (ex.) Articles 100 and 101 must be presumed to be in conformity with the Treaty (including (ex.)

[10] I.e. in a manner that prevents arbitrary decision-making. See N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford, Oxford University Press, 2013.
[11] See Chapter Two, and Part II (Chapter Two).

Article 30'.[12] Indeed, by imposing the same regulatory standard on all Member States, the regulatory effect of harmonisation should, by definition, contribute to the overall goal of market integration. On the other hand, and as we demonstrate in Chapter Two, national acceptance of the *Tedeschi* leg seems to have been influenced by the Court's willingness to subject Community rules to less intensive Treaty review. This legislative 'Voice', and the presumption of constitutionality it enjoys, could compensate for the Court's intrusive review of national measures *in the absence of harmonisation*, thereby contributing to the overall stability of the free movement of goods regime. We will return to the link between the two legs of the Rule in Chapter Two. For now, we focus on the constitutional principles underlying the relationship between secondary and national law, as expressed through the first leg of the Rule, and secondary and primary law, as expressed, through its second leg.

1. THE PRE-EMPTION PRINCIPLE

10. EU product rules, through their dual 'integrative and regulatory' function, impact on national capacity to regulate in two ways. First, Member States are pre-empted from adopting national product rules that conflict with the EU legislative act. Second, Member States are obliged (or in some cases, granted the option) to adopt EU (or, in the case of minimum or optional harmonisation, national) regulatory standards, which can be enforced before national courts. These effects are built on – and governed by – three core principles that underlie the hierarchy and relationship between national and EU law, summed up by Weiler as the principle of primacy, the principle of self-execution (direct effect) and the principle of pre-emption.[13]

11. The first and, in many ways, overarching constitutional principle is EU primacy, as this refers to the capacity of EU law to overrule inconsistent norms of national law in domestic court proceedings.[14] The EU brand of primacy is, at least in theory, absolute[15] as it applies to all EU

[12] Opinion in *Cassis de Dijon*, Case 120/78, EU:C:1979:3, p. 671.
[13] J. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law*, vol. 1, no. 1, 1981, pp. 267 – 306 at pp. 271 – 279. In subsequent writings, Weiler replaced the reference to pre-emption, as the third principle governing national / Community law, with 'the doctrine of implied powers' although discussed pre-emption within this latter context. He also added human rights as a fourth doctrine. See J. Weiler, 'The Transformation of Europe', *op. cit.*, pp. 2415 – 2417.
[14] First pronounced in *Costa*, Case 6/64, EU:C:1964:66. For general discussion, see P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, Oxford, Oxford University Press, Sixth Edition, 2015, Chapter 9; K. Alter, *Establishing the Supremacy of European Law*: *The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001; B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig & G. de Búrca,, *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, pp. 177 – 213.
[15] *Internationale Handelsgesellschaft*, Case 11/70, EU:C:1970:114. This is, however, challenged in many Member States. For a presentation and analysis of the debate, see ex. P. Craig & G. De Búrca, *ibid.*; A. Bailleux & H.

norms in relation to all national norms, 'irrespective of the status of that rule of national law in the national legal order and irrespective of whether the Community rule is one of primary or secondary law'.[16] It also applies whether or not the EU rule pre- or post-dates the national.[17] This obligation, which extends to all state authorities, including courts, legislators and government, requires the setting aside of conflicting national norms. The 'internal primacy' of EU law distinguishes it from other international law rules that have primacy but only in the relationship between States on the international plane.[18] Determining what amounts to a conflict falls to the national and the European courts, which ensures a key role for national judges in the enforcement of EU law.

12. The doctrine of direct effect, as the second principle, facilitates such enforcement by allowing individuals to invoke EU norms, namely Treaty articles, regulations and, in certain situations, directives in national legal orders.[19] National judges can therefore resolve the conflict and allow EU law to reign, and, together with individuals, help ensure the effectiveness of EU law.[20] The Court has supported both an objective and subjective definition of direct effect in its case-law. The former allows 'provisions of binding EU law that are sufficiently clear, precise and unconditional to be considered justiciable' to be 'invoked and relied on by individuals before national courts'.[21] On this understanding, the role of individuals in enforcing EU law is not limited to their own rights but comes into play where they have an interest, 'the protection of which will further the objectives of the directive'.[22] The subjective definition is

Dumont, *Le pacte constitutionnel européen*, *op. cit.*, pp. 238 – 246; F. Amtenbrink, 'The European Court of Justice's Approach to Primacy and European Constitutionalism – Preserving the European Constitutional Order?', in H.-W. Micklitz & B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States,* Cambridge-Antwerp-Portland, Intersentia, 2012, pp. 35 – 63; A. von Bogdandy & S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', *Common Market Law Review*, vol. 48, no. 5, 2011, pp. 1- 38 and P. Kirchhoff, 'The Balance of Powers between National and European Institutions', *European Law Journal,* vol. 5, no. 3, 1999, pp. 225 – 242.

[16] K. Lenaerts & T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *European Law Review*, vol. 3, no. 3, 2006, pp. 287 – 315 at p. 289.

[17] *Simmenthal*, Case 106/77, EU:C:1978:49.

[18] B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', *op. cit.*, pp. 328 – 329.

[19] For general discussion, see P. Craig & G. De Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, Chapter 7 and citations; J. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy', *International Journal of Constitutional Law*, vol. 12, no. 1, 2014, pp. 94 – 103 and S. Robin-Oliver, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections', *International Journal of Constitutional Law*, vol. 12, no. 1, 2014, pp. 165 – 188.

[20] *Van Gend en Loos*, note 8.

[21] This definition is arguably derived from *Van Gend en Loos*, note 8. See P. Craig & G. De Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, pp. 184 – 186.

[22] M. Lenz, D. Tynes & L. Young, 'Horizontal What? Back to Basics', *European Law Review*, vol. 25, no. 5, 2000, pp. 509 – 522, at p. 512.

narrower, as it limits direct effect to 'the capacity of a provision of Union law to confer (substantive) rights on individuals'.[23]

13. The meaning and scope of primacy and direct effect have been analysed in vast literature that spans the lifetime of the EU.[24] While eliciting much debate,[25] their core role in ensuring the effectiveness of EU law within national legal systems is without doubt. Our research thereby takes as a given the capacity for EU law to be directly invoked by individuals and to override conflicting national rules. Its focus, rather, is on the *substantive effect* of EU secondary measures on national regulatory competence. For this, we must refer to the pre-emption principle, which governs the question of whether, *and the extent to which*, Member States can continue to regulate in an area of shared competence, such as the internal market, in the presence of EU secondary legislation.[26]

14. Article 2 (2) TFEU provides that Member States can exercise shared competences once the EU legislator has not acted. This means that they cannot adopt overlapping national rules in those occupied fields, as any conflict will be resolved in favour of the EU measure under primacy. As a result, Member States must, when confronted with EU legislation, establish its scope and substance to determine the space left for national regulation. In doing so, they often seek maximum room for national possibilities. Disputes inevitably ensue – traditionally, between a free mover (in the form of a trader and/or Commission), which argues that the Member State has no competence to act, and the (national) regulator, which defends the measure as a legitimate exercise of its power. And it is here that the pre-emption principle can step in to provide a rational framework within which to consider such matters, and analyse

[23] P. Craig & G. De Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, pp. 185 – 186.
[24] Indeed, a discussion of both principles provides the staple of any general textbook on EU law. For a sample of more in-depth analysis, see *infra*, notes 14 and 19.
[25] For example, many Member States contest the absolute primacy of EU law. See *supra*, note 15. There is also the on-going debate over the direct effect of directives and its relationship with primacy. Ex. M. Lenz, D. Tynes & L. Young, 'Horizontal What? Back to Basics', *op. cit.*; K. Lenaerts & T. Corthaut, 'Of Birds and Hedges', *op. cit.*; M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', *Common Market Law Review*, vol. 44, 2007, pp. 931 – 936 and S. Drake, 'Twenty Years after Von Colsen: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights', *European Law Review*, vol. 30, no. 3, pp. 329 – 348.
[26] Commentators have traditionally considered this question within the context of the vertical distribution of powers between the EU and Member States, the doctrine of implied powers and the question of normative conflict. See ex. J. Weiler, 'The Transformation of Europe', *op. cit.*, pp. 2415 – 2417 and K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, Bruylant, Bruxelles, 1988, paragraphs 436 – 468 and 577 – 578.

Court judgements that resolve regulatory conflicts.[27] This framework is of particular value in assessing the impact of EU internal market legislation (and for our purposes, product regulation), which, to achieve market integration, often pre-empts Treaty-based discretion.

15. From one perspective, the pre-emption principle could be seen as a mere appendage to the broader principle of EU primacy. Indeed, the notion of shared competences – and the resulting pre-emption of national powers – requires regulatory conflicts to be resolved in favour of EU law. Yet this research considers the pre-emption principle, while intrinsically linked to primacy, to have independent constitutional value, since EU legislation precludes national regulatory competence, but *only to the extent that* there is a conflict between the two norms.[28] In other words, it recognises that the Court may need to establish, not only the existence of pre-emption (ex. that the *Tedeschi* Rule ousts Treaty-based discretion), but also the specific regulatory impact of the exhaustive measure. In other words, can Member States continue to regulate, *notwithstanding* application of *Tedeschi*, and if so, to what extent. As we will see, the latter can vary considerably, for example, from precluding all national discretion to allowing a certain amount of space for national action, and by pre-empting both higher and lower national standards. Such potential for variation lies at the heart of many regulatory disputes, which the Court must resolve in a manner that respects both the EU legislator's intention and the hierarchy of norms. The research considers that this judicial task of determining pre-emptive effect is distinct from the question of how any regulatory conflict is resolved. This leads in turn, to a more realistic, nuanced view of EU legislation – and of the Court's complex role in interpreting and enforcing such legislation – than is currently available under harmonisation models. We will return to this latter point in Part III. For now, we focus on describing the characteristics of the pre-emption principle, as well as its effects and limitations.

[27] E. Cross, 'Pre-emption of Member State law in the European Economic Community: A framework for Analysis', *Common Market Law Review,* vol. 29, no. 3, 1992, pp. 447 – 472 at pp. 454 – 455.
[28] For support for this perspective, see M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation', in Sandalow & Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, vol. 2, Oxford, Oxford University Press, 1982, pp. 548 – 580; E. Cross, *Ibid*; R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, Oxford, Oxford University Press, 2009 and A. Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Solen'*, Jean Monnet Working Paper,* No. 03/10, 2010. Available at https://jeanmonnetprogram.org/paper/the-doctrine-of-union-preemption-in-the-eu-single-market-between-sein-and-sollen/. Last accessed 4 September 2019.

1.1 An Autonomous Concept with a Legislation-Based Definition

16. The pre-emption principle, like the principles of primacy and direct effect, has constitutional value and can be considered as an autonomous concept (1.1.1). It also deals with a legislative phenomenon, since its effects flow, not from the existence of competence, but from the EU legislator *exercising* its competence by adopting secondary rules (1.1.2). Each of these characteristics is discussed in turn.

1.1.1 An Autonomous Concept

17. The principles of EU primacy and pre-emption are intrinsically linked, which explains why they have not always been distinguished. Such assimilation is particularly understandable when the EU measure is presumed to oust all national regulatory discretion in a field, or when it directly conflicts with a national rule. In both scenarios, the role of pre-emption can remain invisible as the Court immediately resolves the conflict in favour of the EU measure, without having to search for its pre-emptive effect.[29] This can happen, for example, when disputing parties accept that the EU measure harmonises the field, but disagree over whether its scope extends to the impugned national rule. Once the Court finds that the EU measure does indeed cover the national rule, conflict will be presumed and the national measure will fall without further assessment.[30] This presumption can also arise in cases of direct conflict, as in *Commission v Germany (Male Pigs)*.[31] Here, the Commission challenged a German requirement for uncastrated boar carcasses weighing *under* 80 kilos to be marked and treated. The Court agreed on grounds that the relevant directive explicitly reserved the procedure for carcasses weighing *over* 80 kilos.[32]

18. In other cases, however, primacy of EU legislation over national law can be insufficient to determine whether and the extent to which national competence has been pre-empted. This is because parties can disagree, not only over the regulatory scope of the EU measure, but also over its impact on national regulatory discretion. For example, EU legislation might preclude a national measure simply for regulating the same subject matter, even in the absence of direct

[29] Although Member States could still seek to justify national measures on grounds that they are pursuing an alternative objective. For discussion of this option, see Part I (Chapter Two), point 211.
[30] See ex. *Delhaize Frères*, Joined Cases 2/82, 3/82 and 4/82, EU:C:1983:268.
[31] *Commission v Germany (Male Pigs)*, C-102/96, EU:C:1998:529.
[32] *Ibid*., paragraphs 31 – 32. See also *Wulro*, Case 130/85, EU:C:1986:260, paragraphs 18 – 19.

conflict.[33] Other EU rules might only pre-empt national measures that conflict with its objectives,[34] or impose an obligation on Member States via ambiguous or undefined terminology.[35] To resolve such disputes, the Court may need to interpret the EU legislation to establish its substantive effect, and whether a conflict has arisen with the national measure.[36]

19. The principle of EU primacy cannot, on its own, describe the complexity of such legislation and the process by which the Court interprets and enforces its provisions. Instead, the complementary principle of pre-emption steps in to provide a framework of analysis, which should be distinguished from the manner in which any resulting conflict is resolved (primacy). As Waelbroeck summarises, 'the problem of pre-emption consists in determining whether there exists a conflict between a national measure and a rule of Community law. The problem of primacy concerns the manner in which such conflict, if it is found to exist, will be resolved'.[37] Schütze also emphasises this distinction between primacy and pre-emption. Specifically, he defines primacy as determining the 'superior hierarchical status of the Community legal *order* over national legal *orders*' and giving EU law 'the capacity to pre-empt'.[38] However, the principle of pre-emption deals with the question that emerges before primacy can kick in, as it determines whether and what type of conflict arises in the first place. In other words, while the EU's *capacity* to pre-empt flows from the principle of primacy,[39] pre-emption 'denotes the *actual degree* to which national law will be set aside by Community legislation'.[40] Schütze then quotes Baumann's observation that, 'the supremacy of Community law does not mean that national law has no place within the Community law dealing with the same subject matter'.[41] It is the existence and size of this 'place' reserved for national regulation following the adoption

[33] *Ratti*, Case 148/78, EU:C:1979:110. See also *Apple and Pear Development Council*, Case 222/82, EU:C:1983:370, paragraph 23 and *Commission v Belgium (Vegetables and Fruit)*, Case 255/86, EU:C:1988:63, paragraphs 10 – 11. &&

[34] Ex. *Pigs Marketing Board*, Case 83/78, EU:C:1978:214; *McCarran*, Case 177/78, EU:C:1979:164; *Vriend*, Case 94/79, EU:C:1980:50 and *Le Campion,* Case 218/85, EU:C:1986:440. For a more recent example, see *Danske Svineproducenter I,* C-491/06, EU:C:2008:263.

[35] Ex. Article 6 (2) of Council Directive 76/768/EEC on the approximation of national laws relating to cosmetic products, OJ L. 262, 27 September 1976, pp. 169 – 200 (the Cosmetics Directive), as interpreted in *Clinique,* C-315/92, EU:C:1993:823.

[36] For a presentation of the Court's early approach to the question of normative conflict between national and secondary law, see K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.,* paragraphs 436 – 468.

[37] M. Waelbroeck 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation', *op. cit.*, p. 551.

[38] R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.*, p. 1033.

[39] *Ibid*.

[40] *Ibid*. (Emphasis in original).

[41] *Ibid*. See also P. Baumann, 'Common Organisations of the Market and National Law', *Common Market Law Review*, vol. 14, no. 3, 1977, pp. 303 – 327, at p. 303.

of EU legislation that pre-emption seeks to determine. Lenaerts & Corthaut also acknowledge this distinction by stating: 'when it comes to precedence, the only question is whether a conflict can be identified. In principle, if that is the case, the conflicting provision of national law has to yield. This also means however, that the exclusion only applies *to the extent of the conflict'*.[42]

20. The pre-emption principle must also be distinguished from direct effect, which, as outlined earlier, allows individuals to rely directly on EU rules, including secondary law, within the national legal order. While individuals often rely on a directly effective EU measure to oust a conflicting national measure, this fact says nothing about the exact nature of that measure's pre-emptive effects. As just noted, the latter must be determined by the Court. Lenaerts notes in this regard that a decision in relation to direct effect 'does not mean … that the directly effective provision of Community law may need no interpretation …; it only means that, whenever such an interpretation proves to be necessary, the judicial office can functionally provide it. Thus, a decision that a provision produces direct effect makes the Court of Justice responsible for fine-tuning the application of the provision in concrete cases, which in turn leads to a judge-made gloss on the provision, determining its real content and relevance.'[43]

21. The Court, in its early agricultural case-law, sometimes ignored this distinction by relying on the doctrine of direct effect to preclude national legislative power.[44] For example, in *Bollman* it considered that national legislative powers were excluded as a result of the directly effective nature of the regulation on the common customs tariff (as opposed to the complete nature of that Community rule).[45] The defendant in *Ratti* relied on a similar argument. Specifically, he sought to exclude recourse to Article 36 TFEU on grounds that the Community rules had direct effect, which he claimed arose when a directive 'imposes detailed and complete obligations in such a way so as to leave no margin of discretion to the Member State'.[46] He argued that this prevented more detailed or different national rules, otherwise justifiable under Article 36 TFEU. The Commission also listed the conditions for direct effect as including 'no margin of discretion left to the Member State'.[47] The Court concurred that Italy could not justify

[42] K. Lenaerts & T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *op. cit.*, p. 291. (Emphasis added).
[43] K. Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians in the European Community', *The University of Chicago Legal Forum*, vol. 1992, issue 1, pp. 93 – 133 at p. 105.
[44] M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption', *op. cit*., pp. 555 – 556.
[45] *Bollmann*, Case 40/69, EU:C:1970:12. See also *Krohn*, Case 74/69, EU:C:1970:58, paragraph 4 and *Amsterdam Bulb,* Case 50/76, EU:C:1977:13, paragraph 5. For discussion, see M. Waelbroeck, *ibid.*, pp. 555 – 556.
[46] *Ratti*, note 33, p. 1634.
[47] *Ibid*., p. 1636.

its measures under Article 36 TFEU but differed in its reasoning. First it did not list absence of discretion among the criteria to establish direct effect but referred instead to the 'unconditional and sufficiently precise' nature of the obligation.[48] This reflected the earlier *Salgoil* judgement, which confirmed that the discretion inherent in Article 36 TFEU did not impact on the directly effective nature of Article 34 TFEU, since it was exceptional and did not undermine the clear obligation in the latter.[49] Second, the Court precluded Italy's recourse to Article 36 TFEU, not because the directive was directly effective, but because it harmonised the relevant health and safety measures and restricted national measures to those adopted under the directive's safeguard clause.[50]

22. The decoupling of direct effect from absence of discretion took some time to fully infiltrate the Court's thinking. As noted by Craig & de Búrca, 'the idea that direct effect could apply even where the Member State possessed discretion, because the exercise thereof could be judicially controlled, represented a significant juridical shift in thinking about direct effect'.[51] The Court's position today is that discretion does not preclude an individual from relying on a directive, whether or not the Member State has exercised its full discretion on implementation, where a sufficiently clear, precise and unconditional obligation can be separated or identified.[52] Whether and the extent to which this obligation will preclude the national measure in question is explained by reference to the principle of pre-emption.

1.1.2 An Effect of EU (Internal Market) Legislation

23. The principle of pre-emption deals with a legislative rather than constitutional phenomenon. This means that pre-emptive effects flow from the EU *exercising* its competence (by adopting secondary rules) as opposed to the *existence* of an exclusive competence in primary law. As Weatherill points out, 'it is the actual enactment of an item of EU legislation that ousts national lawmaking in the area concerned'.[53] This contrasts with an earlier

[48] *Ibid*. p. 1642, paragraph 23.
[49] *Salgoil*, Case 13/68, EU:C:1968:54. See also *Van Duyn*, Case 41/74, EU:C:1974:133.
[50] *Ibid*., p. 1644, paragraphs 36 – 38.
[51] P. Craig & G. De Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, p. 190.
[52] *Ibid*., p. 192. See also ex. *Linneweber*, C-453/02, EU:C:2005:92, paragraphs 32 – 33 and *Kapper*, C-476/01, EU:C:2004:261, paragraph 62.
[53] S. Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London, Chancery, 1994, Chapter Two, pp. 13 – 33 at p. 14.

constitutional (or competence-based[54]) perspective, which limited the notion of pre-emption to areas of exclusive Community competences. For example, Jacobs & Kars noted in 1986 that 'the [principle of pre-emption] … will be taken to refer to cases where the Member States are precluded from legislating, not because the legislation would conflict with Community law but because the competence in question is exclusively a Community competence'.[55] However, the legislative definition, which focuses on identifying conflict between 'competing legislation' has since taken over and appears to be generally accepted today.[56] As a result, conflicts between national law and Treaty provisions, which '(turn) on the interpretation to be given to express Treaty provisions', are excluded.[57]

24. This legislative approach must be taken for a number of reasons. First, it corresponds to the Treaty definition of shared competences, which refers to consequences flowing from the EU's 'exercise' of its competences as opposed to the 'existence' of the competence.[58] Second, it corresponds to the Court's approach to resolving regulatory conflicts,[59] as expressed in its recent definition of pre-emption as concerning 'the situations in which the concurrent competences of the Member States in a particular field may have been displaced by the activity of the Community legislature'.[60] Third, the legislative understanding ensures the principle has the greatest possible significance since, as Cross correctly points out, the restrictive 'competence-based' definition covers only a limited sphere of activities and ignores the crucial link between pre-emption and legislation.[61] And finally, it accords with the perspective taken by the highly developed United States doctrine of pre-emption,[62] where 'the pre-emptive effect does not stem from the (US) supremacy clause, but arises under a particular piece of federal legislation'.[63] This does not mean that the Treaty cannot continue to be a relevant consideration

[54] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Solen', *op. cit.*, pp. 6 – 8.
[55] F. Jacobs & K. Karst, 'The "Federal" Legal Order, The U.S.A. and Europe Compared: A Juridical Perspective', in M. Cappelletti, M. Seccombe & J. Weiler (eds.), *Integration through Law*, vol. I, Book Three, 1986. For further discussion, see A. Arena, *ibid.*, pp. 7 – 8.
[56] See citations at note 28 and P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials, op. cit.*, pp. 84 – 85.
[57] M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption', *op. cit*., p. 550.
[58] Article TFEU 2 (2). See also P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials, op. cit.*, pp. 84 – 85 and A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit*., p. 9.
[59] E. Cross, 'Pre-emption of Member State law in the European Economic Community', *op. cit.*, pp. 454 – 455.
[60] Opinion in *Budějovický Budvar*, C-478/07, EU:C:2009:52, paragraph 93.
[61] E. Cross, 'Pre-emption of Member State Law in the European Economic Community', *op. cit.*, p. 452.
[62] *Ibid*., p. 455.
[63] R. Schütze, 'Supremacy without Pre-emption?', *op. cit*., p. 1044. In comparing the US and, at the time of writing, Community approach to the question of pre-emption, Lenaerts notes a similarity in techniques used by the US Supreme Court and Court. In particular, and notwithstanding core differences between the US Constitution and the Community Treaties, a parallel is observed between both jurisdictions in vertically delimiting power so as to

in pre-emption decision – to the contrary, the Court will consistently interpret secondary measures, and the resulting national obligations, to ensure compatibility with the Treaty. Moreover, as we will discuss in Chapter Two, the Court, until at least the mid-1990s, often reinforced its finding of pre-emption under the *Tedeschi* Rule by referring directly to Articles 34 – 35 TFEU.

25. Taking a legislative understanding of pre-emption, the Court resolves regulatory conflicts by analysing national law in light of EU secondary law.[64] One key advantage of this approach is that it can avoid judicial decisions of a constitutional nature, which can be 'more encompassing and more difficult to repair'.[65] Indeed, if the Court succeeds in restricting its analysis to secondary legislation, its judgement may be more easily limited to the subject-matter of that legislation, as well as being easier to fix (ex. by limiting an interpretation to a specific case or through legislative amendments at EU level). Unsatisfactory Treaty interpretations would, on the other hand, require either a constitutional amendment or an explicit reversal by the Court of its jurisprudence.[66] As Cohen notes (in relation to the US), '(d)ecisions in pre-emption cases … can be tentative and truly *ad hoc*. No generalisation can be drawn from a pre-emption decision which would apply to decisions involving different problems and different statutes, since each case turns theoretically on the construction of a particular federal statute with its particular legislative history'.[67]

26. Justifying the exclusion of national regulatory autonomy on the basis of legislative interpretation (under the principle of pre-emption) has also more scope to satisfy the principle of subsidiarity, be less intrusive of Member State autonomy and more acceptable than a teleological Treaty interpretation guided by the language of primacy.[68] Legislative provisions are also, generally, more specific than open-ended Treaty provisions, such as Articles 34 – 36 TFEU, with less scope for judicial imagination. Member States can, in this context, influence

preserve the necessary pre-eminence of the common legal order. K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, p. 665.

[64] E. Cross, 'Pre-emption of Member State law in the European Economic Community', *op. cit.*, p. 454.

[65] *Ibid.*

[66] This is however rare. See ex. *Keck & Mithouard*, Joined Cases C-267/91 and C-268/91, EU:C:1993:905.

[67] W. Cohen, 'Congressional Power to define State Power to Regulate Commerce: Consent and Preemption', in T. Sandalow & E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, *op. cit.*, pp. 543 – 547 at pp. 544 – 545.

[68] Although this will clearly depend on the pre-emptive effects of each specific legislative act. See E. Cross, 'Pre-emption of Member State law in the European Economic Community: A Framework for Analysis', *op. cit.*, pp. 470 – 471 and A. Goucha Soares, 'Pre-emption, Conflicts of Powers and Subsidiarity', *European Law Review,* vol. 23, 1998, pp. 132 – 145.

the content of prevailing EU secondary rules by engaging with the legislative process (i.e. through the Council), subject to complying with the Treaty. While resulting legislation will pre-empt national powers, Member States will have had an input into the extent of such pre-emption and in terms of the balance reached between regulation and integration, which the Court will generally defer to. Indeed, as we discuss in Chapter Two, it was the Member States, not the Commission, that called for application of the *Tedeschi* Rule in the first place, relying on the 'displacement' of Article 36 TFEU discretion to justify the validity of a legislative safeguard clause. In their view, the pre-emptive effect of the directive was such that unilateral national measures adopted were no longer necessary or justified, a position no doubt reinforced by the principle of unanimity in the Council at the time.

27. This is not to suggest that exhaustive secondary rules do not have a far-reaching impact on national regulatory autonomy. To the contrary, while such rules can grant certain discretion to the Member States (referred to by this research as 'legislation-based discretion'), this is in principle more limited than the scope for national action in the absence of harmonisation.[69] What is more, the Court will not hesitate to interpret ambiguous EU legislative provisions to reinforce their integrative effect at the expense of national regulatory standards.[70] The point, however, is not that an EU legislation does not pre-empt or limit national regulatory action, but rather, that the extent of this pre-emptive effect can vary and may need to be established.

1.2 Establishing Pre-emptive Effects

28. The pre-emption doctrine 'provides the analytical framework' to explain how the Court identifies conflict (potential or actual) between EU and national legislation.[71] If such conflict is established, the EU rule will trump the national measure under the principle of primacy. The pre-emptive potential of secondary legislation therefore *depends* on the principle of primacy. At the same time, it should not be subject to the same degree of contestation, since the ousting of national competence is not necessarily incompatible with the view, held by certain Member States, that EU primacy flows from and is ultimately subject to national constitutions.[72] What is open to controversy, however, is how the Court interprets the pre-emptive effects of a

[69] Advocate General (AG) Cosmas makes this point by comparing the limited options for national protective measures under Article 6 (3) of the Cosmetics Directive with the broader scope for national action under Article 36 TFEU. See Opinion in *Unilever*, C-77/97, EU:C:1998:333, p. 457, second paragraph.
[70] Ex. *Clinique,* note 35.
[71] R. Schütze, 'Supremacy without Pre-emption?', *op. cit*., p. 1045.
[72] *Supra*, note 15.

particular EU measure. As illustrated throughout this research, this judicial task, while grounded in the legislative text, is not necessarily a mechanical exercise, with an outcome pre-determined by the legislator. To the contrary, the Court must often interpret what can be ambiguous legislative provisions, with implications for the relationship between the EU and its Member States. It is on this basis that Schütze conceives the pre-emption doctrine 'as a federal theory of statutory interpretation', which gives the Court 'considerable power … to fashion the dominant federal philosophy for the Community legal order'.[73]

29. This section looks at how the Court, in exercising this power, searches for balance between EU and national powers (1.2.1). As regards assessing this approach (1.2.3), the US doctrine of pre-emption can provide a useful framework of analysis (1.2.2).

1.2.1 The Search for Balance

30. From one perspective, the pre-emption principle necessarily envisages the centralisation of internal market regulation at the expense of national competence. As discussed in the General Introduction, and as frequently repeated by the Commission, harmonisation aims to create a level playing field by replacing disparate national rules with an EU standard.[74] And as illustrated throughout this research, the Court has consistently relied (*albeit* implicitly) on the pre-emption principle to oust divergent national measures, so as to ensure the effectiveness and uniform implementation of EU law. In this context, 'once agreement has been reached on the style of regulation or even on its absence, the mould is fixed. States may not set different rules that cut across the objectives of the Community intervention'.[75] One need not go so far as the *Ratti* understanding of harmonisation, which pre-empted the entire regulatory field,[76] to observe this effect, since even more flexible modes of regulation pre-empt national measures. This is illustrated with new approach directives, insofar as 'essential health and safety

[73] R. Schütze, 'Supremacy without Pre-emption?', *op. cit*., p. 1045.
[74] Ex. Commission Communication on the single market act, COM (2011) 206 final, p. 21; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - EU Consumer Policy strategy 2007-2013 - Empowering consumers, enhancing their welfare, effectively protecting them, COM (2007) 99 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a digital single market strategy for Europe Commission Communication, COM/2015/0192 final. See also A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit*., section 4.1.
[75] S. Weatherill, *Law and Integration in the European Union*, Oxford, Clarendon Press, 1995, p. 139.
[76] See General Introduction, point 17.

requirements' have been harmonised,[77] and 'minimum harmonisation' directives that limit the possibility to adopt higher standards to domestic production.[78]

31. Pushed too far, however, the pre-emption principle can have damaging consequences on the EU's regulatory and federal balance. For example, centralisation and over-regulation can undermine consumer choice and innovation through the suppression of regulatory competition,[79] which cannot be easily challenged once an agreement has been reached by the EU legislator. Moreover, while the EU standard is often protective, it is not necessarily set at the highest level and can only be amended through the cumbersome EU legislative process. In such circumstances, the pre-emptive effects of secondary legislation could threaten national regimes based on higher regulatory standards,[80] as well as fundamental rights protected under national constitutions.[81] More insidiously, perhaps, powerful pre-emptive effects can trigger 'competence creep'[82] by stripping Member States of all regulatory discretion over a field that should be subject to shared competence. While the persistent adoption of total harmonisation is the most obvious route to such intrusion,[83] competence creep can also emerge in more subtle forms - for example, when the legislator uses 'broad and vague legal concepts', which require

[77] See Part II (Chapter Two), points 32 – 25.
[78] Ex. Council Directive 91/629 on laying down minimum standards for the protection of calves, OJ L. 340, 11 December 1991, pp. 28–32.
[79] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit*., section 4.2, M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution,* Oxford and Portland, Oregon, Hart Publishing, 1998, pp. 113 – 114 and S. Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', *op. cit*. See also F. Scharpf, 'Introduction: The Problem-Solving Capacity of Multi-Level Governance', *Journal of European Public Policy*, vol. 4, no. 4, 1997, pp. 520 – 538, who notes that stricter domestic standards may sometimes attract manufacturers.
[80] Such critiques were levied against the Commission's programme to transform much of the consumer protection acquis from instruments of minimum harmonisation to instruments of total harmonisation. For discussion see Part III (Chapter One), point 56 with references at notes 214 & 215.
[81] In *Melloni* (C-399/11, EU:C:2013:107), for example, the Court held at paragraph 60 that 'national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.' As such, if the EU legislature harmonises the field, as *in casu* regarding when a person, convicted *in abstentia*, would have a right to a retrial, national authorities cannot rely on national constitutional rights to extend such harmonised conditions, once the EU measure conforms with the Charter. As summarised by Franssen, 'whenever the EU legislator harmonises the fundamental rights in a certain area in an exhaustive way, the Member States are no longer allowed to require a higher standard of procedural safeguards, even on the basis of their national constitutions'. V. Franssen, 'Melloni as a Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights Protection', *European Law Blog*, 10 March 2014. Available at http://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/. Last accessed 13 September 2019.
[82] For discussion of this phenomenon, See M. Pollak, 'Creeping Competence: The Expanding Agenda of the European Community', *Journal of Public Policy*, vol. 14, no. 2, 1994, pp. 95 – 145 and S. Weatherill, 'Competence Creep and Competence Control, *Yearbook of European Law*, vol. 23, 2004, pp. 1 – 57.
[83] See A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.*, p. 47, J. Huet, 'Le scandale de l'harmonisation totale', *Revue des contrats*, no. 3, 2011, pp. 1070 – 1077 and R. Schütze, 'Supremacy without Pre-emption?', *op. cit.*, p. 1040.

a uniform 'Community' interpretation by the Court.[84] Schillig notes this phenomenon in the context of EU private law, where notions such as 'good faith', 'average consumer', 'fairness' could, over time, significantly restrict national competence in fields with only tenuous connections to the internal market.[85] A further concern is that pre-emption, while ensuring EU regulatory coherence, might simultaneously undermine coherence at national level, as national regulatory systems must give way to the EU standard, notwithstanding the political bargain they represent. This could, in turn, undermine the political desirability and democratic legitimacy of adopting EU measures with forceful pre-emptive effects.[86] Finally, the Court retains the final say on whether, and the extent to which, a particular EU legislative measure has pre-empted national regulatory competence – leading, traditionally, to a fear of bias in favour of lower regulatory standards to ensure maximum free movement.[87]

32. Yet looked at another way, the pre-emption principle can appear as a device to protect national competence against unwarranted intrusion. Indeed, the very fact that the Court will carry out a pre-emption analysis to establish conflict, before it ousts national competence, acts as an important limitation on the otherwise boundless potential of EU primacy on national regulatory discretion. As Lenz notes: 'When what is sought is the exclusion of national law due to a conflict with Community law … there must be other *boundaries inherent to the very notion of supremacy* itself which may be more difficult to delimit but which serve nonetheless to keep this particular application of Community law in check'.[88] These boundaries are often found in the content of the EU legislation, which is influenced by the Member States through the Council, and which should only oust national regulatory capacity to the extent intended. What is more, resulting regulatory standards enjoy a presumption of constitutionality under which the Court can enforce the legislator's intention, without necessarily assessing its merits. If such an assessment becomes necessary, in the face of a legislative ambiguity for example, the Court

[84] See ex. Lenaerts, who describes the Court's approach to resolving conflicts between national and secondary law, whereby the national interests protected the former must give way to the Community interests protected by the latter, as 'la clef de voûte de la structure normative centripète que soutient l'ordre juridique de la Communauté européenne'. K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, paragraph 466, p. 563.
[85] M. Schillig, 'The Interpretation of European Private Law in the Light of Market Freedoms and Fundamental Rights', *Maastricht Journal of European and Comparative Law*, vol. 15, 2008, pp. 285 – 321. See also H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *Common Market Law review*, vol. 44, no. 5, 2007, pp. 1237 – 1284 and Part III (Chapter Two), point 32.
[86] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, *pp*. 219 – 222.
[87] For an assessment of the legitimacy of this fear, see Part II (Chapter Two), section 3.1 (An Integration and Free Trade Bias?)
[88] M. Lenz, D. Tynes & L. Young, 'Horizontal What? Back to Basics', *op. cit.*, p. 518. (Emphasis added).

is subject to constitutional constraints, not only in the form of fundamental freedoms,[89] but also in line with fundamental rights[90] and the principle of attributed competences. An example of the latter arises when the Court interprets 'open textured provisions' in the context of EU private law to assess 'the extent to which national private law and legal acts of private parties are capable of constituting obstacles to free movement'. As noted by Schillig, the Court should only give a uniform and autonomous interpretation of such concepts if that meaning 'could equally have been enacted by the Community in accordance with a sufficient legal basis'.[91]

33. The Court, against this backdrop, generally carries out its task of enforcing – and interpreting – EU legislation with sensitivity, to ensure balance between the EU and its Member States, as required under primary law.[92] To this end, it does not presume that the Exhaustion Rule applies to pre-empt national competences but will, where necessary, assess whether there is an exhaustive and relevant EU measure in place and explore its regulatory impact.[93] What results is a case-by-case approach to legislative interpretation that reflects the complexity and diversity of internal market regulation. At one end of the spectrum are EU measures that regulate an entire field, for example by instituting total harmonisation to pre-empt all residual national regulatory action, even if there is no direct or concrete conflict with the EU rule[94] and even in the absence of any direct cross-border effect.[95] In the context of the free movement of goods, this means that all unilateral national actions are forbidden, whether adopted under

[89] For extensive discussion of the relationship between secondary law and the fundamental freedoms, see section two below.

[90] Ex. in *European Air Transport*, C-120/10, EU:C:2011:94, AG Cruz Villalón referred *inter alia* to fundamental environmental rights, protected under Article 37 of the Charter, to conclude that Directive 2002/30 regulating noise-related operating restrictions at Community airports, OJ L. 85, 28 March 2002, pp. 40 – 46, did not institute maximum (total) harmonisation, since to find otherwise would 'give rise to a paralysis of State action against noise pollution, depriving States of any latitude in the exercise of their environmental, planning and health policies'. and the principle of attributed competences. See paragraphs 77 – 82. Fundamental rights can also be deployed for the opposite end – that is, to reinforce the pre-emptive effect of EU legislation and limit the exercise of national regulatory discretion. See ex. *Alemo-Herron*, C-426/11, EU:C:2013:521.

[91] M. Schillig, 'The Interpretation of European Private Law in the Light of Market Freedoms and Fundamental Rights', *op. cit.*, p. 289 and p. 297.

[92] For an outline of the Treaty limits imposed on judicial interpretation along the vertical axis, see T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *Common Market Law Review*, vol. 50, 2013, pp. 931 – 964 at p. 949.

[93] That is, whether and the extent to which the EU measure pre-empts or authorises national action. For a discussion of this term, see Part III (Chapter Two), section 2.

[94] Ex. *Bollmann*, Case 40/69, EU:C:1970:12; *Fleischkontor,* Case 39/70, EU:C:1971:1; *Granaira,* Case 18/72, EU:C:1972:108 and *Galli,* Case 31/74, EU:C:1975:8.

[95] *Rundfunk*, Joined Cases C-465/00, C-138/01 & C-139/01, EU:C:2003:294 and *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 40 and. For discussion, G. Davies, 'Can Selling Arrangements be Harmonised?', *European Law Review*, vol. 30, no. 3, 2005, pp. 371 – 385 and D. Wyatt, 'The Community Competence to Regulate the Internal Market', University of Oxford, Faculty of Law, *Legal Studies Research Paper Series*, Working Paper No 9/2007, July 2007.

Treaty-based or legislation-based discretion. At the other end of the spectrum, there is an absence of any EU legislation, and Member States retain full discretion to regulate the matter, subject to compliance with the Treaty. Between these two points, Member States can retain different possibilities to regulate in the presence of EU legislation, depending on the pre-emptive effects of the latter. The question for the Court is how these effects can be identified, classified and enforced.

1.2.2 The US Approach

34. Some legislative acts explicitly set out or limit their pre-emptive effects, for example, by excluding certain matters from their regulatory scope or by explicitly precluding Treaty-based discretion under a market access clause.[96] However, most EU legislative acts are not so explicit, or if they are, remain ambiguous in practice.[97] Disputes thus arise, and the Court is called upon to confirm whether and the extent to which the Member States' regulatory capacity has been precluded. Notwithstanding its rich jurisprudence on such questions, the Court has yet to develop an explicit framework of pre-emption to guide its approach. This contrasts with the United States, where the effects of federal statutes are subject to a sophisticated doctrine of pre-emption, the starting point of which lies in a presumption *against* pre-emption. In other words, the federal legislator is presumed *not* to have ousted state competence.[98] However, this presumption can be rebutted if there 'was the clear and manifest purpose of Congress'[99] or where such purpose can be implied from the scheme of the federal regulation.[100] In the latter scenario, the court should identify the pre-emptive effect of a measure according to three pre-

[96] Cross refers to these clauses as, respectively, 'express saving' and 'express pre-emption' clauses. E. Cross, 'Pre-emption of Member State law in the European Economic Community', *op. cit*., sections 3.1 – 3.2. See Part 1 (Chapter Two), points 213 – 214 for discussion of their role in identifying the pre-emptive effect of EU legislation.
[97] For discussion of the pre-emptive effects of market access clauses, see Part 1 (Chapter Two), points 213 – 215.
[98] See *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218 (1947) and in particular the Opinion by Judge Douglas who states at p. 230 that 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act'. For discussion of the US doctrine of pre-emption, see K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, paragraphs 167 – 177.
[99] *Rice v. Santa Fe Elevator Corp*, *ibid*., p. 230. This is called 'express pre-emption'. For discussion, see A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.*, pp. 21 – 22.
[100] *Pacific Gas & Electric Co. v. State Energy Commission*, 461 U.S. 190 (1983).

emption types, being: field pre-emption, obstacle pre-emption and rule pre-emption.[101] This task grants to the deciding court a potentially wide margin of appreciation.[102]

35. Field pre-emption is the most powerful type as it displaces all state regulation in a specific area, thus in the absence of any actual or direct conflict. As a result, all state law in that field is ousted, including, for example, those laws that seek to achieve the same aim as the federal measure but through more aggressive means.[103] Given its far-reaching impact, US courts tend to be wary of finding that a statute institutes field pre-emption.[104] Instead, they often rely on one of the other pre-emption types, which only pre-empt state law 'to the extent it *actually conflicts* with federal law'.[105] The second type, obstacle pre-emption, pre-empts state laws that stand as 'an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'[106] and is the most vague pre-emption type. An example can be seen in *Crosby*, which found that federal legislation had pre-empted the State of Massachusetts from imposing economic sanctions on Myanmar. According to the Court, to find otherwise would conflict with Congress's objective that the President should enjoy authority over the matter, particularly in relation to bargaining leverage.[107] The third type, rule pre-emption, applies when state law directly conflicts with federal law, making it impossible to comply with both. In such circumstances a state measure that either validates or requires an action expressly prohibited by the federal law must give way. Rule pre-emption, while less flexible than obstacle pre-emption, is also less aggressive than field pre-emption, as its effects are limited to situations of direct

101 *Ibid*., pp. 203 – 4, which states: 'Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a scheme of the federal regulation so pervasive as to make reasonable the interference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose . . . Even where Congress has not entirely displaced state regulation in a specific area, each state is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'.

102 K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, paragraph 169. On the judicial margin at play in the context of obstacle pre-emption, see D. Meltzer, 'Preemption and Textualism', *Michigan Law Review*, vol. 112, no. 1, 2013, pp. 1 – 58.

103 Ex. *Ray v. Atlantic Richfield Co*., 435 U.S. 151 (1978). See also A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.*, p. 23.

104 A. Arena, *ibid.*, section 2.2.3.

105 *Silkwood v. Kerr-McGee Corp*., 464 U.S 238 (1984), (Emphasis added). See also A. Arena, *ibid*., p. 24.

106 *Pacific Gas & Electric Co. v. State Energy Commission*, note 100.

107 *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). For a critique of the Supreme Court's reliance on obstacle pre-emption, see D. Meltzer, 'Preemption and Textualism', *op. cit*.

conflict.[108] It is also more amenable than obstacle pre-emption to ensuring legal certainty and thus to resolving regulatory disputes in the field of antitrust.[109]

36. It is clear that these pre-emption types are based on arbitrary classifications, with 'no *a priori* boundaries between the various degrees of normative conflict'. [110] Yet they can still 'serve as constitutional devices for systematizing those species of conflict that have crystallized in a particular federal legal order'.[111] As a result, commentators have relied on the US typology to describe the Court's approach to assessing the varied pre-emptive effects of EU legislation.[112]

1.2.3 The Pre-emptive effects of EU legislation

37. The Court's approach to interpreting secondary legislation can have a far-reaching impact on the scope for national regulation, and, more broadly, on the balance between the EU and its Member States. The question, explored by this research, is how this judicial power is exercised – and how it can be controlled. Unlike the US doctrine of pre-emption just discussed, the Court has adopted neither an *explicit* presumption against pre-emption, nor any *explicit* framework to guide its *de facto* 'pre-emption analysis' of EU secondary legislation.[113] Legal scholarship has therefore filled the vacuum by categorising EU pre-emption as a variable effect of EU secondary law, explaining when different types of pre-emptive effects are produced[114] and suggesting how the Court *should* assess such pre-emptive effects. As regards the latter, commentators generally caution against any presumption of total harmonisation/field pre-emption,[115] even if this remains as a regulatory option.[116] For them, the centralising and homogenising forces unleashed thereunder are no longer necessary or appropriate as a general

[108] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.* section 3.3.3; A. Goucha Soares, 'Pre-emption, Conflicts of Powers and Subsidiarity' *op. cit*., ex. p. 39 & p. 83; R. Schütze, 'Supremacy without Pre-emption?', *op. cit.* pp. 1042 – 1043 and E. Cross, 'Pre-emption of Member State Law in the European Economic Community', *op. cit*., section 3.4.1.
[109] Ex. *Schwegmann Brothers* v. *Calvert Distillers*, 341 U.S. 384 (1951) and *California Liquor Dealers* v. *Midal Aliminum*, 445 U.S. 97 (1980). See also A. Arena, *ibid.*, p. 25;
[110] R. Schütze, 'Supremacy without Pre-emption?', *ibid.*, p. 1034 (Emphasis in original).
[111] *Ibid*.
[112] Ex. E. Cross, 'Pre-emption of Member State Law in the European Economic Community', *op. cit*., R. Schütze, 'Supremacy without Pre-emption?', *op. cit.*, and A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.*
[113] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *ibid*., p. 26.
[114] *Ibid*.
[115] R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism', *Cambridge Law Journal*, vol. 68, no. 3, 2009, pp. 525 – 536; A. Arena, *ibid.*, section 6.2.3 and S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., pp. 219 – 222.
[116] A. Arena, *ibid*.

rule in EU27/28.[117] As Weatherill notes, pre-emption (as imposed through total harmonisation) might level the regulatory playing field, but it also means 'inflexibility, insensitivity to local preference and suppression of regulatory experimentation'. [118] In this context, the Court should, in the absence of an express indication to the contrary, assess EU legislation from the perspective of obstacle[119] and/or rule[120] pre-emption as a preferable means of preserving national regulatory diversity and respecting the principle of subsidiarity.[121] This would also better reflect the EU's rich and evolving legislative programme, where total harmonisation/field pre-emption must often coexist with, or cede to more flexible and diverse regulatory schemes, in line with the principles of subsidiarity and attributed competences.[122]

38. Reflecting such concerns, the Court generally exhibits some sensitivity when assessing whether and the extent to which national regulatory competence has been pre-empted. Indeed, when assessing a national product rule, the Court does not necessarily presume that the EU measure triggers the *Tedeschi* Rule, or if it does, that the national measure falls within its scope.[123] Rather, the Court will assess the wording of the EU legislation, as well as its objectives, context and general scheme to see if this is the legislator's intention.[124] Protection of fundamental rights may also push the Court away from pre-empting national action under total harmonisation.[125] However, once the Exhaustion Rule is found to apply, Member States can no longer justify national measures by reference to Treaty-based discretion - a finding that is often sufficient to pre-empt the national measure at issue. As Arena notes, 'national measures departing from the harmonised standard are per se illegal and must be set aside without

[117] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., pp. 220 – 222. See also Huet's critique of total harmonisation, which he characterises as illegitimate and dangerous. J. Huet, 'Le scandale de l'harmonisation totale', *op. cit*., pp. 3 – 4.
[118] *Ibid*.
[119] E. Cross, 'Pre-emption of Member State law in the European Economic Community', *op. cit*., section 4.
[120] A. Goucha Soares, 'Pre-emption, Conflicts of Powers and Subsidiarity', *op. cit*.
[121] *Ibid*. Arena also suggests a structured presumption against field pre-emption and calls for rule and obstacle pre-emption as the preferred solution to prevent national autonomy from being disproportionately restricted. A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit*., section 6.2.3. For further discussion on the legal limits to be respected along the vertical axis when interpreting EU law, see ex. G. de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', *Journal of Common Market Studies*, vol. 36, 1998, pp. 217 – 235 and T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit.*, section 4.
[122] See General Introduction, points 28 – 30. See also Schütze, who sees this evolution as reflecting the EU's development from a system of dual to cooperative federalism. R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* particularly at Chapter 5.
[123] See Part I (Chapter Two), section 2.1.2 (Triggering the Exhaustion Rule).
[124] Ex. *UNIC*, C-95/14, EU:C:2015:492, paragraph 35.
[125] See ex. Opinion in *European Air Transport*, note 90, paragraphs 77 – 82. See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., p. 221.

additional scrutiny'.[126] A typical example is the Court's judgement in *Ratti*, which prohibited Member States from introducing conditions that were 'more restrictive … more detailed or in any way different' to the provisions of the directive.[127] It is in this context that commentators generally associate activation of the Exhaustion Rule with total harmonisation and field pre-emption.[128]

39. The fact that an EU measure triggers *Tedeschi*, or the broader Exhaustion Rule, does not necessarily resolve the dispute, since the Court may need to further investigate the extent to which the Member States can regulate a particular matter, *within the framework* of the (exhaustive) EU legislation. To this end, the Court can be guided by rule pre-emption or obstacle pre-emption reasoning, as the case may be. An example of obstacle pre-emption reasoning can be seen in *Belgische Petroleum Unie*.[129] Here, the Court validated a Belgian requirement on petrol companies to sell a particular quantity of biofuels per calendar year, even though this restricted the sale and movement of fuels that complied with relevant EU legislation. According to the Court, since the Belgian measure was compatible with the objectives of the broader EU legislative framework for the EU's fuel economy, it could not be considered as contrary to EU law. An example of rule pre-emption is illustrated by the Court's assessment of a UK measure in *Gallaher*.[130] Specifically, Articles 3 (3) and 4 (4) of the Tobacco Labelling Directive[131] provided that health warnings and indications of nicotine/tar levels had to cover 'at least 4%' of the surface area of the cigarette package. The UK had implemented these provisions by requiring relevant labels to cover 6% of the surface area of cigarette packs, as far as domestic production was concerned. Taking a rule pre-emption approach, the Court held that the term 'at least' contained in the directive 'must be interpreted as meaning that, if they consider it necessary, Member States are at liberty to decide that the indications and warnings are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption.'[132]

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[126] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market'*, op. cit*., p. 30.
[127] *Ratti*, note 33. For a more detailed discussion of this case, see General Introduction, point 21.
[128] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market'*, op. cit*., p. 30 and 70; K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market – Towards a Concordance Rule', *Common Market Law Review*, 2002, vol. 39, no. 6, pp. 1303 – 1346 at p. 1328 and M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit.*, p. 866. See, more generally, Part III. For discussion of field pre-emption in an EU context, see A. Arena, sections 3.3.1 & 5.3.3 and E. Cross, 'Pre-emption of Member State law in the European Economic Community', *op. cit.,* section 3.3.
[129] *Belgische Petroleum Unie*, C-26/11, EU:C:2013:44.
[130] *Gallaher,* C-11/92*,* EU:C:1993:262.
[131] Council Directive 89/622/EEC on the labelling of tobacco products, OJ L. 359, 8 December 1989, pp. 1 – 4.
[132] *Gallaher*, note 130, paragraph 20.

40. This more nuanced analysis contrasts with the Court's early approach to interpreting and enforcing Community legislation, which, until the mid-1980s, mainly concerned measures adopted in the context of the Common Agricultural Policy (CAP). As documented by various authors, the Court initially deemed such legislation to institute field pre-emption, where its mere presence would pre-empt all national regulatory competence, regardless of the existence or not of regulatory conflict.[133] Specifically, and taking what Waelbroeck termed a 'conceptualist-federalist approach',[134] the Court considered the very fact of legislating to pre-empt the field, and, with respect to cross-border trade, trigger the *Tedeschi* Rule to oust all national regulatory competence. In *Galli* for example, it held that 'the very existence of a common organization of the market … has the effect of precluding measures capable of impeding intra-Community trade', and that Member States, as a result, could 'no longer interfere through national provisions taken unilaterally'.[135] By extension, and insofar as these national provisions impacted on cross-border trade, Member States could no longer rely on Article 36 TFEU to justify potential national trade barriers.

41. This interpretative approach certainly contributed to the integration of national agricultural markets by limiting the potential for regulatory diversity. Yet maintaining it in the long run would have been both impractical and illegitimate, particularly when assessing protective national standards that were not directly related to price formation.[136] Community regulation of such matters, even when exhaustive, cannot cover every future eventuality, while the status of agriculture as a shared competence limits the ousting of national powers to those fields in which the EU has acted. This explains why the Court started adopting a more 'pragmatic approach' from the mid-1970s, where it accepted that non-exclusive powers must be shared between the EU and the Member States – even in the presence of EU rules - once national law does not jeopardise, impede or undermine the objectives or functioning of the normatively superior Community rules.[137] In doing so, it abandoned the presumption that CAP

[133] *Supra*, note 128.
[134] M. Waelbroeck 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation', *op. cit*., p. 551.
[135] *Galli,* note 94, paragraphs 69 – 70. See *supra*, note 33 for further references.
[136] R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.*, pp. 228 – 229.
[137] The Court has repeated this formula in numerous cases. Ex *Le Campion,* Case 218/85, EU:C:1986:440 paragraph 13 and *Danisco Sugar*, C-27/96, EU:C:1997:563 paragraph 24. See also *Tasca,* Case 65/75, EU:C:1976:30; *SADAM*, Joined Cases 88-90/75, EU:C:1976:32; *Bussone*, Case 31/78, EU:C:1978:217; For discussion see M. Waelbroeck 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation', *op. cit.*, p. 551 and K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, paragraphs 440 – 468; E. Cross, "Pre-emption of Member State Law in the European Economic

legislation automatically pre-empted Article 36 powers, and the possibility for any discretionary national action in the regulated field.[138] This latter approach, which corresponds more closely to obstacle pre-emption, acknowledged that national powers to regulate agricultural policy could only be ousted by establishing conflict. Under the *Tedeschi* Rule, this required showing, first, that a relevant exhaustive EU measure was in place and second, that the national measure conflicted with the objectives or functioning of that measure. The bar to establish such conflict has often been relatively low, as the Court continued to strictly apply CAP rules to the detriment of national competence, which seemed, at times, to almost 'completely – replace the Member States'.[139] In other cases, however, reliance on obstacle pre-emption reasoning has, like with non-CAP measures, ensured a degree of leeway for the Member States. As noted by Lenaerts, 'when the Court of Justice, in resolving a conflict of norms (between secondary and national legislation), only takes the Community's political objective into account, its judgement will have favourable consequences for the Member States sphere of residual competences. Effectively, the positive law impact of the Community measure will be interpreted restrictively, in light of its compatibility with the political goal pursued by the Member State at issue…'.[140] This was seen earlier in *Belgische Petroleum Unie*.[141] It was also illustrated in *Danske Svineproducenter I*,[142] which assessed whether Danish animal welfare rules were proportionate by reference to the regulatory and integrative goals of the Animal Transport Directive.[143] As for rule pre-emption reasoning, an example arose in *Commission v Germany (male pigs)*, discussed earlier.[144]

42. Against this backdrop, two observations should be made, which, together with the Court's case-by-case approach to triggering the Exhaustion Rule, highlight its relative sensitivity to the question of pre-emption. The first observation concerns the link between the *Tedeschi* Rule and total harmonisation. It is clear that the Rule ousts national competence to legislate under Article 36 TFEU, which can imply total harmonisation and field pre-emption.

Community: A framework for analysis", *op. cit.*, section 3.4.2; R. Schütze, *From Dual to Cooperative Federalism*, *ibid.*, p. 217 and A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.*, section 3.3.2.

[138] Ex. *Amsterdam Bulb,* Case 50/76, EU:C:1977:13 and *Prantl,* Case 16/83*,* EU:C:1984:101.

[139] R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* p. 217.

[140] K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, paragraph 459, pp. 551 – 552. Personal translation from French by author.

[141] *Belgische Petroleum Unie*, note 129.

[142] *Danske Svineproducenter I,* note 34.

[143] Council Directive 91/628/EEC on protecting animals during transport, OJ L. 340, 11 December 1991, pp. 17 – 27.

[144] *Commission v Germany (Male Pigs)*, note 31.

Indeed, a market access clause, as the legislative manifestation of *Tedeschi*,[145] could be classified in this context as express pre-emption clauses.[146] Yet, exhaustive EU legislation, while triggering the *Tedeschi* Rule, also sets regulatory standards, which can include an option or authorisation for Member States to act. The extent of and limits to this action can then be assessed by reference to rule pre-emption (*Gallaher)* or obstacle pre-emption (*Belgische Petroleum Unie*) reasoning, which may or may not result in the national measure being struck down. Thus, the ousting of Treaty-based discretion under the Exhaustion Rule is not *necessarily* synonymous with the loss of *all* discretion under total harmonisation and field pre-emption. We will return to this core point throughout the research.

43. The second, related, observation is that *Tedeschi* forms part of the broader Exhaustion Rule, which ousts direct application of not only Article 36 TFEU, but also Articles 34 – 35 TFEU. As a result, regulatory standards adopted within the framework of exhaustive legislation, while assessed by reference to the EU secondary measure, can escape scrutiny by direct reference to the Treaty. While linked to the pre-emptive effect of the first leg, this possibility to suspend direct application of Articles 34 – 36 TFEU is not itself an instance of pre-emption, which, as we have seen, describes an exclusively *legislative* phenomenon.[147] Instead, it goes to the heart of the relationship between secondary and *primary* law and is subject to different constitutional considerations.

[145] See *infra*, Part I (Chapter Two), point 214.
[146] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit.*, section 5.3.3.
[147] As noted by AG Trstenjak, '…harmonisation of laws deprives the Member States of the possibility of relying on the justifications established by (ex) Article 30 EC' but 'does not, however, preclude the application of (ex.) Article 28 EC. Whilst secondary law may give concrete expression to that Treaty provision, it cannot, however, preclude its application', Opinion in *Danske Slagterier*, C-445/06, EU:C:2008:464, paragraph 27.

2. THE PRESUMPTION OF CONSTITUTIONALITY

44. The dual function of EU legislation means that it has both an integrative effect, where it pre-empts unilateral national trade rules, and a regulatory effect, where it sets EU regulatory standards. As discussed in the General Introduction, this latter function is set out under the Treaties, which do not envisage national regulation being eliminated at the expense of the underlying public interest. Rather, and in accordance with Article 114 (3) TFEU, the Treaty's various sectoral and mainstreaming provisions, and obligations under the Charter, the EU has a mandate, 'as the acting legislator for the Member States', to shape and administer policy at EU level, according to its own design, which restricts economic freedoms to the extent deemed necessary to protect the relevant public good.[148] This mandate is not, however, without legal limitations. As discussed in the General Introduction, and in accordance with the 'principle of constitutional legality', EU legislation must be validly based on an enabling provision (positive legality) and comply with primary law (negative legality).[149] In other words, it must be in line with all obligations under primary law, including the principle of attributed competences, the protection of fundamental rights and the protection of fundamental freedoms. As regards the latter, it should be recalled that Articles 34 – 35 TFEU embody the fundamental principle of free movement, to be respected by both Member States and EU institutions, *notwithstanding* the presence of a harmonising measure. These fundamental freedoms cannot be simply disregarded or 'pre-empted' following exhaustion, since this would allow the EU legislature to reinstate – or authorise the reinstatement – of unconstitutional obstacles to trade. As a result, EU regulatory standards and procedures cannot impose, or authorise the Member States to impose, an unjustified or disproportionate restriction on the right to move products, services and labour throughout the internal market. Secondary law is subject to primary law.

45. The Treaties grant to the Court the power to enforce this hierarchy of norms through judicial review and interpretation of secondary legislation. To this end, and to the extent that it carries out a constitutional function,[150] the Court must protect and further the Treaty's objectives and values, on behalf of and for the benefit of the constitutional subjects, in a manner

[148] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *EuR*, 2002, pp. 322 – 350. (This article was translated from German to English by professional translators).
[149] A. Von Bogdandy & J. Bast, 'The European Union's Vertical Order of Competence: The Current Law and Proposals for its Reform', *op. cit*., p. 229.
[150] According to Nic Shuibhne, the constitutional responsibility of the Court is based on (a) the nature of the EU legal order; (b) different normative perspectives; (c) functional constitutionalism (recognition of Court's case-law, even if empirical data on national application is missing). See N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit.*, 2013, pp. 12 – 21.

that is fair, reasoned and responsive.[151] Treaty interpretations by the legislator should, as a result, be subservient to Court judgement. Yet subservience is not incompatible with the legislator's core function of giving concrete expression to Treaty objectives and provisions, such as the fundamental freedoms[152] and rights.[153] To the contrary, the Court recognises the EU legislator as enjoying a wide margin to determine questions of fact and policy, to the extent that it weighs different interests, makes complex economic assessments and relies on expert knowledge.[154] As Craig notes, 'The general legal mantra is that the court should not substitute its judgement for that of the initial decision-maker on issues of fact and discretion'.[155] Still, the line between law and fact can be blurred, particularly when applying the proportionality principle. As noted by Nic Shuibhne, '(t)the further we drill into proportionality – where most of the balancing and reconciling takes place – the further we move away from the sphere of legal analysis'.[156] What is more, secondary legislation can sometimes veer into what is in reality an interpretation of primary law. The question is how should the Court respond in a system that recognises judicial review and that is based on the hierarchy of norms.

46. In cases of judicial review, this 'deference question' is explicit, as the Court is specifically asked to assess whether the EU legislative act has breached primary law, for example, by exceeding the principle of attributed competences,[157] violating a fundamental freedom[158] and/or a fundamental right,[159] and/or failing to comply with a general principle of law, such as the principle of proportionality.[160] However, most internal market disputes do not directly question the validity of the EU measure, but seek an interpretation of its provisions to

[151] Or, as Nic Shuibhne notes, fair, with integrity and with room for imagination. *Ibid.*, pp. 8 – 9.
[152] See *infra,* section 2.2.2 (Limiting the Legislator).
[153] Ex. *Glatzel*, C-356/12, EU:C:2014:350.
[154] See ex. *Alliance for Natural Health & Others*, Joined Cases 154/04 & 155/04, EU:C:2005:449, paragraph 52 and *infra*, points 110 – 116. For discussion, see A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *Common Market Law Review*, vol. 47, 2010, pp. 361 – 403, section 4, P. Craig, *EU Law and Administration*', second edition, Oxford, Oxford University Press, Chapter 15 and A. Bailleux, 'La part du droit dans l'arbitrage social général', in Y. Cartuyvels et al. (éds.), *Le droit malgré tout. Hommage à François Ost*, Bruxelles, Presses de l'Université Saint-Louis, 2018, pp. 877 – 905.
[155] P. Craig, *Ibid.*
[156] N. Nic Shuibhne, 'Primary Laws: Judging Free Movement Restrictions after Lisbon', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.*, pp. 297 – 318 at p. 309.
[157] *Germany v European Council and Parliament*, C-376/98, EU:C:2000:544 (*Tobacco Advertising I*).
[158] Ex. *Diageo Deutschland,* C-457/05, EU:C:2007:576.
[159] *Wachauf,* Case 5/88, EU:C:1989:321. See also *McDonagh,* C-12/11, EU:C:2013:43, *Schaible,* C-101/12, EU:C:2013:661 and *Digital Rights Ireland*, C-293/12, EU:C:2014:238.
[160] Ex. *Fedesa*, C-331/88, EU:C:1990:391, paragraph 14; *UK v Commission (BSE),* C-180/96, EU:C:1998:192, paragraph 97; *Beneo-Orafti*, C-150/10, EU:C:2011:507, paragraph 75 – 77, *SFIR,* Joined Cases C-187/12 to C-189/12, EU:C:2013:737, paragraphs 42 – 43 and *Poland v Parliament and Council (Flavoured Tobacco)*, C-358/14, EU:C:2016:323.

assess the legality, or clarify the meaning, of a national measure based thereunder. Lurking behind such questions can be a potential clash between primary and secondary law, and by extension, between the judiciary and legislator,[161] as exemplified in certain cases dealing with the rights of EU citizens.[162] Resolving this dilemma is further complicated by the fact that the judiciary must determine the limits of its own decision-making powers.[163] Thus, when faced with constitutional questions regarding legislation, the Court itself must decide whether, and the degree to which, deference should be afforded to the legislator.[164] To this end, it will, exceptionally, strike down secondary legislation for failing to conform to the Court's, often teleological, interpretation of primary law.[165] More commonly, the Court will consistently interpret secondary legislation in line with its vision for the Treaty's objectives, and for our purposes, free movement.[166] In some such cases, the Court might refer directly to the Treaty to 'emasculate' or 'avoid' the legislator's intention, notwithstanding relevant secondary rules.[167] In others, however, it will more readily defer to the legislator, for example by relying exclusively on the literal reading of the secondary measure.[168]

47. It is against this backdrop that this section explores whether and how the Exhaustion Rule ensures the hierarchical relationship between primary and secondary law, notwithstanding the deference it implies in favour of the EU legislator (2.2). Following an outline of the relationship between the judiciary and legislator more generally (2.1), we demonstrate that the Rule's 'procedural suspension' of Articles 34 – 36 TFEU (primary law) in favour of EU harmonising rules (secondary law) should not reverse this hierarchy. However, nor does it ignore the legislator's legitimate role in resolving the numerous tensions that underlie the internal market for goods. Instead, by granting EU product measures with a generalised but rebuttable presumption of constitutionality, the Exhaustion Rule can help the Court to achieve

[161] *Infra*, points 96 – 99.
[162] *Infra*, points 56 – 59.
[163] B. Foley, *Deference and the Presumption of Constitutionality*, Dublin, Institute of Public Administration, 2008, p. 22. See also A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *op. cit.*, pp. 389 – 390.
[164] An example of this dynamic can be found in case-law acknowledging that an EU act enjoys a presumption of legality and will only be deemed non-existent if it is tainted by an irregularity, the gravity of which is so obvious that it cannot be tolerated in the EU legal order. Ex. *Commission* v *BASF & Others*, C-137/92, EU:C:1994:247, paragraphs 48 – 49 and *Commission v Greece (Ouzo)*, C-475/01, EU:C:2004:585, paragraph 19.
[165] Ex. *Digital Rights Ireland*, note 159 and *Diageo Deutschland*, note 158.
[166] For examples of how the Court ensures consistent interpretation of EU legislation with Articles 34 – 35 TFEU, see *infra*, points 94 – 95. On the duty of the Court to ensure such consistent interpretation, see K. Lenaerts & T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *op. cit.*, pp. 293 – 294.
[167] See G. Davies, 'Legislative Control of the European Court of Justice', *Common Market Law Review*, vol. 51, no. 6, 2014, pp. 1579 – 1607 at sections 3.2 and 3.3.
[168] See ex. *Dano*, C-333/13, EU:C:2014:2359, discussed *infra*, points 56 – 59.

institutional balance while respecting legality and ensuring effective judicial protection.[169] As a result, the EU legislator is deemed either not to have restricted the free movement of goods, or to have justified any such restriction. However, if legislation goes too far, for example by unjustifiably partitioning the market or allowing Member States to do likewise, the primacy of primary law, as interpreted by the Court, should trump deference to the legislator directly, through judicial review, or indirectly, through consistent interpretation.

2.1 The Judiciary and the Legislator

48. Articles 263 – 267 TFEU explicitly task the Court with enforcing the hierarchy of norms by exercising its powers of review and interpretation. These powers are also encapsulated in Article 19 (1) TEU, which requires the Court to 'ensure that in the interpretation and application of the Treaties the law is observed'. As summed up in *Les Verts*, 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[170] Thus, while the Commission is seen as the guardian of the Treaties, legislative considerations that impact on the Treaty are subservient to Court judgement and must give way in the event of conflict.[171] It is the Court, therefore, that emerges as the true guardian of EU law,[172] as its role is 'not just to dialogue with political actors but sometimes to remind them of the constitutional constraints under which they, too, must act as bound constitutional subjects'.[173]

49. Applied in the context of the free movement of goods, this hierarchy grants the Court ultimate authority to interpret Articles 34 – 36 TFEU, since, when 'ensuring that the law is observed', it is also empowered to say what that law actually is'.[174] This authority has been expressed through a rich jurisprudence that has, since the 1960s, teased out key concepts, such

[169] See General Introduction, point 49.
[170] *Les Verts*, Case 294/83, EU:C:1986:166, paragraph 23. See also, more recently, *LM*, C-216/18 PPU, EU:C:2018:586, paragraphs 49 – 51 and *Commission v Poland (Judicial Independence)*, C-619/18, EU:C:2019:531, paragraphs 43 – 47.
[171] P. Craig, *EU Law and Administration*', *op. cit*., pp. 405 – 408.
[172] Indeed, as Lenaerts notes, the Court is 'the guardian of the rule of law and of democratic values when the actors in the political process seem to need protection against each other's majoritarian rule'. K. Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians in the European Community', *op. cit.*, p. 133.
[173] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit.*, p. 258.
[174] *Ibid.*, p. 2.

as the definition of a 'good',[175] the scope of the prohibition against trade[176] and how such prohibitions might be justified.[177] As we will discuss, the EU institutions are bound by these concepts, even though they were largely developed in the context of defining national trade barriers. At the same time, judicial interpretation of primary law remains general and under-determinate, with leeway for policy makers to balance the goals of integration with regulatory requirements. Indeed, such leeway comes under the legislator's function of giving concrete expression to Treaty provisions through secondary law.[178] To this end, it enjoys broad discretion to 'elaborate' and 'shape' the 'provisions on the fundamental freedoms as specific rights and duties'.[179] The grey area between law and policy also allows the legislator to promote a certain vision of the scope of and limitations to the free movement of goods, thus incorporating a constitutional dimension. The question is how should the Court deal with such legislative pronouncements in a system that recognises judicial review and that is based on the hierarchy of norms. This question is particularly relevant when the Exhaustion Rule applies, given that it ousts direct application of Articles 34 – 35 TFEU. This section provides some conceptual foundations for this discussion by exploring the relationship between the judiciary and legislator (2.1.1) and presenting the concept of 'deference' (2.1.2) and the 'presumption of constitutionality' (2.1.3).

2.1.1. Conceptualising a Complex Relationship

50. That the Court must enforce the hierarchy of EU norms through judicial review and interpretation of secondary legislation is without doubt. The EU legislator's role in adopting the measures necessary to attain the objectives of the Treaties is similarly assured. As observed by Syrpis, however, accepting these respective functions can lead to different visions in conceptualising the relationship between the EU judiciary and legislator.[180] This controversial

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[175] Ex. *Commission v Italy (national treasures)*, Case 7/68, EU:C:1968:51, p. 428. For discussion of relevant case-law, see European Commission, *Guide to the Application of Treaty Provisions governing the Free Movement of Goods*, Ares (2013) 3759436 – 18/12/2013, section 3.1.2.

[176] Ex. *Dassonville,* Case 8/74, EU:C:1974:82, *Cassis de Dijon*, Case 120/78, EU:C:1979:42 and *Keck & Mithouard,* Joined Cases C-267 and 268/91, EU:C:1993:905. For discussion of relevant case-law, see the Commission's '*Guide to the Application of Treaty Provisions governing the Free Movement of Goods*', *ibid.*, sections 3.1.8 – 3.1.11.

[177] Ex. *De Peijper*, Case-104/75, EU:C:1976:67. For discussion of relevant case-law, see the Commission's '*Guide to the Application of Treaty Provisions governing the Free Movement of Goods*', *ibid.*, section 6.

[178] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit.*, section 2.

[179] Opinion in *Commission v Germany (Ambulance Services)*, C-160/08, EU:C:2010:67, paragraph 108.

[180] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', in P. Syrpis (ed.) *The Judiciary, the Legislator and the EU Internal Market*, Cambridge, Cambridge University Press, pp. 1 – 24 at p. 4.

dynamic is the subject of voluminous literature[181] and an in-depth analysis of the matter is outside the scope of the research. It is, however, useful to explore some key elements of the debate, insofar as they relate to the Exhaustion Rule. We therefore briefly present two competing visions on how to conceive the relationship between the judiciary and legislator in the internal market, articulated by Syrpis over a series of recent articles.[182]

51. Syrpis's first vision, presented at its extreme, casts the constitution in formal terms and grants the judiciary exclusivity with respect to its interpretation. This involves privileging the position of primary law over legislation, and as a result, the position of the judiciary over the legislature.[183] Courts cannot and should not be influenced by the passage of secondary rules. Indeed, this vision considers any such influence as 'alarming'.[184] In the EU context, this means that legislation should be interpreted – and if necessary constrained – to ensure compatibility with, and furtherance of, the Court's teleological conception of the Treaty and the internal market. Where this is not possible, legislation should be annulled. The Court, and its interpretation of the Treaty, reigns supreme.[185]

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[181] For commentary on this relationship in an EU context, see ex. T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit.*; G. Davies, 'Legislative Control of the European Court of Justice', *op. cit.*, and M. Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship', in H.-W. Micklitz & B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, *op. cit*., pp. 113 – 147. For more generalised commentary, with a focus on the US context, see ex. A. Bickel, *The Least Dangerous Branch*, Second Edition, New Haven and London, Yale University Press, 1986; D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in M. Taggart (ed.), *The Province of Administrative* Law, Oxford, Hart Publishing, 1997, pp. 279 – 307; B. Foley, *Deference and the Presumption of Constitutionality*, Dublin, Institute of Public Administration, 2008; L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, New York, Oxford University Press, 2004; M. Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts', *Wake Forest Law Review*, vol. 38, 2003, pp. 697 – 688; Lord Steyn, 'Deference: a Tangled Story', *Public Law*, 2005, pp. 346 – 359; C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Harvard University Press, Cambridge, Massachusetts, 1999; M. Thushnet, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, 1999; J. Waldron, *Law and Disagreement*, Oxford, Clarendon Press, 1999 and J. Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal*, vol. 115, no. 6, (2005 – 06), pp. 1346 – 1406;

[182] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit*., pp. 3 – 24. See also P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *Common Market Law Review*, vol. 52, 2015, pp. 461 – 488 and P. Syrpis, 'EU Secondary Legislation and its Impact on Derogations', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis, (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, Oxford and Portland, Oregon, Hart Publishing, 2006, pp. 278 – 296.

[183] P. Syrpis, 'EU Secondary Legislation and its Impact on Derogations', *ibid*., p. 290.

[184] P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *op. cit.*, p. 483.

[185] See ex. D. Edward, 'Guest *Editorial*: Will there Still Be *Honey for Tea*?', *Common Market Law Review*, vol.43, no. 3, 2006, pp. 623 – 627, who notes at p. 627, 'It is the power and duty of the Court to interpret the Treaties in accordance with internationally recognised canons of interpretation in order to "ensure that the law is observed". It is the obligation of the political institutions, including the Parliament, to work within the bounds of that interpretation unless and until the Treaty is itself amended by those who have the power to amend it'.

52. Syrpis then presents the alternative 'second' vision, which recognises a decisive role for political institutions in interpreting primary law provisions, thereby rejecting such judicial supremacy.[186] Under this perspective, the constitution, or the Treaty, is seen as 'an organic document' to be concretised according to an evolving dialogue between court and legislator.[187] However, judicial policing of the legislator's voice in this dialogue should only be exercised in 'extreme circumstances', where it has 'manifestly and gravely' exceeded its powers.[188] What is more, the court should, 'try to read secondary legislation literally' and 'be prepared to adjust its own interpretation in light of the stance adopted by the legislature'.[189] While they can legitimately fill in gaps left by the legislature, courts must avoid intruding into the political domain insofar as the legislator has spoken. Suspicious of judicial review,[190] this latter vision, at its extreme, requires legislative exclusivity with respect to constitutional interpretation. Adherents consider that 'if the Constitution is under-determinate and requires *choice* in its interpretation, it is better to be ruled by the choices of those who are democratically elected and electorally accountable than the choices of the judiciary.'[191]

53. By presenting each vision as an extreme, Syrpis's approach provides a useful framework within which to expose the dangers of privileging either the judiciary or the legislature with respect to Treaty interpretation. These dangers have been extensively documented elsewhere[192] and require only a brief mention. As regards Sypris's first 'hierarchical' vision, it can be criticised for allowing unelected judges to undermine democratic institutions and frustrate democratic principles, as it reduces the role of political institutions to Treaty revision and can intrude too heavily into legislative discretion.[193] Indeed, such concern for democratic legitimacy underlies the most trenchant arguments against judicial review,[194] and, in the US context, prompted Bickel to famously characterise the judiciary as a 'deviant institution in the

[186] For discussion of this perspective, see A. Bickel, *The Least Dangerous Branch*, *op. cit.*; J. Waldron, 'The Core of the Case against Judicial Review', *op. cit*.; M. Thushnet, *Taking the Constitution Away from the Courts*, *op. cit.,* and L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, *op. cit*. A useful summary is also provided by B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.,* Chapter 7.
[187] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit.*, pp. 5 – 6.
[188] P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *op. cit.*, p. 484.
[189] *Ibid*.
[190]See ex. A. Bickel, *The Least Dangerous Branch*, *op. cit.*
[191] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, p. 211. (Emphasis in original).
[192] *Ibid*. See also references *supra*, note 181.
[193] Ex. P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *op. cit.*, section 4 and G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*.
[194] See *supra*, note 186. See also P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit.*, section 2.

American democracy'.[195] This critique can also resonate in an EU context, where the Court's creative and teleological approach to interpretation has been criticised for promoting a contested and potentially illegitimate vision of EU integration.[196] This approach can be problematic in the context of the internal market, given its ambiguous and dynamic nature, and the many unresolved tensions encompassed thereunder.[197]

54. Yet legislative supremacy also poses risks, this time by placing too much control in the hands of political institutions, which could undermine the judicial role of ensuring lawfulness, fairness and justifiability, and thereby the rights of constitutional subjects. Indeed, a core function of EU primary law, as the fundamental source of law, is to limit the actions of Member States and EU institutions. If the Court cannot review resulting decisions, or if its review is too light, individual rights could be severely curtailed with limited redress.[198] Furthermore, limiting judicial review could also threaten the delicate federal balance between the Member States and the EU, and between the EU institutions themselves.[199]

55. As Sypris himself notes, the Court does not conform to either extreme approach but has instead adopted elements of each, depending on the interpretative methodologies adopted and the extent to which it is willing to defer to legislation.[200] Still, the Court's jurisprudence can sometimes be criticised for going too far in one or another direction, as illustrated by its interpretation of EU regulation of the rights of non-economically active EU citizens. On the one hand, and relying on the core values of Syrpis's first vision, was the Court's early case-law, where it interpreted EU secondary legislation to ensure its own teleological vision of the

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[195] A. Bickel, *The Least Dangerous Branch*, *op. cit.*, p. 18.

[196] See T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit*. See also H. Rasmussen, *On Law and Policy of the European Court of Justice – A Comparative Study in Judicial Policymaking*, Dordrecht, Nijhoff Publishers, 1986; T. Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union', *Law Quarterly Review,* vol. 112, 1996, pp. 95 – 109 and P. Neill, *The European Court of Justice: A Case Study in Judicial Activism*, European Policy Forum, 1995.

[197] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*., pp. 1589 – 1590.

[198] P. Syrpis, 'EU Secondary Legislation and its Impact on Derogations', *op. cit*., p. 293. See also Lord Steyn, 'Deference: A Tangled Story', *op. cit.*, pp. 346 – 351.

[199] Ex. K. Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians in the European Community', *op. cit*.

[200] P. Syrpis, 'EU Secondary Legislation and its Impact on Derogations', *op. cit.*, section IV. See also different AG Opinions on the question of how primary and secondary law should interact. Compare, for example, Opinions of AGs Rozes, Jacobs & Cruz Villalón (respectively, *Inter Huiles*, Case 172/82, EU:C:1983:35; *Bristol-Myers Squibb & Others*, Joined Cases C-427/93, C-429/93 and C-436/93, EU:C:1995:440 & *Commission v France (Excise Duty on Tobacco)*, C-216/11, EU:C:2012:819) with Opinions of AG Trstenjak & Jääskinen (respectively, *Commission v Germany,* C-160/08, EU:C:2010:67 and *Opus Supplies*, C-462/09, EU:C:2011:133). See discussion, Part II (Chapter Two, section two).

Treaty, and more specifically, EU citizenship.[201] As has been well documented,[202] scant deference was shown to the legislator's intention in these cases. Instead, primary law, as interpreted by the Court, appeared to trump the law-maker at every turn. In *Baumbast*[203] and *Grzelczyk*,[204] for example, the Member States defended national measures that refused, respectively, residence rights and minimum subsistence payments on grounds that the applicants did not fulfil the specific requirements laid down in the relevant Residency Directives, those being, the need to have comprehensive health insurance, in the former case, and sufficient resources, in the latter.[205] Bypassing these explicit legislative choices, however, the Court relied on Article 21 TFEU[206] to identify a directly effective right to reside on the territory of a Member States for all EU citizens, by virtue of their status as a national of a Member State.[207] On the face of it, this meant that national measures implementing legislative restrictions on such residence would still have to comply with the proportionality principle. However, in reality, it amounted '*indirectly* and through the medium of the Member States to *judicial review of that very Community legislation*', akin to the sort of scrutiny applied to national measures adopted in the absence of EU rules.[208] The consequence was that '*all* restrictions on the residency rights of economically inactive Union citizens are now subject to a detailed judicial review of their appropriateness and necessity, *regardless* of their legal origin'.[209] In other words, the traditional light touch review of secondary legislation no longer applied.

56. These and other judgements can certainly be lauded for strengthening the rights of EU citizens and their family members.[210] They also appear to be on solid legal grounding, given

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[201] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit.*, p. 1605.
[202] *Ibid*. See also T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit*., section 5.
[203] *Baumbast,* Case C-413/99, EU:C:2002:493.
[204] *Grzelczyk*, C-184/99, EU:C:2001:458.
[205] See Council Directive 93/96/EEC on the right of residence for students, OJ L. 317, 18 December 1993, pp. 59–60 and Council Directive 90/364/EEC on the right of residence, OJ L. 180, 13 July 1990, pp. 26 – 27.
[206] Article 21 TFEU reads as follows: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.
[207] *Baumbast*, note 203, paragraph 84.
[208] M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *International and European Law,* Inter Alia Michaelmas, no. 77, 2006, pp. 77 – 80, at p. 76 (Emphasis in original). See also M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *European Law Review*, vol. 31, no. 5, 2006, pp. 613 – 641.
[209] *Ibid*.
[210] *Ibid.* See also E. Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects', *Common Market Law Review*, vol. 45, no. 1, 2008, pp. 13 – 45, O. Golynker, 'Partial Migration in the EU after the *Bambaust* Case: Bringing Social and Legal Perspectives Together', *Kings College Law Journal*, vol. 15, 2004, pp. 367 – 397 and H. Verschueren, 'European (Internal) Migration Law as an

the hierarchy of norms that operates in the EU and the Court's monopoly over interpreting the law. As noted by Dougan, once the Court interpreted Articles 21 and 22 TFEU as providing directly effective rights to all citizens coming within the personal scope of EU law, it could legitimately require both the Member States and EU legislator to respect such rights by granting equal treatment and protection to all EU citizens, not just to those who exercised economic free movement.[211] At the same time, the political will for such a leap has always seemed lacking, as evidenced by the level of national contestation both during and after the delivery of certain judgements, particularly when this involved enhancing the rights of economically inactive EU citizens or third-country national family members.[212] It was in this context that the problems cited above in relation to Syrpis's first vision emerged, with the Court being accused of overstepping its proper function, undermining politically sensitive compromises and prizing individual rights over the public interest.[213] Yet the Court's response to these criticisms seems, at least in some cases, to have gone to the other extreme, as it has poured 'the content of the primary right to equal treatment into a statement in secondary law', thereby granting secondary legislation a 'hegemonic attribution of supremacy', and 'imploding' the 'primary-ness' of Union citizenship rights.[214] Specifically, in *Dano*, the Court held that an EU citizen could only invoke a right to equal treatment if his/her residency complied with the conditions of the Citizens Directive.[215] This conclusion was reached on grounds that Article 24 of the directive

Instrument for Defining the Boundaries of National Solidarity Systems', *European Journal of Migration Law*, vol. 9, 2007, pp. 307 – 346.

[211] M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit.*, pp. 78 – 79. See also N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', *Common Market Law Review*, vol. 52, no.4, 2015, pp. 889 – 938 and E. Spaventa, *ibid.*

[212] Ex. Numerous Member States intervened to support Belgium in *Grzelczyk* (note 204) Austria in *Brey* (C-140/12, EU:C:2013:565) and Germany in *Dano* (note 168), all of which considered the rights of non-economically active citizens. Similar pushback can be seen in cases considering the rights of mobile EU students (ex. *Förster*, C-158/07, EU:C:2008:630.) and third-country national family members of EU citizens (ex. *Metock,* C-127/08, EU:C:2008:449 and *Zambrano*, C-34/09, EU:C:2011:124) For discussion, see A. van Wageningen, 'Free Movement, Citizenship and the Regulation of Higher Education: A Constitutional and Institutional Stress Test", in H. Mercenier, E. Ni Chaoimh, L. Damay & G. Delledonne (eds.), *La libre circulation sous pression. Régulation et dérégulation des mobilités dans l'Union européenne*, Bruxelles, Bruylant, 2018, pp. 185-204 and S. Currie, 'Accelerated Justice or a Step Too Far? Residence Rights of non-EU Family Members and the Court's Ruling in Metock', *European Law Review*, vol. 34, no. 2, 2009, pp. 310 – 326.

[213] Ex. K. Halibronner, 'Union Citizenship and Access to Social Benefits', *Common Market Law Review*, vol. 42, no. 5, 2005, pp. 1245 – 1267; T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit.* and G. Davies, 'Legislative Control of the European Court of Justice', *op. cit.* Dougan also voices a more critical assessment in M. Dougan, 'The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon', in U. Neergaard, R. Nielsen & L. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, Djøf Publishing, Copenhagen, 2009*,* pp. 147 – 187.

[214] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', *op. cit.*, pp. 891 – 892 and p. 935.

[215] *Dano*, note 168, paragraph 61. For discussion, see N. Nic Shuibhne, *ibid.*; D. Thym, 'When Union Citizens Turn into Illegal Migrants: The *Dano* Case'*, European Law Review,* vol. 40, no. 2, 2015, pp. 248 – 261 and H.

grants equal treatment to all Union citizens *'residing on the basis of'* the directive, while also allowing Member States to refuse social assistance to such citizens during their first three months of residence. Ms. Dano, who, as an inactive, poor Romanian citizen, had not been residing in Germany on the basis of the directive, was therefore precluded, by secondary law, from making a Treaty-based claim to equal treatment under Article 18 TFEU.[216] The Court maintained a similar approach in subsequent cases, such as *Alimanovic*[217] and *García-Nieto*,[218] which both precluded the applicant EU citizens from accessing social assistance on the basis of Article 24 (2) because their residence did not comply with the conditions laid down thereunder.

57. This more restrictive judicial interpretation of EU citizenship has solicited a torrent of debate and analysis – both positive and negative. Viewed from one perspective, the Court, by interpreting an unambiguous legislative instruction without direct reference to the Treaty, was simply relying on its longstanding approach under the Exhaustion Rule.[219] In fact, this approach may even have been mandatory under Articles 20 and 21 TFEU, which explicitly subject the rights of EU citizens to 'the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect', i.e. secondary law. At the same time, however, and as observed by Nic Shuibhne, the Court's original interpretation of citizenship had 'created substantive rights at the level of primary law', which pre-dated Article 24 of the Citizens Directive. In other words, the legislator had acted after the 'Articles 18 and 21 TFEU horse had already bolted'.[220] In this context, judicial reliance on Article 24, as the specific and exhaustive expression of the general principle of non-discrimination, reversed the Court's earlier acceptance that a lawfully resident but economically inactive citizen could directly invoke primary law to assert a claim for equal treatment in host Member States, even if he/she did not fully comply with conditions laid down in secondary legislation. In doing so, the Court inverted the starting point of its analysis from rights to restrictions, 'upended established constitutional protocols' and backtracked from its previous position regarding the substance of primary citizens' rights, yet without 'explicit articulation' or 'careful explanation'.[221]

Verschueren, 'Preventing 'Benefit Tourism' in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano', Common Market Law Review,* vol. 52, no. 2, 2015, pp. 363 – 390.

[216] Article 18 TFEU reads as follows: Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

[217] *Alimanovic,* C-67/14, EU:C:2015:597.

[218] *García-Nieto*, C-299/14, EU:C:2016:114.

[219] See in particular, *Dano*, note 168, at paragraph 61, which appears as an expression of the Exhaustion Rule.

[220] S. O Leary. 'The Curious Case of Frontier Workers and Study Finance: *Giersch*', *Common Market Law Review*, no. 51, 2014, pp. 601 – 622, at p. 617.

[221] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', *op. cit.*, p. 935

58. Without entering into the debate surrounding the merits and concerns with this reversal,[222] two conclusions relevant for our research can be drawn. First, the saga reveals the fragility of certain rights that are based solely on judicial interpretation of primary law, without being preceded, or followed up by legislative acceptance. This, in turn, recalls the weaknesses associated with Syrpis's first vision, which, as mentioned in our General Conclusions, could have future implications for the rights of EU workers and their family members. Second, the saga also highlights how the Court's failure to adopt a rational and coherent approach to assessing the relationship between primary and secondary law can ultimately undermine its legitimacy. Indeed, one of the strongest critiques of *Dano* is that it neither openly reverses previous case-law, nor tries to reconcile that case-law with its revised logic.[223] The result, according to Nic Shuibhne, is 'a distorted and unconvincing jurisprudence; but more fundamentally, a status splintered further into tiers and, ultimately, diminished'.[224] Making a similar criticism of the Court's jurisprudence on labour rights, Kilpatrick states that it has 'flip-flopped between positions close to internal market purism and reassuring interested constituencies … that it will ensure labour rights are not threatened, and can even be bolstered, by the internal market'.[225] Such critiques feed into Sypris's overall assessment of the Court as being unpredictable in assessing the relationship between EU legislation and primary law. According to him, the Court seems to be guided by 'little more than intuition', without any 'clear sense of where the boundary between the legal and political is, and ought to be, located' and without 'identifying the proper weight which it should attach to the interventions of the legislature'. This ultimately undermines legal certainty, with damaging consequences for both the legislature and potential litigants.[226]

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[222] *Ibid*. See also H. Verschueren, 'The right to reside and to social benefits for economically inactive EU migrants: how to balance freedom of movement and solidarity?' and S. Mantu, 'Controlling Poverty Migration – Asserting Gradations of EU Citizenship', in H. Mercenier, E. Ni Chaoimh, L. Damay & G. Delledonne (éds.), *La libre circulation sous pression*, *op. cit.*, at, respectively, pp. 33 – 51 and pp. 169 – 184 and A. Bailleux, 'La libre circulation en contreplongée ou Le bon citoyen (européen) dessiné par le droit', *Politique européenne*, vol. 2017/4, no. 58, pp. 164 –187.

[223] N. Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship', *op. cit.*, p. 916.

[224] *Ibid*.

[225] See C. Kilpatrick, 'Internal Market Architecture and Labour Rights – As Good as it Gets?', in P. Syrpis (ed.) *The Judiciary, the Legislator and the EU Internal Market*, *op. cit.*, pp. 205 – 239 at p. 232.

[226] P. Syrpis, 'EU Secondary Legislation and its Impact on Derogations', *op. cit*., pp. 295 – 296. See also D. Kochenov, 'The Right to have *What* Rights? EU Citizenship in Need of Clarification', *European Law Journal*, vol. 19, no. 4, 2013, pp. 502 – 516.

59. While we accept this criticism in relation to certain fields of free movement, our research indicates that such difficulties have been largely avoided in the context of the free movement of goods. First, in contrast to the free movement of people, the EU legislator's broad competence, and, crucially, its political will to regulate trade in goods has enabled it to legitimate radical Court judgements that rewrite the balance between regulation and integration, and between national and EU competences. The most striking example of this dynamic is the legislative response to *Cassis de Dijon*.[227] However, the legal regime can also allow for the opposite trend, that is, for the legislature to inspire the Court, thereby providing room for respectful dialogue and sense that the free movement of goods is genuinely co-owned by the Court and the legislature. This leads to our second point, which is that this balanced approach has not occurred by chance, through intuition or in response to political controversy, as appears to have been the case in *Dano*. Rather, it has generally been guided by the Exhaustion Rule, which, when systematically relied upon, can provide a rational framework to assess the relationship between Articles 34 – 35 TFEU and secondary law. In particular, by granting EU legislation a (rebuttable) presumption of constitutionality, the Rule requires a degree of deference to EU product legislation, while ensuring the Court retains its powers of consistent interpretation and judicial review. It can, as such, provide an appropriate framework to protect the Court from the extremes discussed by Syrpis, which helps to preserve its legitimacy, as well as the overall stability of the legal regime. We first introduce the notion of 'deference' and the 'presumption of constitutionality', before relying, in section 2.2, on these concepts to present the second leg of the Exhaustion Rule.

2.1.2 The Bridge of Deference

60. The Treaties explicitly recognise that the Court has powers of judicial review. The question is how to ensure it is nonetheless subject to restraint. Indeed, even proponents of judicial supremacy (Syrpis's first vision) do not necessarily support the notion of unbridled judicial power. Rather, while remaining suspicious of political input, they may seek to restrain the judiciary exclusively through the interpretation of primary law.[228] However, this can require declining jurisdiction or 'reading down' the constitution – that is, restricting the grounds of judicial review by providing a more narrow interpretation of the definition and application of

[227] This included the Commission White Paper on completing the internal market, 14 June 1985, COM (85) 310 final and Council Resolution on a new approach to technical harmonisation and standards, OJ, 4 June 1985, C. 136, pp. 1 – 9.
[228] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, p. 38.

rights.[229] As noted by Foley, the 'price of judicial supremacy is the remoulding of the Constitution'.[230] Indeed, one need only recall the Court's ruling in *Keck*, where it limited the judicial role of review by 'reading down' Article 34 TFEU to exclude non-discriminatory selling arrangements from its purview.[231] However, this approach can also be criticised. For example, in his early work on this subject, the American scholar Sager cautioned against 'under enforcing' the US Constitution with respect to certain socio-economic rights, which he believed to be protected thereunder.[232] Yet he also acknowledged that judicial stewardship of such rights could cause too much controversy. As such, to avoid that they would be ignored completely, he suggested that the legislature should be given guardianship over such matters, under the banner of 'legislatively enforced constitutional rights'. This would allow the legislator to make complicated decisions, with judicial oversight limited to protecting against discrimination. In essence, therefore, Sager proposed a deference-based model of restraint as a more appropriate way to protect socio-economic rights under the US Constitution.[233] Foley builds on this analysis to suggest deference as a 'better vehicle for judicial self-doubt about judicial capacity, not only in the context of socio-economic rights, but also more generally'.[234] In our view, this approach could also be appropriate for Court's analysis of secondary legislation that regulates the free movement of goods.

61. Judicial deference describes the situation where the court accepts as authoritative the legislator's perspective regarding the dispute at hand.[235] As such, it is central to the relationship between judiciary and legislator, since the court, 'in deciding whether or not to unmake a particular legislative choice … should be sensitive to the institutional balance and the

[229] *Ibid.*, Chapter 2. See also A. Young, 'Deference, Dialogue and the Search for Legitimacy', *Oxford Journal of Legal Studies*, vol. 30, no. 4, 2010, pp. 815 – 831 at p. 817.
[230] B. Foley, *ibid.*, pp. 26 – 27.
[231] *Keck & Mithouard,* note 66. Ramien understands this case as applying the principle of subsidiarity to the Court's de-regulatory approximation of laws through the market freedoms. See O. Remien, 'Grenzen der gerichtlichen Privatrechtsangleichung mittels der Grundfreiheiten des EGVertrages', *Juristenzeitung*, 1994, pp. 349-353 at p. 353, as discussed by M. Schillig, 'The Interpretation of European Private Law in the light of Market Freedoms and Fundamental Rights', *op. cit.*, p. 295.
[232] L. Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms', *Harvard Law Review*, 91, 1978, pp. 1212 – 1264.
[233] In a more recent contribution to the (US) debate between judicial activism and judicial restraint, Sunstein relies on the term 'judicial minimalism' (as opposed to 'judicial maximalism') as a means to 'limit the width and depth of judicial decisions', in a manner that would be 'democracy-promoting'. See C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, *op. cit.*, pp. 259 – 260.
[234] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, p. 24.
[235] *Ibid*., p. 6.

discretionary powers of the legislative institutions'.[236] The question of, and rationale for, deference goes to the core of what constitutional decision-making is about and has long animated legal theorists.[237] This brief outline does not intend to enter into such discussions but simply introduces a model of deference that bridges Syrpis's competing visions and that is, in our view, encapsulated under the Exhaustion Rule.

62. When the court is called upon to assess legislation by reference to fundamental rights (and economic freedoms), it can apply deference at the 'interpretative' stage and/or the 'limitation' stage of constitutional review.[238] The 'interpretative' stage concerns the determination as to whether a right has been limited, while the 'limitation' stage applies to assess whether the limitation of a particular right is legitimate.[239] According to the traditional distinction between law and policy, and in line with Syrpis's first vision outlined above, deference cannot be shown to the legislator at the interpretative stage, since this is considered as pertaining to questions of law and within the exclusive purview of the court.[240] As a result, the Court should substitute its judgement for that of the legislator, to the extent that there is a difference in interpretation.[241] Deference, rather, should be reserved for the limitation stage, which is recognised as being based on empirical considerations, or questions of fact, and thus within the realm of the legislator.[242] Here, the applicant must generally show that the legislator made a 'manifest error' or clearly exceeded the bounds of discretion before intervening.[243]

63. We will see in section 2 below that the Court tends to follow this traditional approach when reviewing EU product rules, which are generally subject to the same definition of Articles

[236] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit.*, p. 15. See also A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *op. cit.*, section 5.
[237] For a summary, see B. Foley, *ibid.*, Chapter 9. Respect for legislation is central to theories of legal positivism but the most absolute (or at least famous) version of judicial deference to the legislator was probably pronounced by Montesquieu, when he wrote that judges should only be "the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour", C-L. Montesquieu, *L'esprit des lois*, Paris, Flammarion, 2008, Livre XI, ch. VI, pp. 244 – 256 (personal translation).
[238] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit.*, pp. 16 – 18. See also O. Doyle, *Constitutional Equality Law,* Dublin, Thomson Round Hall, 2004, pp. 104 – 109 and A. Barak, *Proportionality, Constitutional Rights and their Limitations,* Cambridge University Press, Cambridge Books Online, 2012, Chapter 16.
[239] *Ibid*.
[240] *Ibid.* See also A. Barak, *Proportionality, Constitutional Rights and their Limitations*, *op. cit*., pp. 436 – 437.
[241] P. Craig, *EU Law and Administration*', *op. cit*., pp. 405 – 407.
[242] This seems to be the approach adopted by the Canadian courts and the European Court of Human Rights. See B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.,* Chapter 3 for discussion.
[243] P. Craig, *EU Law and Administration*', *op. cit*., pp. 408 – 409.

34 – 35 TFEU as the Member States, but with more scope for justification.[244] At the same time, viewing the Court's interpretation of secondary legislation solely through the lens of this law/policy distinction might, in some cases, ignore a more fluid reality, which, in our view, can be accommodated under the Exhaustion Rule. First, empirical considerations and value judgements can be relevant at the interpretative stage, where 'the legislature's resolution of an interpretative question *may* draw on the same kind of empirical or social evidence that may be more often associated with the limitation stage'.[245] This can be seen, for example, when the legislator defines constitutional terms such as 'life' and the question as to whether this could extend to embryos and stem cell treatment. Substituting the opinion of the court on such matters could be seen as illegitimate and anti-democratic. Second, systematic deference at the limitation stage could lead to the hollowing out of certain rights, for example by requiring the court to review legislative limitations according to a light proportionality test or by placing the onus on the party whose rights have been breached to prove an absence of justification or proportionality. Third, a rigid law/policy divide could also invite more or less scrutiny, depending on whether legislation is presented in terms of principle, or the application of principle, even if the impact on a particular right is the same.[246] Fourth, one could argue that the legislator *should* have a voice in constitutional interpretation – even if this remains subject to judicial review. Indeed, as Davies notes, judicial supremacy with respect to Treaty interpretation does not necessarily mean exclusivity, particularly when it comes to ambiguous and under-determinate provisions, such as those relating to the internal market.[247] Finally, as we discuss in section 2, the Court seems less concerned with the law/policy distinction when interpreting and applying EU legislation, as it relies on the Exhaustion Rule to defer to that legislation, even where the latter incorporates a constitutional dimension.

64. These observations suggest the need to move away from a rigid distinction between law and policy and allow a more nuanced approach to the question of 'deference'.[248] For example,

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[244] *Infra*, points 113 – 116.
[245] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.,* p. 17.
[246] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*., p. 1587. See also P. Craig, *EU Law and Administration*', *op. cit*., p. 408.
[247] G. Davies, *ibid.*, p. 1584 and pp. 1589 – 1590.
[248] A novel framework within which to appreciate such nuance is Bailleux's proposal to consider the role of law, not as a means of social arbitration – which is a task left largely to the political system - but rather to organise and civilise the process, for example, by requiring the legislator and other public bodies and institutions, including the courts, to justify decisions that restrict individual freedoms. A. Bailleux, 'Le part du droit dans l'arbitrage social général', *op. cit*. See also B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, p. 354 who suggests a 'due deference' model, whereby the Court should only defer to the legislator when this is earned. As

one might welcome an increase in scrutiny of policy decisions by relying on proportionality as a meaningful norm,[249] while not being averse to granting some weight to legislative interpretations of the Treaty. This latter possibility accepts that legislation can be 'an act of constitutional interpretation, since it embodies a claim about what the constitution allows'.[250] This has, in turn, led some authors to conclude that constitutional interpretation could be 'co-owned' or 'shared' between the judicial and political institutions, whereby non-judicial branches of state should have at least some authority to interpret the constitution.[251]

65. Davies considers such views to resonate in the EU context, where there is a close link between 'directly effective Treaty rights and legislative competences'. This allows certain legislation relating to, say, free movement or environmental protection to implicitly contribute to an understanding about 'what those ideas, in the Treaty context, mean'.[252] Against this backdrop, the Court, when carrying out its functions, should exercise 'a degree of deference' to such constitutional interpretations.[253] In other words, it should 'exercise that privilege with respect for other approaches to understanding the Treaty',[254] where it defer(s) at the moment of adjudication to constitutional decisions reached by the legislature.[255] However, such deference should also retain certain merits from Syrpis's first vision by embracing the legitimacy of judicial review and granting the last word to the judiciary. As a result, it need not be absolute or require submission. Rather, the Court's approach should be seen in terms of granting weight to the legislator, the degree of which will depend on different factors, such as the subject matter involved and the degree to which the legislator has justified its choices.[256] The key issue, then,

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such, 'the onus is firmly on the state to justify rights-limiting legislation. The deference which the Court may extend to the state will, therefore, be a function of the justification put forward'.

[249] G. Davies, *op. cit.,* p. 1587. See also A. Garde, 'Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance', in N. Nic Shuibhne & L. Gormley (eds.), *From Single Market to Economic Union – Essays in Memory of John A Usher*, Oxford, Oxford University Press, 2012, pp. 117 – 133.

[250] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*., p. 1586.

[251] See ex. B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.* and F. Hessik, 'Rethinking the Presumption of Constitutionality', *Notre Dame Law Review,* vol. 85, no. 4, 2010, pp. 1447 – 1504. For further references from American scholarship, see G. Davies, *ibid*., footnotes 17 – 21. See also A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire : Essai sur la figure du juge traducteur*, Bruxelles, Bruylant, 2009, pages. 483, 519 and 560.

[252] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*., p. 1587.

[253] *Ibid*. See also M. Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship', *op. cit.*, and T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit*., section 5.

[254] G. Davies, 'Legislative Control of the European Court of Justice', *ibid*., pp. 1587 – 1588. See also P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *op. cit.*, p. 483.

[255] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.,* p. 4.

[256]See ex. D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', *op. cit.*, who calls for deference as 'respect', as opposed to deference as 'submission'. See also B. Foley, *ibid.*, pp. 6 – 10.

is the intensity of judicial review, which the Court can modify depending on the circumstances.[257] In all cases, it should be able to reach the final conclusion regarding the constitutionality of legislation and should not defer to decisions that are obviously wrong.

66. Accepting such co-ownership can therefore provide a bridge between both of Syrpis's visions, by granting weight to legislative interpretations of primary law, while ensuring that the court has 'the last word' over such matters and allowing, where necessary, a more intensive review of how policy decisions have been reached. It is submitted, and will be discussed below, that the Court promotes a similar understanding of deference when it relies on the Exhaustion Rule to interpret and enforce EU product rules. This is because the Rule relies on a presumption of constitutionality that can both empower and limit the legislator.

2.1.3 The Presumption of Constitutionality

67. In certain common law jurisdictions,[258] such as Ireland and the US, the questions of judicial restraint and deference can be discussed within the framework of the 'presumption of constitutionality'. This doctrine is, in essence, 'a deferential principle of constitutional adjudication'[259] that requires the court to 'accept as authoritative' the decision of the legislator in respect of the dispute at hand.[260] Rooted in the notion of institutional balance, democracy and mutual respect,[261] it stems from the fact that the court's duty to declare a statute unconstitutional under the hierarchy of norms should be exceptional and limited.[262] Secondary legislation must, as a result, enjoy a presumption of *validity*, whereby 'the courts should not hold legislation unconstitutional unless the unconstitutionality is clear' – that is, unless there is

[257] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit.*, p. 14. See also A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *op. cit.*, particularly section 4, and P. Craig, *EU Law and Administration*', *op. cit*., Chapter 15.
[258] This notion is not unknown in civil law countries. See ex. A. Vanwelkenhuyzen, 'La présomption de constitutionnalité de la loi et du décret en droit belge', in C. Perelman et P. Foriers (éd.), *Les présomptions et les fictions en droit belge*, Bruxelles, Bruylant, 1974, pp. 259 – 277 and J. van Compernolle & M. Verdussen, 'La guerre des juges aura-t-elle lieu ? – A propos de l'autorité des arrêts préjudiciels de la Cour d'arbitrage', *Journal des Tribunaux*, no. 5965, 2000, p. 301.
[259] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, p. 137.
[260] *Ibid.*, p. 6.
[261] The reasons for the presumption of constitutionality mirror Syrpis's second vision and include the need 'to show due respect to the judgements of legislators, who are bound by an oath to support the Constitution; to promote democracy by preventing courts from interfering with decisions rendered by the elected legislature; and to take advantage of the legislature's superior institutional design'. See F. A. Hessik, 'Rethinking the Presumption of Constitutionality', *op. cit*., p. 1449.
[262] F. A. Hessik, *ibid.*, p. 1448.

convincing evidence that the presumption should be rebutted.[263] While the court's authority over the law remains intact in principle, this power should be exercised sparingly when reviewing secondary legislation. As such, the presumption of constitutionality seems to support a deferential relationship between the judiciary and legislature.

68. This first – empowering – dimension to the presumption of constitutionality corresponds to Dawson's observation that the presumption 'simply means that in evaluating the constitutionality of a statute, the Court will afford some deference to the statute, and the party challenging the statute will bear some burden of proof to show its unconstitutionality'.[264] The question then reverts to what we have just discussed, that being how much and what type of deference does the court in fact apply. In this context, the meaning and impact of the 'presumption of constitutionality' can vary widely, depending on the jurisdiction and the content of the constitutional challenge. In the United States, for example, the presumption of constitutionality is largely limited to 'a form of factual deference',[265] where the statute enjoys 'the benefit of the doubt on questions of constitutional fact-finding, with no interpretive deference'.[266] As a result, while the legislator can enjoy a wide margin to justify policy decisions, the court's monopoly over questions of law is not, in principle, challenged.[267] What is more, a higher standard of review generally applies when legislation is challenged for violating fundamental rights, as the legislator holds the burden of specifically justifying any such restriction.[268] At the same time, courts can show a degree of factual deference in some such cases, once policy justifications are raised.[269]

69. Ireland, however, seems to adopt a different understanding of the presumption of constitutionality, by allowing the deference implied thereunder to slide into legal deference.

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[263] G. Metzger & T. Morrison, 'The Presumption of Constitutionality and the Individual Mandate', *Fordham Law Review*, vol. 81, no. 4, 2013, pp. 1715 – 1736 at p. 1729.
[264] E. Dawson, 'Adjusting the Presumption of Constitutionality based on Margin of Statutory Passage', *Journal of Constitutional Law*, vol. 16, no. 1, pp. 97 – 152, at p. 110.
[265] F. Hessik, 'Rethinking the Presumption of Constitutionality', *op. cit.*, p. 1448.
[266] E. Dawson, 'Adjusting the Presumption of Constitutionality based on Margin of Statutory Passage', *op. cit.*, p. 110.
[267] F. Hessik, 'Rethinking the Presumption of Constitutionality', *op. cit.*, p. 1448.
[268] *Ibid*., pp. 1454 - 1455. See also E. Dawson, 'Adjusting the Presumption of Constitutionality based on Margin of Statutory Passage', *op. cit.*, pp. 111 – 112; A. Barak, *Proportionality, Constitutional Rights and their Limitations*, *op. cit*., pp. 445 – 446 and, in the Canadian context, A. Honickman, The Paradoxical Presumption of Constitutionality, Blog, Advocates for the Rule of Law, 2017. Available at: http://www.ruleoflaw.ca/the-paradoxical-presumption-of-constitutionality/. Last accessed 20 April 2018.
[269] Such an approach is taken in Canada and at the European Court of Human Rights. For discussion of this approach and of relevant case-law, see B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, pp. 47 – 51 and pp. 56 – 61. See also Chapter 4.

Specifically, when considering rights-restricting legislation, Irish courts tend to assume *'*(a) that the legislature has not, in fact, limited the right in question' and '(b) that the legislature *has* limited the right but has good justification for doing so'.[270] The presumption is, as such, an expression of 'double deference' that applies at both interpretative and limitation stages of review.[271] Yet Foley's difficulty with the Irish approach is not, the *fact* that it *could* grant legal deference to legislation. Instead, he agrees with Hessik and Dawson, in the American context, and Davies, in the EU context, that constitutional interpretation could, in principle, be 'shared' between the judicial and political institutions.[272] Moreover, he questions the feasibility of a deference model that relies on a rigid distinction between law and policy, particularly where rights exist as checks on legislative action.[273] His issue, rather, is that the Irish presumption applies 'in a blanket manner' to all legislation, regardless of whether it is warranted, and seems to require deference as 'submission' as opposed to 'respect'. As a result, courts simply presume that the legislator's opinion regarding the constitutionality of its laws is correct, unless there are very strong reasons to suggest otherwise.[274]

70. The blanket approach criticised by Foley can, however, be tempered by the second dimension to the presumption of constitutionality, whereby the legislator is presumed, not only to have adopted constitutional laws, but to have specifically *intended* its laws to be valid. By attributing an *intention* of constitutionality to the legislator, the court can also rely on the presumption of constitutionality as a presumption of *constitutional construction*,[275] or, in EU parlance, of consistent interpretation.[276] Accordingly, 'if the interpreter faces two plausible interpretations, according to which one is constitutionally valid and the other is not, the interpreter must choose the constitutionally valid interpretation'.[277] This presumption of consistent interpretation can be seen as 'an instrument of judicial restraint', which restricts the court's ability to invalidate political decisions. However, it can also be a means to protect

[270] *Ibid*., p. 71.
[271] *Ibid*., p. 16.
[272] F. Hessik, 'Rethinking the Presumption of Constitutionality', *op. cit.* (see p. 1450 for summary), E. Dawson, 'Adjusting the Presumption of Constitutionality based on Margin of Statutory Passage', *op. cit.*, section II and G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*., section 2.
[273] B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, Chapter 6.
[274] *Ibid.,* Chapter 10. See also A. Young, 'Deference, Dialogue and the Search for Legitimacy', *op. cit.*, p. 819.
[275] A. Honickman, The Paradoxical Presumption of Constitutionality, *op. cit.* (Blog)
[276] K. Lenaerts & T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *op. cit.*, pp. 293 – 294.
[277] A. Barak, *Proportionality, Constitutional Rights and their Limitations, op. cit*., p. 445. See also A. Honickman, The Paradoxical Presumption of Constitutionality, *op. cit.* (Blog). This could raise issues of legal certainty, if the constitutionally valid interpretation was (much) less predictable than the unconstitutional interpretation.

constitutional values and, as a result, reinforce the position of primary law, and the judiciary, *vis-à-vis* secondary law, and the legislator. Indeed, in commenting on this phenomenon at the US courts, Young considered that its purpose is 'not to reflect what Congress might have wanted under particular conditions, but rather to give voice to (the) normative values … embodied in the underlying constitutional provisions that create the constitutional doubt'.[278]

71. Turning to the EU, the Court has confirmed that secondary measures start off with a general presumption of constitutionality, where they are 'in principle presumed to be lawful and … produce legal effects until such time as they are withdrawn, annulled … or declared invalid', unless tainted by an obvious and sufficiently serious irregularity.[279] As a result, the party arguing that the EU measure is invalid bears the burden of proving this is indeed the case. However, the Court, in practice, retains the power to reinforce or weaken this initial presumption at the point of adjudication, by being more or less deferential to the legislation at issue. As we will see below, the Court seems to follow the traditional law/policy divide when assessing EU product rules, which it considers to be equally bound by the free movement provisions but with more discretion, and thus enjoying wider scope than Member States, to justify potential obstacles, namely through application of the proportionality principle. This should then feed into its interpretation of EU measures, which it presumes to have balanced – or reconciled – the requirements of regulation and integration in a manner that respects primary law. In practice, however, the line between law and policy is blurred, while the Court can vary its approach when interpreting EU rules. For example, it might, as in cases such as *Dano*,[280] view the presumption as an invitation for legal deference under its first (empowering) dimension, as it refuses to look beyond literal meaning of secondary legislation or interpret the latter by reference to primary law. Yet the Court could also understand the presumption in terms of its second (limiting) dimension and interpret secondary legislation in line with its vision of primary law, as in *Baumbast* and *Grzelczyk.*

72. Elements of both dimensions have normative foundations in the Treaties. As outlined earlier, the second limiting dimension to the presumption of constitutionality is bound up with

[278] E. Young, 'Constitutional Avoidance, Resistance Norms and the Preservation of Judicial Review', *Texas Law Review*, vol. 78, 2000, pp. 1549 – 1614 at p. 1551. For discussion, see G. Metzger & T. Morrison, 'The Presumption of Constitutionality and the Individual Mandate', *op. cit*., pp. 1719 – 1720.
[279] *Commission v Greece (Ouzo)*, note 164, paragraphs 18 – 19.
[280] *Dano*, note 168. See also *Förster*, C-158/07, EU:C:2008:630 and *Pringle*, C-370/12, EU:C:2012:756. For discussion of the latter two cases, see P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', section 3.4.

the Court's function to review and interpret EU law. However, the first, empowering, dimension can also be rooted in the Treaty. Specifically, and as discussed in the General Introduction, the Treaty could be interpreted as mandating deference to the legislator, under Article 13 (2) TEU. In this regard, Horsley argues that the principle of 'mutual sincere cooperation' across the Union institutions outlined thereunder[281] should place 'key limits on the Court's freedom to adjust, supplement or simply ignore the Union legislature's policy choices regarding the scope of EU law'.[282] While not challenging the Court's authority over interpreting EU law, this should '(transpose) to the judicial lawmaking sphere the same minimum standards of mutual respect developed to maintain inter-institutional balance between the Union's legislative and administrative organs' and oblige the Court 'to engage appropriately with the policy choices of the EU legislature in the same substance area'.[283]

73. In the end, it is up to Court, as master of its own function, to achieve an appropriate balance, and it can, to this end, rely on the two dimensions of the presumption of constitutionality to both empower and limit the legislator. Pushed to the extreme, or at the expense of the other, however, and either approach can revert to the difficulties discussed above in relation to Syrpis's two visions, and the citizens' saga. Yet, the Exhaustion Rule shows us that these two dimensions need not be mutually exclusive, but can coexist to facilitate the Court in pursuing its joint goals of institutional balance and legality. Indeed, the next section demonstrates how the Rule expresses a presumption of validity and deference with respect to EU secondary legislation, while also incorporating a requirement of consistent interpretation, which is bolstered by the Damocles Sword of judicial review.

2.2 The Exhaustion Rule and the Presumption of Constitutionality

74. Many regulatory disputes seek to challenge (or confirm) the lawfulness of a national measure adopted in the presence of a potentially relevant EU legislative measure. The Court's task is to decide whether the impugned national rule complies with or goes beyond/falls below the standard required (or authorised) within the EU regulatory framework. Under the Exhaustion Rule, this framework will become the Court's sole norm of reference against which

[281] Specifically, Article 13 (2) TEU states; 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.
[282] T. Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking', *op. cit.,* p. 948.
[283] *Ibid*., p. 960.

to assess the national measure. Considering the hierarchy of norms however, the displacement of Articles 34 – 35 TFEU can only arise because 'the provision of secondary legislation benefits from a presumption not only that it complies with the Treaty but also that it is faithful to the objectives of integration applied to a particular market.'[284] In other words, the second leg of the Rule constitutes a specific expression of the presumption of constitutionality, whereby the Court assumes that the EU legislative framework is sufficient, on its own, to determine the lawfulness of the national measure.

75. This does not, in principle, amount to blanket deference. Instead, the Court relies on the second dimension to the presumption of constitutionality to consistently interpret secondary legislation in line with its interpretation of Articles 34 – 35 TFEU, which ultimately imposes limits on the legislator. As a result, 'the provision of secondary legislation continues to be closely bound by the subject-matter of the Treaties, including the fundamental freedoms'.[285] Disapplying Articles 34 – 35 TFEU can be seen in this context as a question of economy in reasoning.[286] Indeed, if the EU provides adequate protection for the public interest at issue, and is presumed to comply with free movement, 'statistically and from the point of view of economy, it makes sense to focus on the question of whether national law complies with the secondary legislation'.[287] Yet, suspending direct application of these latter provisions, even if only for that particular case, is also a mark of judicial deference, which, under the first dimension of the presumption of constitutionality, can have the practical effect of softening scrutiny of legislative decisions. Considering the blurred reality between law and policy, this can also empower the legislator, not only in terms of empirical considerations, but also with respect to its conception of the Treaty. In this section, we first outline how EU product measures can incorporate a constitutional dimension (2.2.1), before outlining how this dimension can be both limited (2.2.2) and accommodated (2.2.3) under the Exhaustion Rule.

2.2.1 The Constitutional Dimension of EU Product Rules

76. EU product rules say something about the scope of, and limitations to, the free movement of goods. They can, as a result, incorporate a constitutional dimension. The

[284] Opinion in *Commission v France (Excise Duty on Tobacco)*, note 200, paragraph 43.
[285] *Ibid*., paragraph 43.
[286] *Ibid*., paragraph 46.
[287] K. Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement', *European Law Review*, vol. 36, no. 3, 2011, pp. 339 – 361 at p. 358.

legislative perspective is often based on, and therefore compatible with, that of the Court. For example, the legislator might decide to codify earlier judgements, as it did under the Trade Mark Directives.[288] It might also build on a judicial vision, as it did following *Cassis de Dijon* with the new approach to harmonisation.[289] The Court, for its part, can also be receptive to EU legislation that offers what Fallon calls an 'anticipatory' interpretation of the Treaty.[290] For example, it readily incorporated the derived rights for workers' family members, granted by Regulation 1612/68 on freedom of movement for workers, into its interpretation of Article 45 TFEU.[291] A potential example from the free movement of goods could be the fact that the EU has harmonised selling arrangements, notwithstanding the Court's exclusion of such matters from the scope of Article 34 TFEU.[292] In this regard, Davies notes that any challenge to the legislator's competence to do so would probably not succeed.[293] In a further category of cases, the legislator may seek to clarify – or even redress – the judicial balance achieved between market integration and regulation in the absence of harmonisation. Indeed, the negative integration process may even provide an incentive for EU rules by exposing the need for such action.[294] Lenaerts notes, in this regard, the Court's early intrusive interpretation of Articles 34 – 36 TFEU 'showed the way to more realism in the political process'. Specifically, and as traced in the General Introduction, developments such as the new approach to harmonisation and qualified majority voting facilitated the adoption of EU legislation, as an alternative to 'letting the judicial process continue making the necessary policy choices incrementally'.[295] In such circumstances, unilateral national action may not be so much an 'alternative to harmonisation

[288] Council Directive 89/104/EEC to approximate the laws of the Member States relating to trademarks, OJ L. 40, 11 February 1989, pp. 1 – 7. Similar codification can be seen in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L. 158, 30 April 2004, pp. 77 – 123 and Directive 2006/123/EC on services in the internal market, OJ L. 376, 27 December 2006, pp. 36 – 68.
[289] *Cassis de Dijon*, note 175 and *infra*, points 98 – 99. See also General Introduction, point 24.
[290] See M. Fallon, 'Faut-il réécrire les libertés de circulation' in E. Dubout & A. Maitrot de la Motte (éds.), *L'Unité des libertés de circulation* – In varietate *concordia*, Bruxelles, Bruylant, Collection droit de l'Union européenne, 2013, pp. 413 – 448 at pp. 426 – 427.
[291] Ex. derived rights for the worker's family members, including educational rights for workers' children. Council Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community, OJ L. 257, 19 October 1967, pp. 2 – 12.
[292] Ex. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L. 149, 11 June 2005, pp. 22–39 (the UCPD).
[293] G. Davies, 'Legislative Control of the European Court of Justice', *Common Market Law Review*, *op. cit*., p. 1595.
[294] L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', in P. Syrpis (ed.), *The Judiciary, The Legislature and The EU Internal Market*, *op. cit.*, pp. 49 – 61.
[295] K. Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians in the European Community', *op. cit*., pp. 110 – 111. Maduro makes a similar point in M. P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', *European Law Journal*, vol. 3, no. 1, 1997, pp. 52 – 82 at pp. 55 – 56.

as a precursor to it'.[296] Examples of this dynamic abound in the EU's legislative history,[297] including the regulation of misleading and comparative advertising,[298] food supplements,[299] waste shipments[300] and patients' rights.[301]

77. We have already observed that EU legislation is not aimed at general economic liberalisation but at eliminating specific barriers to cross-border trade. It is therefore deemed to reconcile protection of the public interest with the establishment and functioning of the internal market. As discussed in the General Introduction, once a 'gain' has been achieved for the internal market, the Court is not generally concerned with the standard of regulation, at least not from the perspective of establishing compliance with Articles 34 – 35 TFEU. Moreover, harmonising legislation, and the regulation/integration balance achieved thereunder, is generally perceived as being based on discretion and fact. To the extent that such decisions do impinge on free movement, they are worthy of judicial deference at the justification stage. As discussed in section 2.2.2, this logic provides a basis for the presumption of constitutionality, as expressed through the second leg of the Exhaustion Rule. Still, this presumption does not mean 'reconciliation' or 'proportionate' regulation has a neutral impact. As AG Szpunar notes:

> 'The EU legislature may promote the *freedom* aspect of the fundamental freedoms at the inevitable expense of their *justification* aspect. Indeed, it lies in the nature of harmonisation to define, level out and, if considered appropriate by the EU legislature, restrict grounds of justification so as to create a level playing field for economic operators. Put illustratively, in such a situation the 'winner' is the EU fundamental

[296] G. Davies, 'Process and Production-Method' based Trade Restrictions in the EU', *Cambridge Yearbook of European Legal Studies*, vol. 10, 2007 – 2008, pp. 69 – 97 at p. 94.
[297] L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', *op. cit*., pp. 53 – 55.
[298] In the 1980s, the Court started assessing, and sometimes authorising, national regulation of such activities under Articles 34 *et seq*, notwithstanding cross-border restrictions. Ex. *Oosthoeck,* Case 286/81, EU:C:1982:438 and *GB-INNO,* Case 362/88, EU:C:1990:102. The EU legislature responded with a number of directives, including the general Misleading and Comparative Advertising Directives and sector-specific measures, such as the Tobacco Advertising Directives and the Medicinal Products Code.
[299] Ex. Directive 2002/46/EC of the European Parliament and Council on the approximation of the laws of the Member States relating to food supplements, OJ L 183, 12 July 2002, pp. 51 – 57. The Food Supplements Directive was adopted following several challenges to national rules on vitamins in food, including *Commission* v *Denmark (Food Supplements)*, C-192/01, EU:C:2003:492 and *Commission* v *France (Food Supplements)*, C-24/00, EU:C:2004:70. While the Court condemned the national measures in the latter cases, it confirmed the validity of the directive in *Alliance for Natural Health & Others*, note 154. See G. Davies, 'Process and Production-Method' based Trade Restrictions in the EU', *op. cit.*, footnote 67.
[300] Ex. Council Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ. L. 30, 6 February 1993 pp. 1 – 28, was adopted following the Court's decision in *Commission v Belgium (Walloon Waste),* C-2/90, EU:C:1992:310. It has since been replaced by Regulation (EC) No. 1013/2006 of the European Parliament and Council on shipments of waste, OJ L. 190, 12 July 2006, pp. 1 – 98, which incorporated the Court's findings in *EU Wood Trading*, C-277/02, EU:C:2004:810.
[301] Directive 2011/24/EU of the European Parliament and Council on the application of patients' rights in cross-border healthcare, OJ L. 88, 4 April 2011, pp. 45 – 65. See Preamble references to the Court's case-law at ex. Recitals 8, 12, 38, 40, 42, 44, 46 and 57.

freedom, as well as the economic operator intending to rely on this freedom – which is fully in line with the objectives of the FEU Treaty'.[302]

78. Yet the opposite could also arise – that is, the justification, or regulatory, aspect of the EU measure might be favoured at the expense of the *fundamental freedom*. For example, the EU measure might prohibit a particular product without linking it to the creation of a legal market, as happened with the EU ban on tobacco for oral use under the Tobacco Sales Directive;[303] Or the use of a geographical indication could be restricted to products produced, packaged and labelled in a particular region, as with Commission measures regarding the use of the designations Parma ham and Grana Padano.[304] Similarly, the Medicinal Products Code extends a demanding authorisation procedure, appropriate for risky medicines, to potentially benign products, such as certain food supplements or herbal medicines, even though a simplified procedure may well be sufficient to authorise the latter.[305] A similar precautionary approach underlies the positive list system in Food Supplements Directive, which prevents excluded food supplements from moving freely through the internal market.[306]

79. The EU legislature might also authorise the Member States to adopt certain acts of 'legislation-based discretion'. As noted earlier, and as will be detailed in Part III, such discretion refers to the room for national regulatory manoeuvre within the exhaustive framework of an EU act. In exercising this discretion, however, the Member States might also restrict the free movement of goods. For example, Article 12 (C) of the second Waste Shipment Regulation[307] allows a Member State to object to shipments of waste from its territory, if the standards to recover such waste in the destination state are not in line with national legislation. In other words, the dispatching Member State can make a 'low standards objection' against such shipments. A further example is Article 17 (2) of the Foodcode, which allows Member States

[302] Opinion in *College van Burgemeester en Wethouders van de gemeente Amersfoort*, Joined Cases C-360/15 and C-31/16, EU:C:2017:397, paragraph 99. (Emphasis in original).
[303] Directive 2001/37 of the European Parliament and of the Council on the manufacture, presentation and sale of tobacco products, OJ L. 194, 18 July 2001, pp. 26-35.
[304] Commission Regulation (EC) No. 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin, OJ L. 148, 21 June 1996, pp. 1–10.
[305] Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use, OJ L. 311, 28 November 2001, pp. 67 – 128.
[306] Directive 2002/46/EC, *op. cit*.
[307] Regulation (EC) No. 1013/2006 of the European Parliament and Council on shipments of waste, OJ L. 190, 12 July 2006, pp. 1 – 98.

to control businesses that produce, process and distribute food, 'as appropriate to the circumstances', if such action is necessary to ensure compliance with food law.[308]

80. Finally, when the EU legislator seeks to 'clarify' jurisprudence, it may, in fact, try to alter the judicial balance achieved between free movement and regulation in the absence of harmonisation. For example, Hervey notes that by extending the Court's list of what could constitute 'an objective public interest' to justify 'prior authorisation' for cross-border care, the Patients' Rights Directive transformed jurisprudence that was relatively protective of the right to move for healthcare into a mechanism to secure national health systems.[309]

81. The legislation cited above, as with other EU product rules, could be presented or understood as merely applying legal principles developed by the Court. In reality, however, the regulatory choices they embody can impact on the substance of the economic right to free movement. Yet in a series of cases, the Court ultimately deferred to this legislative choice by validating the EU rule, or the national measures adopted thereunder. In *Swedish Match*,[310] *Asda Stores*,[311] *Société Ravil*[312] and *Alliance for Natural Health*,[313] for example, it validated as a proportionate trade restriction, respectively, the EU ban on oral tobacco, the Commission's restriction on using the terms 'Parma ham' and 'Grana Padano', and the positive list system for the free movement of food supplements. In *Antropoasana*,[314] *EU Wood Trading*[315] and *Berger*,[316] it relied on the Exhaustion Rule to conclude that the impugned national measures were lawfully based on an EU legislative requirement, even though they limited the free movement of, respectively, anthroposophic medicines, waste for recovery and certain food products. However, such judicial findings, while generally justifiable within the Treaty system, were not always a given. This can be demonstrated by considering the disagreements that can arise during the legislative procedure, before the Court and in academic commentary.

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[308] Regulation of the European Parliament and of the Council (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L. 31, 1 February 2002, pp. 1 – 24.
[309] T. Hervey, 'The EU Patients' Rights Directive in Practice', Blog, 2015, *EU Law Analysis*. Available at: http://eulawanalysis.blogspot.be/2015/09/the-eus-patients-rights-directive-in.html. Last accessed 10 April 2018.
[310] *Swedish Match*, C-210/03, EU:C:2004:802. See also *Swedish Match*, C-151/17, EU:C:2018:938 (hereinafter referred to as *Swedish Match 2*).
[311] *Asda Stores*, C-108/01, EU:C:2003:296.
[312] *Société Ravil*, C-469/00, EU:C:2003:295.
[313] *Alliance for Natural Health & Others*, note 154.
[314] *Antroposana & Others*, C-84/06, EU:C:2007:535.
[315] *EU Wood Trading*, note 300.
[316] *Berger,* C-636/11, EU:C:2013:227.

82. An example of a legislative dispute arose during the procedure to adopt the second Waste Shipment Regulation.[317] At issue was Article 12(C), which, as mentioned earlier, allowed a Member State to raise a low standards objection against shipments of waste from its territory. The Commission, unsuccessfully, opposed the provision, arguing that it pursued 'national solutions to certain waste management problems' and was incompatible with harmonisation at EU level.[318] Specifically, it could 'create barriers in the European waste recycling and recovery market while not improving environmental standards of waste management in the EU'.[319] The provision was also 'vague and complex' and could 'increase the illegal shipping of waste' and lead to 'a number of court cases'.[320] Despite these concerns, the Member States' lack of appetite to develop a European waste management strategy pushed them to retain the possibility of issuing a 'low standards objection' with respect to shipments of waste for recovery.

83. At the judicial level, divergence sometimes emerges between the Court and the Advocate General, as illustrated in *Asda Stores* and *Société Ravil*. In both case, the AG found that the EU measures at issue imposed an unjustified trade barrier contrary to the free movement of goods.[321] However, the Court held that the respective trade restriction was justified and proportionate.[322] In *Alliance for Natural Health*, the AG did not consider that the directive, which restricted free movement for food supplements, constituted a trade barrier, but, rather, that it was disproportionate for lack of transparency.[323] The Court reached the opposite conclusion, finding that the positive list system restricted the free movement of goods but that the restriction was proportionate and justified.[324] A similar divergence emerged in *Kokopelli*, where AG Kokott concluded that the prohibition of certain seed varieties under the Marketing

[317] Regulation No. 1013/2006, *op. cit*.
[318] Amended proposal for a Regulation of the European Parliament and of the Council on shipments of waste (presented by the Commission) COM/2004/0172 final.
[319] Communication from the Commission to the European Parliament concerning the common position of the Council on the adoption of a Regulation of the European Parliament and of the Council on shipments of waste, COM/2005/0303 final, paragraph 3.2.3.
[320] *Ibid*. Stone echoes this concern by outlining the serious problem of illegal waste shipments in the EU. However, she also concludes that 'the solution to bad law is not to flout it, and the illegal movements of waste … are not the solution to the problem'. H. Stone, 'Flouting the Law? European Shipment of Hazardous Waste', *Natural Resources & Environment*, vol. 21, no. 1, 2006, pp. 49 – 53 at p. 53.
[321] Opinion in *Asda Stores*, C-108/01, EU:C:2002:267 and in *Société Ravil*, C-469/00, EU:C:2002:264.
[322] *Asda Stores*, note 311 and *Société Ravil*, note 312. The Court and AG also disagreed over whether an EU trade restriction could be justified in *Meyhui*. See *Meyhui*, C-51/93, EU:C:1994:312, and the Opinion in the same case, at EU:C:1994:102.
[323] Opinion in *Alliance for Natural Health*, Joined Cases C-154/04 and 155/04, EU:C:2005:199.
[324] *Alliance for Natural Health*, note 154.

of Vegetable Seed Directive[325] violated, *inter alia*, the principle of proportionality and thus the free movement of goods.[326] The Court, however, confirmed the directive's validity.[327]

84. Finally, some rulings are challenged in the literature for tilting the balance too far in favour of market integration or the regulatory standard, as the case may be. Such criticism was levied, for example, against Court's interpretation of the Chocolate Directive[328] and Veal Crate Directive[329] for emphasising free movement over the directives' regulatory aim, in a manner not intended by the legislator.[330] Along similar lines, Weatherill berates the Court's interpretation, in *Alemo-Herron*,[331] of the minimum harmonisation clause laid down under Article 8 of Directive 2001/23 on safeguarding employee rights in the transfer of undertakings.[332] Specifically, he holds as 'preposterous', 'wholly unbalanced' and 'aberrant' the Court's finding that more generous national employee protection schemes, adopted under this clause, could not 'adversely affect the very essence of the transferee's freedom to conduct a business' under Article 16 of the Charter.[333] In other words, the Court relied on the Charter to privilege commercial freedom over regulatory protection. For Weatherill, a more stringent national measure 'might be rejected in particular cases for *political* or *economic* reasons' but not for 'clear and generally applicable *constitutional* reasons'.[334]

85. Wyatt's critique of *Swedish Match* is fuelled by the opposite concern – that is, that the Court went too far in promoting the regulatory effect of EU regulation at the expense of free

[325] Council Directive 2002/55/EC, OJ L. 193, 20 July 2002, pp. 33 – 59.
[326] Opinion in *Kokopelli*, C-59/11, EU:C:2012:28.
[327] *Kokopelli*, C-59/11, EU:C:2012:447.
[328] Council Directive 73/241/EEC on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption, OJ L. 228, 16 August 1973, pp. 23 – 35. See *Commission v Italy (Chocolate),* C-14/00, EU:C:2003:22 and *Commission v Spain (Chocolate),* C-12/00, EU:C:2003:21.
[329] Council Directive 91/629/EEC on laying down minimum standards for the protection of calves, *op, cit*. See *Compassion in World Farming (CIWF)*, C-1/96, EU:C:1998:113.
[330] Ex. Slater considers that the Court's interpretation of the Chocolate Directive offered 'a particularly low level of consumer protection', particularly in light of Article 5 of the First Food Labelling Directive, while Scott considers *CIWF* to be a disappointing exception to her understanding of minimum harmonisation as allowing Member States to legislate subject to the Treaty 'ceiling'. See, respectively, D. Slater, 'Would Chocolate by Any Other Name Taste as Sweet?', *German Law Journal*, vol. 3, no. 4, 2003, pp. 571 – 587 at p. 58 and J. Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO', *Jean Monnet Working Paper,* No. 03/99, 1999. Available at. http://jeanmonnetprogram.org/archive/papers/99/990301.html. Last accessed 4 October 2019. See also Part II (Chapter Two), points 141 – 142.
[331] *Alemo-Herron*, note 90.
[332] Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L. 82, 22 March 2001, p. 16 – 20.
[333] *Alemo-Herron*, note 90, paragraph 36. For comment, see S. Weatherill, 'Law and Integration in the European Union', *op. cit*., pp. 214 – 215.
[334] *Ibid*., pp. 215. (Emphasis in original).

movement. He suggests that, by validating the EU ban on oral tobacco as justified and proportionate,[335] the Court, 'extend(ed) internal market competence to subject matter which makes no contribution to the internal market' and, in doing so, contradicted the Court's decision in *Tobacco Advertising I*.[336] Indeed, as AG Fennelly noted in that case, an Article 114 directive must '(contribute) to achieving internal market objectives; otherwise it must be condemned for failing to meet an essential objective which is also a condition of the exercise of competence in the first place'.[337] As such, Wyatt's observations, while relating to the question of competence, could also imply that the ban was an ineffective – and thus disproportionate – means to achieve the objective of health protection[338] – that is, that it pursued the regulatory aim of health protection in a manner that undermined market integration. Purnhagen's response to the Court's ruling in *Berger*[339] raised a similar concern.[340] As discussed in Part II, this case validated a German warning that certain meats were 'unfit for human consumption' and unsafe under the Foodcode,[341] even though they did not threaten consumer health. However, in reaching this conclusion, the Court failed to consider the impact of the German measure on the applicant's free movement rights, which could imply that 'the protection of consumer interest will always take precedence over economic considerations'.[342]

86. Such judicial, academic and inter-institutional disagreements highlight the subjective nature of balancing – or reconciling – regulatory and integration goals, and explain why the Court often defers to the solution chosen by the legislator. However, given the blurred line between law and policy discussed earlier, such deference can, in practice, lead to the Treaty being 'shared between institutions of the legal system, each drawing on their own expertise'.[343] In light of the ambiguous nature of the internal market, and the requirements of institutional balance and mutual sincere cooperation, such sharing can indeed be welcomed. Yet, to ensure

[335] *Swedish Match*, note 310, paragraphs 46 – 58.
[336] D. Wyatt, 'The Community Competence to Regulate the Internal Market', *op. cit*., p. 28.
[337] Opinion in *Tobacco Advertising*, C-376/98, EU:C:2000:324, paragraph 149.
[338] *Ibid*.
[339] *Berger*, note 316.
[340] K. Purnhagen, 'Beyond Threats to Health: May Consumers' Interests in Safety Trump Fundamental Freedoms in Information on Foodstuffs? Reflections on Berger v Freistaat Bayern', *European Law Review*, vol. 38, no. 5, 2013, pp. 711 – 719.
[341] Regulation (EC) No. 178/2002, *op. cit*.
[342] K. Purnhagen, 'Beyond Threats to Health', *op. cit.*, p. 712. For similar concerns with respect to the Court's protective approach to or interpretation of various consumer protection directives, see H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, and V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights' Directive, *European Review of Private Law*, vol. 1, 2011, pp. 25 – 42. See Part II (Chapter Two), points 207 – 211.
[343] G. Davies, 'Legislative Control of the European Court of Justice', *op. cit*., p. 1583.

respect for the rule of law, and the adequate and effective protection of individual rights, the Court must retain the last word in determining what the law means, while ensuring coherence, transparency and respect for discretionary powers.[344] In our view, the Court largely achieves such goals when interpreting and enforcing EU product rules, as it gives effect to the intention of the legislator, while ensuring respect for the free movement of goods. What is more, we contend that the Exhaustion Rule facilitates this achievement, by imposing presumption of constitutionality that both limits and empowers the legislator.

2.2.2 Limiting the Legislator

87. The EU legislator is subject to the fundamental freedoms and must, when legislating, comply with the core free movement principles. The validity of secondary legislation can therefore be challenged on this basis, either directly (under Article 263 TFEU) or indirectly through the preliminary reference procedure (under Article 267 TFEU). The Court in its response must assess whether the secondary measure does in fact comply with Articles 34 – 36 TFEU. The Exhaustion Rule, which presumes compatibility between secondary and primary law, is therefore not relevant to such disputes. Indeed, when the national court queries whether EU legislation complies with primary law, in addition to asking whether national law complies with that EU legislative act, the Court generally resolves the former question first, before triggering the Exhaustion Rule to assess the national rule (dual analysis approach).[345]

88. Still, the power of interpretation enjoyed by the Court in cases where the Rule does apply is potent exactly because of this Damocles Sword of judicial review.[346] We therefore first outline how the Court approaches the question of validity in cases where an EU measure is directly challenged for violating the free movement of goods (A). We then present the Court's interpretative function in cases where the Rule is invoked (B) and highlight why the Rule should never provide cover for unconstitutional national action (C).

[344] *Ibid.* See also A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *op. cit.*, generally and at section 6.1.
[345] *Swedish Match*, note 310. See Part I (Chapter Two), points 171 – 173 for discussion of this approach.
[346] K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit.*, p. 345.

A. The Damocles Sword of Judicial Review

89. In the Community's early days, some Member States thought that the fundamental freedoms did not fully apply to the EU institutions.[347] However, the Court paid little heed to this perspective, and in its 1978 *Ramel* judgement, confirmed that the Community could not authorise national derogations from the free movement provisions but had to respect 'the unity of the market'.[348] The Court then struck down the impugned regulation for authorising Member States to adopt national levies on wine imports, as this amounted to a charge with equivalent effect to customs duties.[349] This principle soon expanded to cover prohibitions on the imposition of quantitative restrictions and measures having equivalent effect.[350]

90. As regards the standard applicable to the EU legislator, the Court's review of secondary legislation is linguistically aligned to that of national measures. Indeed, it often holds that 'the prohibition of quantitative restrictions on exports and of all measures having equivalent effect applies … not only to national measures but also to measures adopted by the Community institutions.'[351] What is more, it seems that the EU legislator is prohibited from adopting both discriminatory and non-discriminatory trade restrictions. The Court has enforced the former prohibition with respect to EU rules imposing import controls,[352] discriminatory language requirements,[353] administrative obligations on traders engaging in cross-border activity,[354] and restrictions based on geographical indications.[355] As regards the latter, the Court has held that an EU rule will offend the free movement of goods if it applies equally to domestic products and imports but restricts cross-border market access. This can be seen in cases such as *Safety*

[347] This view was expressed in relation to the Community's early CAP legislation, which some deemed as exempt from compliance with the fundamental freedoms. See ex. the (unsuccessful) French and Irish submissions in, respectively, *Ramel*, Joined Cases 80 and 81/77, EU:C:1978:87, p. 934 and *Rewe-Zentrale,* Case 37/83, EU:C:1984:89*,* p. 1237, fourth paragraph.
[348] *Ramel*, note 347, paragraphs 35 – 36.
[349] *Ibid*., paragraph 38. See also *Bauhuis*, Case 46/76, EU:C:1977:6 and *Kind,* Case 106/81, EU:C:1982:291.
[350] Ex. *ADBHU,* Case 240/83, EU:C:1985:59, paragraph 9; *Meyhui*, note 322, paragraph 11; *Kieffer & Thill*, C-114/96, EU:C:1997:316, paragraph 27; *Safety Hi-Tech*, C-341/95, EU:C:1998:353, paragraph 61; *Alliance for Natural Health & Others*, note 154, paragraph 47; *Schwarzkopf*, C-169/99, EU:C:2001:439, paragraph 37; *Arnold André*, note 168, paragraph 57 and *Swedish Match*, note 310, paragraph 59. For similar findings with respect to other free movement principles, see, respectively, *Pinna*, Case 41/84, EU:C:1986:1, paragraph 21 (workers); *Commission v France (Tourist Guides)*, C-154/89, EU:C:1991:76, paragraph 24 (services) and *Enel Produzione*, C-242/10, EU:C:2011:861, paragraph 34 (establishment).
[351] *Denkavit Nederland*, Case 15/83, EU:C:1984:183, paragraph 15. In its earlier *Rewe-Zentrale* judgement, it held that Articles 34 – 36 applied primarily to the Member States, but that the Community institutions had to have 'due regard' to these principles. *Rewe-Zentrale,* note 347, paragraph 18.
[352] *Rewe-Zentrale*, note 347.
[353] Ex. *Meyhui* (local language requirement) and *Schwarzkopf* (multilingual labelling requirement), note 322 and 350. See also *Denkavit v Land Baden-Württemberg*, C-39/90, EU:C:1991:267.
[354] *Kieffer & Thill*, note 350.
[355] *Asda Stores*, note 311.

Hi-Tech and *Natural Food Alliance*, where the Court found that an EU ban on, respectively, hydrochlorofluorocarbons and food supplements contravened the free movement of goods, even though the prohibition applied in all Member States and to all domestic markets. [356]

91. EU legislation will also offend the free movement of goods if it *authorises* the Member States to legislate in a manner that would go beyond what is allowed under Treaty. This principle, long confirmed by the Court,[357] was repeated in *Promalvin*, which found that the EU legislative provision 'cannot be interpreted as authorising the Member States to impose conditions contrary to the Treaty rules on the movement of goods'.[358] As noted earlier, the risk that the EU legislator could attempt to 'subvert' the EU's market integration goals in this manner has always been, and remains, very real, given in particular the Council's intergovernmental character. [359] The Court must therefore be vigilant in its review and interpretation of secondary legislation, to prevent Member States from 'harmonis(ing)' their 'failures … to fulfil their obligations'.[360] As noted by Snell, 'It would be intolerable if the Community was able to authorise in its secondary legislation a restriction that a Member State itself could not maintain. This would amount to a change of the EC Treaty by secondary legislation... This cannot be allowed in a Community bound by the rule of law'.[361] This vigilance extends, in particular, to instances where the EU legislator grants 'legislation-based discretion' to the Member States. In this regard, it is not surprising that of those few EU secondary measures that were found to violate Articles 34 – 35 TFEU, most sought to authorise the Member States to impose or maintain an unlawful trade restriction,[362] or to derogate in some way from a harmonised standard.

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[356] Ex. *Safety Hi-Tech*, *Alliance for Natural Health*, *Swedish Match* and *Arnold André*, cited at note 350, 154, 310, and 168; See K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit.*, p. 352.

[357] *Ramel*, note 347. See also *Commission v Ireland (Potato Imports)*, Case 288/83, EU:C:1985:251, paragraph 22; This position has also been consistently when assessing the relationship between primary and secondary law outside the context free movement. For two early examples, see *Commission v Council (ERTA)*, Case 22/70, EU:C:1971:32 and *Defrenne*, Case 43/75, EU:C:1976:56. See also M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption', *op. cit.,* pp. 571 – 572.

[358] *Promalvin*, C-47/90, EU:C:1992:250, paragraph 26. See also *Ruwet,* C-3/99, EU:C:2000:560, paragraph 47 and Opinion in *Denkavit Futtermittel*, C-39/90, EU:C:1991:267, paragraph 31.

[359] M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption', *op. cit.,* pp. 549 – 550. See also J. Weiler., 'The Community System: The Dual Character of Supranationaism', *op. cit.*, p. 282.

[360] Opinion in *Denkavit Futtermittel*, note 358, paragraph 31.

[361] J. Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, Oxford, Oxford University Press, 2002, p. 162. See also M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption', *op. cit.*, section IV and Opinion in *Denkavit Futtermittel*, note 358.

[362] Ex. *Ramel*, note 347 and *Lancry*, C-363/93, EU:C:1994:315; See K. Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement', *op. cit.*, p. 357.

92. While EU measures are often challenged for violating the free movement of goods, it is rare that the Court will establish invalidity. As we will see, it mostly absolves the EU legislator either through consistent interpretation or at the justification stage of review, where the EU legislator enjoys a wide margin to justify any potential trade barriers. Indeed, the literature widely accepts that the legislator must comply with the free movement rules but not to the same extent as the Member States.[363] At the same time, the Court is prepared to make a finding of invalidity if necessary[364] and, as just mentioned, will not allow EU secondary measures to authorise unlawful trade barriers. This willingness gives teeth to the Court's interpretative role in cases where the Exhaustion Rule applies.[365] A recent example can be seen in *Diageo*,[366] which considered whether Germany could market 'Baileys Minis' in pre-packages with a nominal value of 0.071 litres, given that the product had been lawfully marketed in Ireland and in the UK. According to Article 5 (1) of the Pre-packaged Liquids Directive[367] products satisfying the legislative requirements as regards nominal values could enjoy market access. Article 5 (3)(b) prohibited such market access for pre-packages containing certain liquids with different nominal values. However, an exception from this latter prohibition was granted to packages with a volume of 0.071 litres, which could enjoy free movement but only if originally marketed in Ireland or the UK. The Court considered this provision to hinder intra-Community trade by making trade in such products more difficult or onerous. Since it could not be justified, the second paragraph of Article 5 (3)(b), read in conjunction with Article 5 (3)(d), was invalid.

B. Consistent Interpretation of EU Legislation

93. Regulatory disputes frequently question the validity, or meaning, of a national trade rule, that is purportedly based on EU legislation. In such cases, the EU measure is generally presumed valid, with the Court's role being to give an authoritative judicial interpretation of its provisions, often without any direct reference to Articles 34 – 35 TFEU. This approach does not imply a reversal of the hierarchy of norms. To the contrary, and as just noted, the EU

[363] For discussion, see *infra*, points 110 – 117. See also R. Barents, 'The Community and the Unity of the Common Market', *German Yearbook of International Law*, 1990, pp. 9 – 36; M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit.*; K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market – Towards a Concordance Rule', *op. cit.*, section 3.2; J. Snell, *Goods and Services in EC Law*, *op. cit*., pp. 159 – 167; K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit.*, p. 356 and M. Waelbroeck 'The emergent doctrine of Community pre-emption', *op. cit.*, pp. 571 – 572.
[364] Ex. *Ramel*, note 347 and *Lancry*, note 362.
[365] K. Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement', *op. cit.*, p. 345.
[366] *Diageo Deutschland,* note 158.
[367] Council Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquid, OJ L. 42, 15 February 1975, pp. 1 – 13.

legislator cannot authorise national measures that would violate the Treaty. At the same time, the second (limiting) dimension of the presumption of constitutionality – that is, as a presumption of constitutional construction – requires the Court to presume that the EU legislator has acted in accordance with the Treaty. Accordingly, where the wording of secondary legislation is open to more than one interpretation, the Court will consistently interpret that provision to ensure its constitutionality. In other words, 'where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the EC Treaty and the general principles of Community law'.[368] This duty of consistent interpretation will arise when the validity of an EU measure is directly questioned,[369] or, relatedly, when a Member State tries to interpret an EU measure in a way that would undermine the free movement of goods.[370] It is not, however, unlimited. As Sorensen notes, use of the term 'as far as possible' could indicate that the Court's duty of consistent interpretation corresponds to that of national courts when interpreting national law with respect to EU law.[371] Here, the duty of consistent interpretation should not require national courts to interpret *contra legem*, or, in a manner that would contradict the express wording of national law.[372]

94. Application of the principle of consistent interpretation is illustrated in *Inter Huiles*.[373] This case, which will be explored in Chapter Two, assessed whether a French Decree had violated the free movement of goods by dividing the French territory into geographical zones for the purposes of waste oil collection. France, in its defence, claimed that Article 5 of the Waste Oil Directive[374] specifically allowed Member States to set up zones to collect or dispose of waste. The question was whether national exercise of such authorised discretion would be scrutinised to the same degree as unilateral national rules. In her response, AG Rozes held that national measures should, in principle, be assessed by reference to existing directives, presumed to conform to EU primary law (in other words, the Exhaustion Rule). However, where these

[368] *Diageo Deutschland,* note 158, paragraph 22.
[369] Ex. *Inter Huiles,* Case 172/82, EU:C:1983:69.
[370] Ex. *Bristol-Myers Squibb & Others,* Joined Cases C-427/93, C-429/93 and C-436/93, EU:C:1996:282.
[371] *Ibid*. See also K. Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement', *op. cit.*, p. 346.
[372] *Ibid*. See *Adeneler & Others*, C-212/04, EU:C:2006:443, paragraphs 110 – 111 and *Impact*, C-268/06, EU:C:2008:223, paragraphs 100 – 101.
[373] *Inter Huiles,* note 369. See also *Commission v Council (Lomé Convention)*, Case 218/82, EU:C:1983:369, paragraph 15; *Commission v Germany (Insurance)*, Case 205/84, EU:C:1986:463, paragraph 62; *Klensch & Others,* Joined Cases 201/85 & 202/85, EU:C:1986:439, paragraph 21; *Rauh*, C-314/89, EU:C:1991:143, paragraph 17 and *Herbrink*, C-98/91, EU:C:1994:24, paragraph 9.
[374] Council Directive 75/439/EEC on the disposal of waste oils, OJ. L. 194, 25 July 1975, pp. 23 – 25.

directives had multiple interpretations, one of which could contravene the Treaty, direct reference to the Treaty must be made to privilege the interpretation that conforms to primary law. In the case to hand, this meant that national measures based on Article 5 could not prevent the free circulation of waste.[375] The Court agreed that while Article 5 *could be* interpreted as authorising exclusive rights to collect waste oil, this was not the *only* or *correct* interpretation. Given the directive's dual purpose, 'an efficient and coherent system of treatment for waste oils' could not 'create barriers to intra-Community trade …'. This finding was 'reinforced by (ex.) Article 34 of the EEC Treaty, which prohibits all measures having an effect equivalent to a quantitative restriction on exports'. [376] The Court then concluded that the French measures breached both the directive and the 'Community rules on the free movement of goods'.[377] In other words, it relied on Community legislation *as interpreted by the Court* to review the national measure.

95. A similar approach was taken in the earlier *Commission v Council (Lomé Convention)* judgement.[378] This case arose following a challenge to the validity of a Council Regulation that appeared to restrict the free circulation of African-Caribbean and Pacific State rum imported to the UK under a Community quota system. Specifically, Article 4 (2) obliged the UK to 'restrict' its share to what was required for domestic consumption.[379] However, while AG Rozes agreed with the Commission that the provision was 'clearly unlawful', the Court, relying on the principle of consistent interpretation, held that the measure merely limited rum imports to meet domestic demand, which did not impact on their subsequent free circulation. A final example is *Bristol-Meyers Squibb*,[380] where Germany submitted that Article 7 of the newly adopted first Trademarks Directive[381] provided more protection for intellectual property rights than what the Court had previously held in its interpretation of Article 36 TFEU. Both the Court and AG flatly rejected this suggestion. While accepting that the directive triggered the Exhaustion Rule, they confirmed that Article 7 was modelled on Articles 34 – 36 TFEU and that the Court's case-law on the principle of exhaustion of intellectual property rights would provide the basis for its

[375] Opinion in *Inter Huiles*, note 200, paragraph 3.
[376] *Inter Huiles*, note 369, paragraphs 9 – 12.
[377] *Ibid*., paragraph 16.
[378] *Commission v Council (Lomé Convention)*, note 373.
[379] Article 4 (2) of Council Regulation (EEC) No. 1699/82 opening, allocating and providing for the administration of a Community tariff quota for rum, arrack and tafia, falling within subheading 22.09 C I of the Common Customs Tariff and originating in the African, Caribbean and Pacific States, OJ L. 189, 1 July 1982, pp. 1 – 3.
[380] *Bristol-Myers Squibb & Others,* note 370. See also the Opinion in the same case, note 200.
[381] Directive 89/104/EEC, *op. cit.*

interpretation. The legislator could not override this interpretation but rather, such legislation would be consistently interpreted to ensure the latter prevailed.[382]

96. Had the Court not read the provisions at issue consistently with the Treaty, they would have undoubtedly been struck down as violating the free movement of goods. Instead, and in accordance with the presumption of constitutionality, the legislator was assumed to have had intended the constitutional meaning imputed to it by the Court, thereby avoiding an explicit clash of power. The Court thus engaged in what Mortelmans refers to as 'deactivating' or 'defusing the validity bomb'.[383] Yet as Sypris notes, this approach can, in reality, be as potent as a finding of invalidity, since 'there is … no hard and fast dividing line between judicial review (in which a court may annul a legislative act because of its failure to conform to the constitution) and a strategy based on interpretation (in which the court may insist on a particular reading of a piece of legislation, such that it conforms with the constitutional text but perhaps not with the intentions of the legislature)'.[384]

97. The limitation imposed on the legislator through consistent interpretation is further reinforced by the fact that the Court's normative point of reference is the Treaty, which is itself subject to a teleological approach to interpretation. Given the ambiguous nature of the internal market, consistent interpretation of EU trade rules not only ensures against unconstitutional legislation, but also allows the Court to impose a particular vision of EU integration. This is exemplified with the Court's 'consistent' interpretation of the first Food Labelling Directive[385] by reference to *Cassis de Dijon*.[386]

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[382] *Ibid.*, paragraphs 25 – 27. See also *UNIC*, where the Court first relied on the Exhaustion Rule to conclude that the Footwear Labelling Directive did not envisage a country of origin or language requirement. However, it then reinforced its conclusion by referring to Article 34 case-law, which had found that such requirements could constitute an obstacle to free movement of goods. *UNIC*, note 124, paragraphs 43 – 36 and Directive 94/11/EC of the European Parliament on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer, OJ L. 100, 19 April 1994, pp. 37 – 41.

[383] K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market', *op. cit.*, pp. 1324 – 1325. See also *Commission v Italy (Grapefruit),* C-128/89 EU:C:1990:311 and *Ruwet,* note 358.

[384] P. Syrpis, 'Theorising the Relationship between the Judiciary and the Legislator in the EU Internal Market', *op. cit.*, p. 9.

[385] Council Directive 79/112/EEC on the approximation of laws relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L. 33, 8 February 1979, pp. 1 – 14.

[386] Further examples of the Court's reliance on a teleological approach to ensure a 'consistent interpretation' of EU legislation can be seen in *Sturgeon*, Joined Cases C-402/07 & 432/07, EU:C:2009:716, paragraphs 47 – 48; *Leitner*, C-168/00, EU:C:2002:163; *Baumbast,* note 203 and *Grzelczyk*, note 204. For discussion, see P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *op. cit.*, section 3.2.

98. Read literally, Article 5 (1) of this directive appeared to institute the principle of host country control with respect to the labelling of food, as it implied that the names of food imports would have to conform to national rules, or in their absence, national customs.[387] 12 days after its adoption, however, the Court delivered *Cassis de Dijon*, where it interpreted Articles 34 – 35 TFEU as incorporating the principle of home country control. In subsequent case-law, the Court enforced the supremacy of its judicial vision, either by ignoring Article 5 (1) and relying exclusively[388] or predominantly[389] on Article 34 TFEU, or by interpreting Article 5(1) in light of the principle of mutual recognition under the Exhaustion Rule.[390]

99. The literal legislative message, as expressed under Article 5 (1) of the directive, thus gave way to the sweeping principle of mutual recognition.[391] Considering the hierarchy of norms, and the Court's role in judicial review, this jurisprudence is not, legally, problematic. As discussed, secondary rules cannot be relied upon to impose or maintain conditions contrary to the Treaty but must, where possible, be interpreted consistently with primary law. Furthermore, since the Court has the last say in interpreting EU law, it is both logical and necessary for Article 5 (1) to be read in line with its *Cassis* interpretation of Article 34 TFEU. Still, while legally defensible, this narrative could leave a bitter taste in one's mouth. For, behind Article 5 (1) and *Cassis* lie two different logics as to how market integration should proceed. While the former is centred on consumer protection, the latter has a definite free-trade focus, where exceptions to mutual recognition are accepted 'only under very strict conditions'.[392] By transforming Article 34 TFEU into a tool to remove national trade rules, *Cassis*, supported by the Commission, had a profound impact on the pace, modalities and intensity of market integration in the EU. This 'victory' for the Court's (and Commission) vision of Article 34 TFEU over that of the legislator's was explicitly incorporated to the second Food Labelling Directive in 1997.[393]

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[387] Specifically, Article 5 (1) stated: 'The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer …'.
[388] Ex. in *Commission v Italy (Chocolate),* C-14/00, EU:C:2003:22 and *Commission v Spain (Chocolate),* C-12/00, EU:C:2003:21, the Court makes no reference to Article 5 (1), despite reference to this provision by the Commission. See also *Commission v France (Foie Gras),* C-184/96, EU:C:1998:495.
[389] Ex. *Commission v Germany (Food Labelling),* C-51/94, EU:C:1995:352, paragraph 40.
[390] Ex. *Smanor*, Case 298/87, EU:C:1988:415 and *Guimont*, C-448/98, EU:C:2000:663, paragraph 29.
[391] D. Slater, 'Would Chocolate by Any Other Name Taste as Sweet?', *op. cit.*, p. 573.
[392] Commission Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (« Cassis de Dijon »), OJ C. 256, 3 October 1980, pp. 2 – 3, paragraph 10.
[393] Directive 97/4/EC amended Article 5 of the first Food Labelling Directive (*op. cit.*) to include the following sentence: 'The use in the Member State of marketing of the sales name under which the product is legally manufactured and marketed in the Member State of production shall also be allowed'.

C. Reviewing National Acts of Discretion

100. In many regulatory disputes, the Court reviews and interprets *secondary* legislation by reference to the Treaty, with that secondary measure becoming the touchstone against which to assess the national rule. If that national rule goes beyond the EU measure, it will fall without scope for justification, under the principle of pre-emption. On the flip side, a national measure that correctly implements a legislative requirement will be automatically validated, since it is simply adhering to a unified EU standard that was adopted to ensure cross-border trade.[394] Compliant national measures therefore benefit from the same presumption of constitutionality that applies to the EU legislative provision(s) on which they are based.

101. However, different considerations come into play when secondary legislation grants Member States *discretion* to regulate certain aspects of a particular market. This can be by way of a minimum harmonisation clause, which allows national measures beyond the minimum EU standards, subject to compliance with the Treaty. However, Member States may also be granted 'legislation-based discretion', which refers to the limited national leeway that can persist within an exhaustive legislative framework.[395] As noted earlier, this type of authorisation has always posed a particular threat to EU integration by granting potential scope to reinstate national trade barriers. As a result, the Court, correctly, does not presume that such national acts of discretion comply with Articles 34 – 36 TFEU. Instead, it reviews them, generally by reference to the exhaustive secondary measure under the Exhaustion Rule.[396] In this regard, the standard of review often mirrors the principle/derogation template relied on in the absence of harmonisation, where the national measure must generally be the least restrictive of trade under a strict proportionality review, to ensure compliance with the integrative function of the EU measure.[397] Accordingly, while Member States retain some discretion over national policy choices, they remain subject to a 'stubborn super-boundary' imposed by free movement

[394] *Bellamy*, C-123/00, EU:C:2001:214, paragraph 21. See also *Berendse-Koenen,* C-246/98, EU:C:2000:153, paragraphs 24 – 25 and *Schwarzkopf*, note 350.
[395] For a detailed explanation of this phenomenon, see Part III (Chapter Two), points 97 – 106.
[396] Sorensen suggests that *Commission v Greece (Ouzo)* (note 164) could imply that it is 'not possible to challenge the validity of a special authorisation'. However, Sorensen then dismisses this suggestion in same paragraph. K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit.*, pp. 357 – 358.
[397] See ex. *Commission v Austria (Food Labelling),* C-221/00*,* EU:C:2003:44 and *Sterbenz,* Joined Cases C-421/00, C-426/00 and C-16/01, EU:C:2003:46, where the Court condemned an Austrian act of legislation-based discretion, adopted under Article 15 (2) of the first Food Labelling Directive (Council Directive 79/112/EEC, *op. cit.*) because it was, *inter alia*, not the least restrictive of trade.

rights.[398] In other words, the Court appears to 'privilege free movement as the overriding objective, against which justification arguments on different grounds of public interest must then be measured or compete'.[399]

102. An example of authorised or 'legislation-based' discretion can be seen under Article 6 (2) [400] of the Cosmetics Directive.[401] While this provision required Member States to adopt 'necessary measures' to protect against consumer confusion, it did not specify what 'necessary' could entail. As a result, and unlike national measures that *directly implemented* legislative obligations, measures based on Article 6 (2) could constitute a departure from the unified EU standard and thus reinstate a barrier to cross-border trade. And this is indeed what happened: Specifically, Germany relied on Article 6 (2) of the directive to ban cosmetics products from using the name 'Clinique'[402] and from referring to 'lifting'[403] on their labels. And Austria sought to prohibit, (subject to authorisation) references to expert medical opinion[404] and claims that certain toothpastes could prevent or limit tartar. [405] When these national measures were challenged, however, the Court, although relying on the Cosmetics Directive as its norm of reference, followed the same principle/derogation template that it applies in the absence of harmonisation. The national measures were therefore subjected – and invalidated according to a stringent proportionality test. Sorensen concludes on the basis that 'the ECJ … narrowed the reading of the authorisation by applying the principle of proportionality, thereby reaching a result which seems to be identical to the result it would have achieved if it had applied free movement rights'.[406] In his view, when the Court reviews national acts of legislation-based discretion by exclusive reference to the secondary measure under the Exhaustion Rule, it applies the same strict scrutiny as is imposed on national measures in the absence of harmonisation.[407] However, while the Court often adopts this perspective, the Exhaustion Rule also allows for a more nuanced approach.

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[398] N. Nic Shuibhne, 'Primary Laws: Judging Free Movement Restrictions after Lisbon', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis, (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.*, p. 331.
[399] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., p. 46.
[400] Or Article 6 (3) after an amendment in 1988. Both references used alternatively.
[401] Directive 76/768/EEC, *op, cit*.
[402] *Clinique,* note 35.
[403] *Estée Lauder*, C-220/98, EU:C:2000:8.
[404] *Linhart & Biffl,* C-99/01, EU:C:2002:618.
[405] *Unilever,* C-77/97, EU:C:1999:30.
[406] K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit.*, p. 344.
[407] The Court takes a similar strict approach when assessing national measures adopted under the Article 114 TFEU derogation mechanism. See Opinion in *Kortas*, C-319/97, EU:C:1999:37, paragraph 24.

2.2.3 Empowering the EU Legislator

103. The second leg of the Exhaustion Rule displaces direct application of Articles 34 – 35 TFEU in the presence of exhaustive legislation. This is because the latter enjoys a presumption of constitutionality. Under the second dimension of this presumption, the Court can ensure the hierarchy of norms and limit the legislator by consistently interpreting secondary legislation with the Treaty. However, in accordance with the presumption's first dimension, the Court can also *defer* to the legislator through two subsidiary assumptions. These are, first, that the EU legislature has not, in fact, limited the free movement of goods and second, that the legislature has limited that freedom but is justified in doing so.[408] As a result, in the absence of any direct challenge to the validity of the secondary measure, the Court will proceed on the basis that the legislation either complies with its definition of Articles 34 – 35 TFEU, or that any trade restriction is justified. In other words, it considers 'any constitutional issue which is thrown up by the legislation' 'in favour of the legislation'.[409] This could, in practice, impact on the scope of the free movement of goods in a particular case. As discussed in section 2.2.1, there can be a real dispute over whether a particular measure constitutes an obstacle to trade, or indeed, whether a trade restriction can, or not, be justified. Deferring to the legislator in such circumstances, via the Exhaustion Rule, could grant weight to its interpretation of the Treaty, and in particular, how the free movement of goods can be reconciled with, or balanced against, public interest requirements.

104. In contrast to Court's approach in *Dano*, where the Court departed from its jurisprudence without any overt rationalisation, the deference expressed through the Exhaustion Rule is built on a core tenet of the legal regime for goods, which is that EU legislation is presumed to reconcile the requirements of integration and regulation (A). This understanding is complemented by a second tenet of that regime, whereby the EU trade restrictions will be subject to a light proportionality test through factual deference at the justification stage of review (B). Together these elements tilt in favour of a presumption of constitutionality with respect to Articles 34 – 35 TFEU, understood in terms of its first dimension (i.e. deference). This presumption could have a further empowering consequence on the legislator's ability to reset the balance between free movement of goods and the public interest goal. In particular,

[408] This analysis draws inspiration from B. Foley, *Deference and the Presumption of Constitutionality*, *op. cit.*, p. 71.
[409] *Ibid*., p. 61.

the regulator can place these goals on an equal footing, and even pursue the public interest goal as a decisive objective.[410] By extension, the Court, relying on the Exhaustion Rule, should be able to review national acts of 'legislation-based discretion' by reference to this new legislative balance, and not only by reference to the principle/derogation template as suggested by Sorensen (C).

A. A Presumption of Reconciliation

105. The Exhaustion Rule, which displaces not only Articles 34 – 35 TFEU, but also Article 36 TFEU, is built on a presumption that EU legislation has reconciled the objectives of integration and regulation in a manner that does not conflict with the free movement of goods. As discussed in the General Introduction, and specifically in the Court's *Bahuis* judgment, this presumption deems that the harmonised EU standard contributes to cross-border movement since, regardless of the actual standard set, it pre-empts Member States from justifying unilateral national action under Treaty-based discretion.[411] AG Geelhoed made this point in *Alliance for Natural Health* when, in dismissing the claim that the Food Supplements Directive violated Article 34 TFEU, he stated 'the Directive seeks to improve the conditions for the functioning of the internal market for food supplements, thereby limiting the possibilities for Member States to invoke (ex.) Article 30 EC. Second, and at the same time, the Directive seeks to strengthen in the general interest of the Community the protection of public health and consumers'.[412]

106. The presumption of reconciliation thus incorporates the principle of pre-emption inherent to the *Tedeschi* leg discussed above. However, this leg can only kick in because the EU legislator is presumed to provide the necessary protection for the public interest at issue. Otherwise Member States retain regulatory competence under Article 36 TFEU. At the same time, the very fact that a harmonising measure pre-empts national regulatory competences in the first place grants it the internal market dimension necessary to presume compatibility with Articles 34 – 35 TFEU, as expressed through the Exhaustion Rule's second leg.[413] It follows,

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[410] See *Tobacco Advertising I*, note 157 paragraph 88. See also General Introduction, point 13.
[411] See *Bauhuis*, note 349. See also General Introduction, point 23.
[412] Opinion in *Alliance for Natural Health*, note 323, paragraph 53. See also *Kokopelli*, note 327, paragraph 81.
[413] This point was made in *Ruwet,* note 358, which precluded a Belgian measure that had made a Community rule mandatory for products falling outside the scope of that rule, thereby precluding such products from the right to free movement. Specifically, the Court held at paragraph 47 that 'to find otherwise would be 'tantamount to authorising a Member State to partition their markets in regard to products not covered by the Community rules, contrary to the objective of free movement', as it would apply a 'ban on the marketing of prepackages that are not the subject of … harmonisation'.

therefore, that the Rule's two legs, while built on different constitutional principles, are intrinsically linked and interdependent. Without one or the other element, the presumption of reconciliation that sustains the Exhaustion Rule would fall away.

107. The Court has embraced this core point since in its early jurisprudence.[414] A more recent, typical, example can be illustrated by looking at the Court's interpretation of the Medicinal Products Code.[415] As with other internal market rules, the Code has a dual function. Specifically, it seeks to guarantee high standards of quality and safety in medicines, while also promoting the good functioning of the internal market (through the removal of national regulatory disparities) and encouraging innovation and competitiveness. To this end, the Code regulates many matters, including the classification of a product as medicinal and its authorisation in the Member States of sale. Article 6 requires all medicines to obtain market authorisation in accordance with a detailed harmonised procedure. Member States must, as a result, subject a product classified as medicinal to this procedure and, under the *Tedeschi* Rule, cannot rely on Article 36 TFEU to add any new grounds of refusal. The EU authorisation procedure is mandatory, exclusive, and pre-empts all other national requirements.[416]

108. In *Antroposana*,[417] the Court was asked to consider whether the Code's market authorisation procedure applied to anthroposophic medicines, which are an alternative form of medicine based on a holistic understanding of man and nature, and of disease and treatment.[418] The defendant in the case, Antroposana (and Others), had argued that such medicines fell outside the scope of the Medicinal Products Code and could, as a result, be subjected to a simplified national authorisation procedure, justified under Article 36 TFEU. Their particular concern was that the codified procedure would exclude many anthroposophic medicines from the market, given the difficulty of proving their therapeutic effectiveness based on the objective criteria applied to traditional medicines.[419] The Court, and AG Bot, did not accept such arguments. Siding with the Netherlands, they confirmed that anthroposophic medicines,

[414] Ex. *Bauhuis*, note 349.
[415] Directive 2001/83/EC, *op. cit*.
[416] *Orthica & Others,* note 342, paragraph 59.
[417] *Antroposana & Others*, note 314. See also the Opinion in the same case, at EU:C:2007:301.
[418] As noted by the Court: '(u)nlike traditional medicine (also called 'allopathic medicine'), which is based essentially on physically observable phenomena, anthroposophic medicine is based on the idea that a human being is composed of four elements: the physical body, the etheric body, the astral body and the 'ego'. Anthroposophic medicinal products are intended to re-establish the balance between the four constituents of a human being; they are prepared by a specific method and may contain different vegetable, mineral, animal or metallic substances'. *Ibid*., paragraph 18.
[419] *Ibid*., paragraph 20.

although not specifically mentioned by the Code, fell within the definition of medicinal products 'by presentation'.[420] As a result, they had to obtain authorisation in accordance with the Code's procedure before being marketed in a Member State.[421] Since the Code had completely harmonised the national marketing authorisation and registration procedures for medicinal products for human use',[422] the *Tedeschi* Rule pre-empted the Netherlands from establishing an alternative authorisation procedure for anthroposophic medicines. However, this finding also, implicitly, triggered the second leg of the Rule, whereby reliance on the Code's rigorous market authorisation procedure was not subjected to review under Article 34 TFEU, even though it restricted trade in the medicines at issue. Instead, the EU procedure enjoyed a presumption of constitutionality that was not questioned in the dispute, and no explicit reference was made to the potential threat to free movement.[423] As outlined above, this presumption was based on the underlying presumption of reconciliation, whereby the regulatory impact of the EU authorisation procedure went hand-in-hand with the pre-emption of national powers, and the resulting gain for market integration.

109. This logic is repeated in much of the Court's case-law, where it applies and interprets EU internal market legislation without making any direct reference to the free movement of goods. Indeed, unless the EU measure is specifically challenged on this basis, the Court can rely on a legitimate presumption that the standard set is compatible with Articles 34 – 36 TFEU. This does not amount to a *carte blanche* for the EU legislator. As noted in the previous section, the Court is required to interpret EU legislation in a manner that is consistent with the Treaty, while the standard set by the EU legislator can still be subject to review by reference to the fundamental freedoms. Yet it does ensure a certain leeway for the EU legislator, even where secondary rules incorporate a constitutional dimension.

B. A Presumption of Proportionality

110. The Exhaustion Rule directs the Court to presume not only that the EU legislature has not limited the free movement of goods, but also that the legislature, to the extent that it has

[420] The Code harmonises the definition of 'medicinal product' under Article 1 (2) as a product that (a) presents itself as treating or preventing human disease (medicinal product by presentation) or (b) impacts on human physiological functions (medicinal product by function).
[421] *Ibid*., paragraph 35 (AG paragraph 31).
[422] *Ibid.,* paragraph 34.
[423] National attempts to rely on the EU procedure are not always successful. Ex. *Commission v Germany (Garlic Capsules)*, C-319/05, EU:C:2007:678.

limited that freedom, was justified in doing so.[424] The latter scenario is not based on a presumption of reconciliation, as it accepts that the free movement of goods has been restricted. Rather it presumes that any potential trade restriction is suitable and necessary, and thus, proportionate. In other words, balance between the regulatory and integration goals of EU legislation can only be achieved because the legislator is presumed to have complied with the principle of proportionality. That the Court can rely on this presumption in the first place reflects its deferential approach to assessing the proportionality of EU measures in validity disputes more generally. In this section, we briefly present this 'light-touch' approach.

111. We have already noted that the EU legislator is subject to the free movement of goods and that its acts can be challenged for failing to comply with Articles 34 – 35 TFEU. However, as with national trade barriers, an EU measure that is found to restrict the prohibition on trade restrictions can be justified if it (a) pursues a legitimate public interest objective (b) in a manner that is 'necessary and proportionate' in relation to that objective.[425] 112. The proportionality principle reflects the general obligation for EU action not to go beyond what is necessary to achieve the Treaty's objectives so as to protect the individual from undue interference by the state. As noted in *Internationale Handelsgesellschaft*, 'the individual should not have his freedom of action limited beyond the degree necessary for the general interest'.[426] Still, the Court, in contrast to its intrusive and strict review of national trade measures, generally defers to the EU legislator when assessing its product rules, with most EU rules being ultimately validated on this basis.

113. As regards the pursuit of a legitimate objective, the possibilities open to the EU legislator include, without being limited to, those specified in Article 36 TFEU or accepted as a mandatory requirement. This stands to reason, given that Article 114 (3) TFEU specifically

[424] The presumption of proportionality also applies to cases of fundamental rights. See ex. *Glatzel*, note 153.
[425] The Court, officially, relies on a three-part test, similar to that used by the European Court of Human Rights, where it looks at whether the measure, first, pursues a legitimate objective, second, was necessary to achieve the end (ex. there were no 'less restrictive alternatives' available) and third, imposes, in any case, an excessive or disproportionate effect on the applicant's interest (proportionality *stricto senso*). As noted by Craig & De Búrca, however, the Court's application of this test can vary, both in terms of its reference (or not) to both steps two and three, and its intensity of review. P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, pp. 551 – 558. See also T. Tridimas, *The General Principles of EU Law*, Second Edition, Oxford, Oxford University Press, 2006, pp. 136 – 173, P. Craig, *EU Law and Administration*', *op. cit.*, Chapter 15 and G. de Búrca, 'The Principle of Proportionality and its Application in EU Law', *Yearbook of European Law*, 1993, no. 13, pp. 105 – 148. For relevant case-law, see ex. *Fedesa*, note 160, paragraph 13; *UK v Commission (BSE),* note 160, paragraph 96; *Beneo-Orafti*, note 160, paragraph 75; *SFIR,* note 160, paragraphs 42; *Vodafone & others*, C-58/08, EU:C:2010:321 and *Poland v Parliament and Council (Flavoured Tobacco)*, note 160, paragraph 78.
[426] Opinion in *Internationale Handelsgesellschaft*, Case 11/70, EU:C:1970:100, p. 1147.

mentions the possibility to regulate for the purposes of environmental protection, consumer protection and health and safety. Thus, the directives at issue in *Swedish Match*[427] and *Alliance for Natural Health*[428] were found to legitimately ensure health protection, while in *Meyhui*[429] and *Schwarzkopf*,[430] they focused on consumer protection, and in *Safety Hi-Tech,*[431] on environmental protection. It seems, however, that the EU legislator can also justify cross-border restrictions by reference to objectives that are not available to the Member States, such as nationality requirements[432] and 'purely economic considerations'. As noted by the AG in *Essent*, the Court's decision in *Germany* v *Parliament and Council (Deposit Guarantees),*[433] 'in which it was held that the objective of combating any market disturbance could justify a restriction on freedom of establishment stemming from the directive on deposit-guarantee schemes', 'would doubtless not have been held to justify a similar national measure which would have been adjudged to be purely economic in nature'.[434] Again, this seems legitimate, given that the EU should pursue the general interest of the EU as opposed to public interests of individual Member States. As regards the specific justification of economic considerations, Snell notes that EU legislation might be in a position to protect against economic insecurity in a way that is no longer possible for the Member States.[435]

114. Once the EU measure is found to pursue a legitimate objective, the Court will assess whether it is 'necessary and proportionate' in relation to that objective. To this end, it generally concedes broad discretion to the EU institutions,[436] where only those measures that are 'manifestly inappropriate' in relation to the objective pursued will be judged disproportionate.[437] This traditionally translates into a 'marginal review', particularly when decisions reflect discretionary policy choices on economic, political or social matters, where

[427] *Swedish Match*, note 310. See also *Planta Tabak-Manufaktur & Others*, C-220/17, EU:C:2019:76.
[428] *Alliance for Natural Health*, note 154.
[429] *Meyhui*, note 322.
[430] *Schwarzkopf*, note 350.
[431] *Safety Hi-Tech*, note 350.
[432] See *Commission v Netherlands*, C-299/02, EU:C:2004:620, as discussed by K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit*., p. 355.
[433] *Germany v Commission (Deposit Guarantee),* C-233/94, EU:C:1997:231. See also *Yellow Cab*, C-338/09, EU:C:2010:814.
[434] Opinion in *Essent & Others*, Joined Cases C-105/12 to C-107/12, EU:C:2013:242, paragraphs 77 – 78.
[435] J. Snell, 'Economic Justifications and the Role of the State', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis (eds.), *Exceptions from EU Free Movement Law*, *op. cit.*, pp. 12 – 31 at p. 21 and pp. 25 – 26.
[436] See, recently, *Planta Tabak-Manufaktur*, note 427, paragraph 44 and cases cited.
[437] *Fedesa*, note 160, paragraph 14; *UK v Commission (BSE),* note 160, paragraph 97; *Beneo-Orafti*, note 160, paragraphs 76 – 77; *SFIR*, note 160, paragraph 43; *Swedish Match*, note 310, paragraph 48 and *Poland v Parliament and Council (Flavoured Tobacco)*, note 160, paragraph 79.

the legislator has had to make complex assessments and difficult compromises.[438] The Court generally deems such decisions to have been based on fact and discretion, and refrains from substituting its judgement,[439] even if the impugned measure does not constitute the least restrictive alternative.[440] This approach has fluctuated over time and between cases, with observers noting an increasingly more intrusive judicial review of whether the EU legislator committed a 'manifest error' in exercising its discretion and establishing fact.[441] Still, as Weatherill notes, 'a great many decisions of the Court confirm its willingness to intervene only where a measure is manifestly inappropriate to the objective in view, which reflects its determination to allow the political institutions room to enjoy sufficient discretionary power in lawmaking'.[442] This deferential approach, which is adopted in a wide range of fields, [443] can be seen when the Court reviews EU trade restrictions that pursue health, environmental and consumer protection goals.[444]

115. In *Alliance for Natural Health*, for example, the Court first found that the Food Supplements Directive[445] constituted a trade restriction under Article 34 TFEU insofar as it prevented the free movement of food supplements not contained on the positive list.[446] Next, it assessed whether this restriction was 'necessary and proportionate', repeating that 'the Community legislature must be allowed a broad discretion' when making 'political, economic and social choices' and undertaking 'complex assessments' and that the 'manifestly

[438] P. Craig, *EU Law and Administration*', *op. cit.*, p. 408. See also A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *op. cit*., section 4.
[439] P. Craig, *ibid.*, p. 408.
[440] Ex. *Alliance for Natural Health*, note 154, *BAT*, C-491/01, EU:C:2002:741 and *Omega Air & Others*, Joined Cases C-27/00 & C-122/00, EU:C:2002:161. See T. Tridimas, *The General Principles of EU Law, op. cit.*, pp. 142 – 149 for discussion.
[441] P. Craig, *EU Law and Administration*', *op. cit.*, Chapter 15. A more intrusive review also appears more likely when the Court assesses EU legislation by reference to fundamental rights. See D. Thym, 'The Constitutional Dimension of Public Policy Justifications', *op. cit.*, pp. 170 – 189.
[442] S. Weatherill, 'Justification, Proportionality and Consumer Protection', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis, (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.* pp. 240 – 264, at p. 258. For a critique of the Court's 'light-touch' approach to assessing the proportionality of certain EU measures, see A. Garde, 'Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance', *op. cit.*
[443] Including social policies, common policies (fisheries, agriculture, transport) and anti-dumping.
[444] A related question is whether, and the extent to which, the EU legislator could be granted an additional margin of appreciation when reconciling two fundamental principles of the EU legal order, such as the free movement of goods and a fundamental right or right laid down in the Charter. The Court granted Member States such a leeway in cases like *Schmidberger*. Bailleux has characterised this situation as "un étau", that is, where the Member State (or EU) is stuck between two conflicting requirements derived from primary law. See A. Bailleux, *Les interactions entre libre circulation et droits fondamentaux dans la jurisprudence communautaire : Essai sur la figure du juge traducteur*, *op. cit*., paragraphs 1506 – 1517.
[445] Directive 2002/46/EC, *op. cit.*
[446] *Alliance for Natural health,* note 154, paragraph 49.

inappropriate' test would apply.[447] In applying this test, the Court accepted that the positive list system was more burdensome than a negative list system but remained an 'appropriate way of reconciling the objective of the internal market … with that relating to the protection of human health', considering the precautionary principle and the possibility for the EU to 'ensure a high level of health protection', while awaiting a more comprehensive risk assessment.[448] As a result, there was no infringement of Articles 34 – 36 TFEU.[449]

116. The literature generally accepts on this basis that the EU institutions, while subject to the same definition of Articles 34 – 35 TFEU as applies to the Member States, have more scope to justify its measures.[450] As Mortelmans notes, 'the Community is bound by the Treaty rules on the free movement but not in the same way as the Member States'.[451] This difference can be illustrated by comparing the Court's assessment in *Piageme* of a local language requirement imposed nationally,[452] with *Meyhui*, where it examined a similar EU requirement.[453] In the former case, the Court held that a Belgian measure imposing an obligation to exclusively use the language of the Flemish linguistic region for the labelling of food products constituted a disproportionate trade restriction, in violation of both the first Food Labelling Directive[454] and Article 34 TFEU. A different conclusion was reached in *Meyhui*, which challenged a requirement under the Crystal Glass Directive[455] that certain crystal glass products were to be described 'in the language or languages of the country in which the goods are marketed'. Having established that this requirement constituted a barrier to trade by imposing additional packaging costs on imports,[456] the Court found the obstacle to be both necessary and proportionate, considering in particular the high risk of fraud.[457]

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[447] *Ibid.*, paragraphs 51 – 52.
[448] *Ibid.*, paragraphs 68 – 69.
[449] A similar light touch approach can be observed in other cases, including *Swedish Match*, note 310, paragraphs 46 – 58, *EU Wood Trading*, note 300, paragraph 49 and *Schwarzkopf*, note 350, paragraphs 40 – 41.
[450] See citations *supra*, note 363.
[451] K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market', *op. cit.*, p. 1333. See also M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit.*, p. 619.
[452] *Piageme I*, C-369/89, EU:C:1991:256.
[453] *Meyhui*, note 322.
[454] Directive 79/112/EEC, *op. cit*.
[455] Council Directive 69/493/EEC on the approximation of the laws of the Member States relating to crystal glass, OJ L. 326, 29 December 1969, pp. 36 – 39.
[456] *Meyhui*, note 322, paragraph 13.
[457] *Ibid*., paragraphs 14 – 22. In contrast to the Court, AG Gulmann concluded that, while the legitimate objective of the directive could have been met through less restrictive means, although he also admits: 'It is not easy to form a reasoned view on the matter. In those circumstances it must be appropriate to accept the assessment which underlies the rules adopted by the Community legislature'. The Court chose to follow this advice, as opposed to the conclusion. See Opinion in *Meyhui*, note 322.

117. One rationale for this 'light touch' review is that the EU legislator is better placed than the Court to balance policy matters, which are based on empirical considerations and which involve 'political, economic and social choices' that are grounded in 'complex assessments'.[458] However, such considerations should also apply to the national level, even more so given the enhanced democratic legitimacy they enjoy.[459] Weatherill explains this divergence by reference to better quality of argument made by the EU legislator, when compared to national regulators seeking to justify ancient unjustifiable rules.[460] And indeed, this perspective may have some validity, considering the Court's more sympathetic review of some recent national rules.[461] There are also substantive differences between EU and national legislators, in terms of interests they represent and their position in the Treaty, which further justify the Court's divergent approach.[462] In particular, the EU legislator harmonises in the general EU interest and creates 'genuine Community solutions',[463] without the suspicion of national bias that applies to the Member States.[464] Snell argues on this basis that 'attempting to impose the same standards on (the EU and national legislators) would be inappropriate to and incoherent with the different positions and political contexts they occupy', particularly given that the EU legislator is 'much less likely to adopt rules motivated by state protectionism' since 'all interests are represented'. [465] According to Barents this distinction imposes different normative

[458] *Swedish Match*, note 310, paragraph 48. In this context, Bailleux distinguishes between the margin of discretion enjoyed by administrative bodies, which is grounded in their knowledge and expertise, and that pertaining to governments and parliaments, which is based on their democratic legitimacy. See A. Bailleux, 'La part du droit dans l'arbitrage social général', *op. cit.*

[459] For a critique of the Court's reliance on the proportionality principle to intrude into national policy decisions, when compared to its light touch approach to EU measures, see N. Reich, 'How Proportionate is the Proportionality Test? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ', in H.-W. Micklitz & B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, *op. cit.*, pp. 83 – 111.

[460] S. Weatherill, 'Justification, Proportionality and Consumer Protection', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis, (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.*, pp. 240 – 264 at pp. 257 – 259.

[461] *Ibid*. See also D. Thym, 'The Constitutional Dimension of Public Policy Justifications', *op. cit.*, pp. 170 – 189 at section D.

[462] Many examples cited by Weatherill to illustrate the Court's willingness to grant Member States 'regulatory room to breathe' concerned the review of more stringent national measures, adopted in the context of minimum harmonisation, thus with some EU legislative blessing. See Weatherill, *ibid.*, section V. See also Part III for discussion on how EU legislation can influence the Court, even if it is not exhaustive.

[463] K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market', *op. cit.*, p. 1334.

[464] K. Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement', *op. cit.*, p. 355. See also M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution, op. cit.*, pp. 76 – 78 and L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', *op. cit.*, pp. 57 – 58.

[465] J. Snell, 'Economic Justifications and the Role of the State', in P. Koutrakos, N. Nic Shuibhne & P. Syrpis, (eds.), *Exceptions from EU Free Movement Law – Derogation, Justification and Proportionality*, *op. cit.,* pp. 13

consequences on the Member States and the EU legislator when it comes to regulating the internal market.[466] Specifically, while the former should not interfere with cross-border trade, the primary objective of the latter is to safeguard market unity through 'unity of policy', which, while incorporating the freedom to trade, must reconcile (or balance) this requirement with regulatory goals.[467] As noted earlier, the content of this (EU) legislative exercise may then claim a degree of deference before the Court under the principle of mutual sincere cooperation enshrined in Article 13(2) TEU.

C. Room to Reset the Balance?

118. We noted earlier that when the Court reviews national acts of legislation-based discretion, by reference to the Exhaustion Rule, it often mirrors the principle/derogation approach applied in the absence of harmonisation. However, in other cases, the EU's legislative framework, by becoming the Court's sole touchstone for review, could facilitate a more balanced weighing up of the goals of integration and regulation, and potentially displace this traditional template. Member States may, in such circumstances, enjoy scope to regulate beyond what would have been possible in the absence of harmonisation.

119. Underlying this possibility is the Court's acceptance that Article 114 directives can pursue a particular public interest once a net gain is achieved for the internal market.[468] As summed up by Möstl, 'the internal market and issue-related objectives do not find themselves in an 'either-or' correlation, but rather in a 'dyad' relationship, consisting of two objectives on different levels pursued cumulatively'.[469] By the same token, measures adopted under alternative legal bases, such as Article 43 TFEU (agricultural measures) and Article 192 TFEU (environmental protection) can pursue specific regulatory goals once compatible with the free movement of goods, without being subservient to the latter.[470]

120. We have noted above that national measures which directly implement EU standards benefit from the same presumption of constitutionality as enjoyed by the latter. By contrast,

– 31 at p. 26. See also J. Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms*, *op. cit.*, pp. 159 – 167.
[466] R. Barents, 'The Community and the Unity of the Common Market', *op. cit.*, section IV.
[467] *Ibid.*
[468] See *Tobacco Advertising I*, note 157. See also General Introduction, points 29 – 30.
[469] M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit.*
[470] See General Introduction, point 30.

national acts of legislation-based discretion should be subject to an additional review – but according to what standard? As we will outline in Chapter Two, the Court was initially wary of suspending primary law in such cases, opting instead to review the national measure by reference to Articles 34 – 36 TFEU in tandem with the secondary measure. However, this reluctance has now been replaced by a more systematic reliance on the Exhaustion Rule to assess national acts of legislation-based discretion.[471] The Court can, as a result, seek to accommodate the balance achieved by the exhaustive secondary measure, even when that measure deems the regulatory goal to be of equal importance – or in priority to – the goal of economic integration.

121. An early hint of this approach can be seen in *Rewe*,[472] where the Court accepted that a directive could authorise Member States to inspect up to one-third of certain plant consignments to prevent harmful organisms entering their territory. This was so, even though the Court had established in an earlier judgement that national inspections, imposed in the absence of any harmonisation, could only look at 15% of such consignments.[473] As such, to the extent that the Member State activated this possibility, they had more regulatory leeway than under Article 36 TFEU. In justifying this perspective, the Court noted that the aim of the directive was not to hinder trade, but to gradually abolish restrictions otherwise justified under Article 36 TFEU (the *Bahuis* approach) while at the same time protecting plants from damage. Short-term provisions to monitor imports and limit free movement could, in this context, be tolerated. The idea, however, was that these restrictions would eventually give way to more complete harmonisation. This raises the question as to whether the Court would review a national act of legislation-based discretion by reference to an EU regulatory framework that *permanently* resets the balance between free movement and regulation.

122. One example is the Court's judgement in *Gallaher*, discussed earlier in relation to rule pre-emption.[474] We recall that in this case, the Court authorised a UK requirement for health warnings on domestic tobacco packaging to cover 6% of the surface area of the package, on grounds that the Tobacco Labelling Directive[475] stipulated a minimum requirement of 'at least

[471] See ex. *DaimlerChrysler*, note 1.
[472] *Rewe-Zentrale*, note 347.
[473] *Ibid*., p. 1237. This was established in *Commission v France (Italian Wine)*, Case 42/82, EU:C:1983:88.
[474] *Gallaher*, note 130.
[475] Directive 89/622/EEC, *op. cit*.

4%'. This case is often cited as an example of minimum harmonisation.[476] However, while the Court correctly accepted that Member States could adopt standards beyond what was explicitly laid down under the directive, it did not assess the UK rules by reference to the Treaty ceiling. Instead, in an implicit activation of the Exhaustion Rule, the Court relied on the directive as its sole norm of reference and presumed that national rules adopted within that framework complied with the free movement of goods. In doing so, it cast the relevant provisions of the directive as instances of *legislation-based discretion* that authorised certain national regulatory measures *within the framework of the exhaustive EU rule*. Still, the Court did not assess whether the UK measure was in fact proportionate, notwithstanding the potential impact on exports.[477] Instead, it seemed to presume that the UK had complied with the protective regulatory approach mandated by the directive.

123. A more sophisticated analysis can be observed in *Danske Svineproducenter I*.[478] Here, the Court accepted that Denmark, when exercising its discretion with respect to the size of animal holdings under the Animal Transport Directive,[479] could attach 'priority to attaining the objective of protecting animals during transport', while 'taking into account, so far as possible, the economic interests involved'.[480] In other words, the goal of animal protection pursued by the directive was deemed to be equal, if not in priority, to the aim of market integration. Similar scope is observed in *EU Wood Trading*, mentioned earlier.[481] In this case, (discussed in Part II), the Court held that the first Waste Shipment Regulation[482] authorised Member States to object to shipments of waste to destinations where recovery standards were inadequate. In other words, Member States retained discretion to issue a 'low standards objection' against shipping waste outside its territory. In reaching this conclusion, the Court, again, made no reference to Articles 34 – 36 TFEU, but relied exclusively on the Regulation. Considering the environmental focus of the latter,[483] this approach gave the judgement a fundamentally different emphasis than a standard Treaty review of a potential national obstacle to trade. In particular,

[476] Ex. M. Dougan, 'Minimum Harmonization and the Internal Market', *op. cit.*, p. 856.
[477] For a criticism of the Court's approach, see D. Wyatt, "The Community Competence to Regulate the Internal Market", *op. cit.*, p. 32. See also Part II, point 212.
[478] *Danske Svineproducenter I,* note 34. See also *Danske Svineproducenter II*, C-316/10*,* EU:C:2011:863.
[479] Directive 91/628/EEC, *op. cit.*
[480] *Danske Svineproducenter I*, note 34, paragraph 41.
[481] *EU Wood Trading*, note 300.
[482] Regulation (EEC) No. 259/93, *op. cit.*
[483] *European Parliament v Council (Waste Shipment)*, C-187/93, EU:C:1994:265, paragraph 26 where the Court notes that the aim of the Waste Shipment Regulation was 'not to define those characteristics of waste which will enable it to circulate freely within the internal market, but to provide a harmonized set of procedures whereby movements of waste can be limited in order to secure protection of the environment'.

the Court did not start by classifying the German objection as an obstacle to the free movement of waste, in need of justification. Rather, it first confirmed that since that standards of recovery had not been harmonised, and considering the Community's aim of promoting a high level of environmental protection, it was 'evident' that a Member State could rely on its own higher standards to lodge an objection. Having established this right, the Court then stated that waste for recovery must be able to move freely and that any opposition must be proportionate, although, to this end, suggested a very light proportionality test. In particular, while specifying that the risks upon which the national recovery standards were based had to rely on 'scientific research', the Court also emphasised that Member States had discretion to institute different systems of protection. It then deferred to the national court to carry out the proportionality test. In *Van Gennip*, the Court applied a similarly light proportionality test when assessing, by reference to the exhaustive Pyrotechnic Directive,[484] a Belgian ban on the possession and sale of fireworks containing more than one kilogram of pyrotechnic material.[485] In doing so, it explicitly highlighted that the harmonizing directive aimed to both remove trade barriers and ensure a high level of protection for human health and safety, and for the protection of consumers and professional end users.[486] Finally, the Court implicitly accepted in *Opus Supplies* that Member States, when adopting an act of legislation-based discretion, did not have to regulate in a manner that was the least restrictive of trade.[487] These and other judgements[488] will be discussed in Parts II and III. Our point, for now, is that the EU legislator not only has scope to reset the balance between free trade and regulation, but that this 'resetting' can have a knock-on effect on the scope for national regulation, adopted and controlled within that legislative framework.

124. Such a development could be welcomed as a legitimate means to grant and monitor regulatory diversity in the internal market. In particular, it would allow the EU legislator to establish a benchmark that equalises integration and regulatory goals, which can, under the Exhaustion Rule, become the sole norm of reference, not only to assess directly implementing national measures, but also to review certain acts of legislation-based discretion.[489] Member

[484] *Van Gennip & Others*, C-137/17, EU:C:2018:771, paragraphs 55 – 65.
[485] Directive 2007/23/EC of the European Parliament and of the Council on the placing on the market of pyrotechnic articles, OJ L 154, 14 June 2007, pp. 1 – 21.
[486] *Van Gennip & Others*, note 484, paragraph 48.
[487] *Opus Supplies*, C-462/09, EU:C:2011:397.
[488] Ex. *DaimlerChrysler,* note 1 and *Berger* note 316.
[489] This may also be more in line with the recalibration between free movement and public interest goals undertaken by the Lisbon Treaty. See N. Nic Shuibhne, 'Primary Laws: Judging Free Movement Restrictions after Lisbon', *op. cit*.

States could, as a result, rely on this new framework to legitimately recalibrate their policies in favour of regulatory goals, without being subject to rigorous scrutiny under Articles 34 – 36 TFEU. The risk, particularly with legislation-based discretion, is that Member States would seek to reinstate barriers to trade that, under the Exhaustion Rule, might escape proper review and undermine the free movement of goods. Scope for such national action could stem from a misinterpretation of a legislative authorisation, as discussed above in relation to Article 6(2) of the Cosmetics Directive.[490] However, it could also come in more subtle forms, where the national regulator, when exercising its discretion on implementation, interprets EU legislation so as to privilege a national vision over the EU legislative goal.[491] The Court must, in principle, police such interpretations to ensure respect for the primacy – and effectiveness – of EU law. Yet difficulties can arise in practice. For example, as we highlight in Part II, national acts of discretion, adopted in the presence of exhaustive EU rules, have sometimes escaped review, either because that act of discretion was not correctly identified as such, or because the Court did not consider a review to be necessary. What is more, this oversight is often connected to a failure on the part of the disputing parties, and sometimes the Court itself, to distinguish between the 'regulatory character' of the legislation (which, if exhaustive, will trigger the Exhaustion Rule), and its 'regulatory impact' (which determines the room for manoeuvre Member States retain within the exhaustive EU regulatory framework).[492]

125. By clarifying these difference concepts, this research will demonstrate that the Exhaustion Rule can, in fact, alert the Court to the existence of discretionary national acts adopted within an exhaustive EU regulatory framework. And once altered, the Court must review that national measure by reference to the EU framework. While not necessarily giving *precedence* to market integration goals over regulatory aims, the latter framework cannot undermine or allow the Member States to undermine, free movement. To this end, the Court can iron out any lingering doubts via consistent interpretation, as in *Inter Huiles*. It can also subject the *grant* of discretion to direct review by reference to primary law. In this regard, most EU measures that contravened the free movement of goods had granted an intolerable degree of legislation-based discretion to the Member States.[493] Provided the Court exercises such

[490] Directive 76/768/EEC, *op. cit.*
[491] National courts may also play a role in reinforcing the national vision, particularly when interpreting ambiguous concepts in private law. See Part III (Chapter One).
[492] The terms 'regulatory character' and 'regulatory impact' form part of our proposed framework for review and are explained in detail in Part III (Chapter Two).
[493] See *supra*, point 91. See also K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit.*, p. 347 and footnotes 111 – 112.

boundary control, there should be no legal reason why an exhaustive EU legislative framework, which complies with the Treaty, could not provide the sole point of reference to review national acts of legislation-based discretion that come within its scope.

CONCLUSION OF CHAPTER ONE

126. The ambiguous nature of the internal market allows for legislative input on the two main tensions that have animated the internal market since its inception, those being, how to divide power between the EU and Member States, on the one hand, and reconcile the requirements of integration and regulation, on the other. The Court has, in certain sectors, struggled with how to accommodate such input with its interpretation of the Treaties. With regards the free movement of goods, however, the Exhaustion Rule constitutes a constitutional compass for the Court to consider this question in the presence of EU product rules.

127. First, when successfully triggered, the Rule generally implies a gain for the EU competences, as the Court relies on the first leg pre-empt national measures that contradict the EU regulatory standard. This assessment can, however, incorporate a complex pre-emption-based analysis, where the Court interprets EU legislation to establish, not only whether it ousts Treaty-based discretion, but also the room for national action within the exhaustive EU regulatory framework. The Exhaustion Rule provides space to the Court to engage with this interpretative process – as distinct from the task of resolving any conflict (primacy). Second, the Rule acknowledges, through its second leg, that the legislator enjoys discretion to set the level of regulation it deems appropriate for that field. This may include a limited transfer of competences down to the Member States, through the granting of legislation-based discretion. The exercise of this discretion must then be reviewed by reference to the exhaustive EU regulatory framework. Third, while the pre-emption principle and presumption of constitutionality underlying the Exhaustion Rule encourage an abstract and generally deferential enforcement of the EU regulatory standard, the Court can rely on its core function of judicial review and interpretation to clarify legislative ambiguities and ensure compliance with primary law. This grants the judiciary ultimate control both to assess whether the Exhaustion Rule is in fact triggered and to ensure exhaustive EU legislation – and national measures adopted thereunder – does not violate the Treaty. While the exercise of this control remains controversial, the Court can protect itself against charges of arbitrary decision-making

or overreach by ensuring that decisions to trigger, or not, the Rule, and to enforce a particular effect over another are reasoned and justified.[494] The Court should exhibit similar caution when it overrides the presumption of constitutionality generally enjoyed by a relevant and exhaustive secondary EU rule. A respectful constitutional dialogue can thus emerge, whereby the legislator can have a genuine impact on determining the contours of the free movement of goods,[495] without undermining the hierarchy of norms.

128. Against this backdrop, a key role for the Court lies in exposing the need for European-level action.[496] In some cases, this allows the judicial vision to dominate the agenda, with the legislator following suit, as in *Cassis de Dijon*. However, the legislature can also direct the course of events, as it responds to, clarifies and sometimes resets the balance achieved in the absence of harmonisation, which, under the Exhaustion Rule, may enjoy a strong presumption of constitutionality. One example discussed was the codification of the Court's judgement in *EU Wood Trading*, which allowed Germany to object to shipments of waste shipments to Italy, on grounds that Italian waste recovery standards were inadequate. However, that judgement was itself based on the Court's interpretation of the first Waste Shipment Regulation, which had been adopted following *Commission v Belgium (Walloon Waste)*.[497] The latter regulation, being exhaustive, triggered the Exhaustion Rule. As a result, *EU Wood Trading* assessed – and confirmed - the German ban on the shipment of waste to Italy by exclusive reference to the legislative balance achieved between free movement and environmental protection, thus, without mentioning Article 34 TFEU.[498] The legislator then copper fastened this interpretation under the second Waste Shipment Regulation, notwithstanding Commission concerns over its impact on free movement.

129. The principles of institutional balance and sincere cooperation give normative grounding to this legislative role. At the same time, Court must remain mindful that the EU legislator could potentially subvert the Treaty's aims by reinstating barriers to trade at EU level – or authorising Member States to do likewise. As discussed, the phenomenon of legislation-

[494] On the importance of reasoning decisions that impact on individual freedom, see ex. A. Bailleux, 'Le part du droit dans l'arbitrage social général', *op. cit.*
[495] For a presentation of this dialogue in the context of EU citizenship (pre-*Dano*), see M. Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship', *op. cit.*
[496] L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', *op. cit.*, p. 49. See also C. Kilpatrick, 'Internal Market Architecture and Labour Rights – As Good as it Gets?', *op. cit.*, section 7.
[497] *Commission v Belgium (Walloon Waste)*, note 300.
[498] *EU Wood Trading*, note 300.

based discretion could pose a particular challenge by implicitly backtracking on the Court's interpretation of the Treaty. As we will trace in the next Chapter, the Court's fear that this could happen led it to rely on Articles 34 – 35 TFEU as direct norms of reference until at least the mid-1990s, even when the matter fell within the scope of an exhaustive secondary rule. The Rule's subsequent transformation into a widely accepted and systematically used tool highlights how institutional relations have since evolved.

CHAPTER TWO – DEVELOPMENT OF THE EXHAUSTION RULE

130. The Exhaustion Rule can facilitate the resolution of regulatory disputes in a manner that respects the legislator's intention, without compromising the free movement of goods. Specifically, it provides a mechanism for the Court to both limit and defer to the legislator, by presuming compatibility between secondary rules and the Treaty, ensuring consistent interpretation, and pre-empting (or authorising) national trade measures, as the case may be.

131. Still, judicial acceptance the Rule has not been a given, particularly in the Community's early years, when mutual suspicion governed the relationship between the Member States, the Council and the Community's supranational institutions. On the one hand, Member States feared that Community legislation could undermine legitimate national standards. On the other, the Commission and Court were wary of the Community legislative procedure being used to undermine the free movement of goods.[499] Such reticence explains why the Exhaustion Rule started as an *ad hoc* guideline, largely to pre-empt national measures under its first leg, without excluding direct reference to Articles 34 – 35 TFEU. That it has subsequently developed into a systematic obligation attests to a growing trust between the EU and its Member States, as well as between the legislator and judiciary. Nurtured by the Court's – generally – sensitive approach to resolving regulatory disputes, and consolidated in Treaty and institutional changes, this evolution not only ensures a coherent, transparent framework to resolve regulatory disputes. It has also bolstered the legitimacy and stability of the internal market for goods. Chapter Two traces this evolution over two time periods. The first covers the origins and establishment of the Exhaustion Rule between 1956 and 1993, while the second looks at the Rule's development from the 1990s to the present day.

1. ESTABLISHMENT (1956 – 1993)

132. The Exhaustion Rule is comprised of two elements, or 'legs', which allow the Court to enforce both the integrative and regulatory functions of secondary law, while ensuring compliance with free movement. Under the first *Tedeschi* leg, Member States can no longer rely on Treaty-based discretion to justify national trade rules, while the second leg excludes direct application of Articles 34 – 35 TFEU. For many years, however, the Court only referred

[499] See ex. M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation', *op. cit*., pp. 549 – 540.

explicitly to the first leg, generally to enforce the pre-emptive effect of Community legislation. It rarely gave *direct* consideration to the possibility for exhaustive Community rules to oust direct application of Articles 34 – 35 TFEU. This resulted in an inconsistent approach to review, where the Court often – but not always – relied on the latter provisions as specific norms of reference. Far from ideal, this *ad hoc* approach contributed to uncertainty and litigation. In 1993, however, the Court explicitly accepted to disapply both Articles 34 – 35 TFEU (second leg) and Article 36 TFEU (first leg) in the presence of exhaustive secondary measures. While paving the way for the generalised Exhaustion Rule, this statement did not come out of the blue. To the contrary, the Court had always deferred, at least somewhat, to the regulatory effect of Community legislation under an implicit presumption of constitutionality. Indeed, such deference was arguably necessary for Member States to relinquish their Treaty-based discretion in the first place. These developments, outlined in section 1, provide background and context to the Exhaustion Rule as we know it today.

1.1 Establishing the *Tedeschi* Leg

133. The *Tedeschi* leg of the Exhaustion Rule precludes Member States from relying on Treaty-based discretion to justify unilateral national measures in the presence of harmonisation. It is therefore chiefly concerned with achieving market integration through pre-emption. The logic of *Tedeschi* thus justifies the need for harmonisation and has always been a part of free movement law. As Weatherill notes, 'the principle that the Community takes over regulatory competence from the Member States is a foundation stone in the building of the internal market'.[500] This section explores the *Tedeschi* leg by tracing its origins (1.1.1) and outlining the Court's judgement in *Tedeschi v Denkavit* (1.1.2). It also explains how the *Tedeschi* leg is intrinsically linked to the second leg of the Exhaustion Rule (1.1.3).

1.1.1 The Origins of the Tedeschi Leg

134. The Court gave its clearest expression of the *Tedeschi* leg in *Tedeschi v Denkavit*, after which it is named.[501] However, its essence was apparent long before this case. Indeed, German negotiators for the Treaty of Rome had already sought to explicitly link the adoption of

[500] S. Weatherill, *Law and Integration in the European Union*, *op. cit.*, p. 139.
[501] *Tedeschi*, note 7.

secondary rules to the ousting of national powers with the following (unsuccessful) proposal for ex. Article 36 EEC: [502]

> Prohibitions on exports, imports and goods in transit in force in the Member States, for reasons of public security, public health or other analogous reasons, must be applied in a manner that does not discriminate between the States. *Such prohibitions can be removed when they are replaced by legislative measures or uniform or coordinated regulations.* In this respect, the European Commission will submit proposals to the Council who will decide unanimously.[503]

135. This proposal was not accepted in the final text of the Treaty – highlighting, perhaps, Member State reluctance to grant such an explicit transfer of competence to the Community. However, ex. Article 36 EEC (identical in substance to Article 36 TFEU) retained echoes of the German sentiment by authorising trade restrictions on trade that were *justified* on certain public interest grounds. This reference to 'justification' prompted the question as to when such national measures would *not* be justified. While the drafters of the Treaty declined to expressly link an absence of justification to the presence of Community rules, this possibility imbued the Court's case-law as soon as it started assessing the lawfulness of national trade rules.

136. In *Dassonville* for example, the Court, having given its celebrated definition of measures having equivalent effect to a quantitative restriction (MEEQRs), found that Article 36 could not save the discriminatory national trade barrier at issue in the case.[504] In reaching this conclusion, the Court set out an important 'rule of reason', which was that *in the absence of Community rules,* Member States could take reasonable national measures to prevent unfair trade practices that did not discriminate or amount to a disguised restriction.[505] The significance of this 'rule of reason' in understanding the origins of the *Tedeschi* Rule becomes clear when inverted. In particular, pronouncing that Member States retain regulatory discretion *in the absence of Community rules* implies that such discretion could be lost *in their presence*.[506] And indeed, the Court has accepted this possibility for as long as Community rules have been in place. In the early years, judgements that excluded national measures arose primarily in the

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[502] De la Rosa identifies the proposed German formulation in the *travaux préparatoires* for the Treaty of Rome. See S. de la Rosa, 'L'écriture des libertés de circulation', in E. Dubout & A. Maitrot de la Motte (éds.), *L'Unité des libertés de circulation: In varietate concordia*, *op. cit.*, pp. 9 – 39 at pp. 23 – 24.
[503] *Ibid*., footnote 51. Personal translation from French and emphasis added.
[504] *Dassonville*, Case 8/74, EU:C:1974:82.
[505] *Ibid*., paragraph 6. See also *Landwirtschaftskammer,* Case 4/75, EU:C:1975:98, paragraph 7 where the Court (and Commission) confirmed that Germany could, in the absence of Community rules, rely on Article 36 to justify additional measures to combat the spread of San José Scale disease.
[506] L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', *op. cit.*, pp. 50 – 51.

context of the CAP. In *Simmenthal*, for example, the Court was asked whether Italy could rely on Article 36 to justify *national* border health checks, notwithstanding the presence of Community checks covering the same field.[507] Italy argued in the affirmative, stating that the adoption of harmonising measures did not imply the surrender of national regulatory powers over veterinary and public health inspections. However, AG Reischl held that the comprehensiveness of Community rules, and the superior protection they ensured, precluded unilateral national intervention.[508] The Commission agreed, arguing as follows:

> The national rules authorised by Article 36 … may in fact be adopted in Community harmonisation measures … which may have the effect of restricting the freedom of Member States. The effect of the substitution of a Community system of animal health for the national systems is that Member States can no longer take unilaterally and in disregard of Community procedures the steps referred to in Article 36.[509]

137. The Court's judgement followed suit. Finding first that the Italian measure constituted a MEEQR, the Court stated that national measures were only justifiable under Article 36 if they were *necessary* to attain the particular public interest objective – *in casu*, to protect human and animal health. However, it then insisted that such a national measure *would no longer be necessary* or justified if an adequate Community system was in place. In this regard, the Court accepted that secondary law could in principle protect a legitimate objective, stating that 'Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified …'.[510] The Court then explained that the Community system offered such protection by establishing uniform public health conditions for the production and distribution of meat. What is more, these conditions had to be checked and certified by the Member States of export and accepted by the importing Member State, subject to spot checks. The system therefore protected the public interest covered by the Italian measures. As a result, such national intervention was 'no longer

[507] *Simmenthal*, Case 35/76, EU:C:1976:180. Although *Tedeschi* (note 7) is generally recognised as establishing the first leg of the Exhaustion Rule, *Simmenthal* is also relied upon as an earlier authority for this principle. Ex. Opinion in *Delhaize Frères*, Joined Cases 2/82, 3/82 and 4/82, EU:C:1983:241 p.2992 and Opinion in *Campus Oil*, Case 72/83, C:1984:154, p. 2765 See also P. Oliver, *Free Movement of Goods in the EEC*, London, European Law Centre Limited, 1982, pp. 132 – 133, paragraph 8.14.
[508] Opinion in *Simmenthal*, Case 35/76, EU:C:1976:156*,* pp. 1894 – 1895.
[509] *Simmenthal*, note 507, p. 1877. See also *Bauhuis*, note 349, p. 9, where the Commission argues that 'national measures may only be adopted pursuant to Article 36 provided that measures have not been taken by the Community to protect the interests mentioned in Article 36'. Since the relevant EU rule had replaced national provisions to inspect bovine animals and swine, 'national measures based on Article 36 must be excluded'. The Court repeats this point at paragraphs 27 and 30. See also General Introduction, point 23.
[510] *Simmenthal*, *ibid*., paragraph 14.

necessary or, consequently, justified under Article 36'. By linking the possibility to 'justify' national measures in Article 36 to the existence, or not, of Community legislation, the Court re-established the essence of the rejected German proposal, discussed above. This link was repeated in numerous CAP-related judgements throughout the 1960s and 70s, where the Court ruled that national agricultural measures were pre-empted by secondary rules,[511] with[512] or without[513] explicit reference to the Treaty.

138. The essence of the *Tedeschi* Rule was therefore present in the Court's jurisprudence long before the *Tedeschi* judgement. Yet this case remains important for two key reasons. First, the judgement explicitly clarified the relationship between harmonisation and Article 36 by setting out the circumstances under which the latter can be ousted by the former. This transformed the *Tedeschi* Rule into an enduring principle that applied beyond the CAP. Indeed, while the possibility for exhaustive CAP rules to oust Article 36 had already been accepted, earlier judgements generally concerned agricultural products that were subject to very specific rules.[514] While some appeared to be of general application, others did not, even if they referred to ex. Articles 30 and 34 EEC and 'it (was) by no means a simple matter to decide which judgments are of general application and which are not'.[515] The same cannot be said of *Tedeschi*, which is widely accepted as applying beyond the CAP.[516]

[511] For further discussion of how the Court assesses regulatory relationships in the context of the CAP, see M. Waelbroeck 'The Emergent Doctrine of Community pre-emption - Consent and redelegation', *op. cit.*, pp. 555 – 567; P. Oliver, *Free Movement of Goods in the EEC*, *op. cit.,* pp. 208 – 218; F. Snyder, *Law of the Common Agricultural Policy*, Sweet & Maxwell, 1985; J. Usher, *Legal Aspects of Agriculture in the European Community*, Oxford, Clarendon Press, 1988; E. Cross, 'Pre-emption of Member State Law in the European Economic Community: A framework for Analysis', *op. cit.,* and R. Schütze, *From Dual to Cooperative Federalism'* , *op. cit.*, pp. 215 – 240.

[512] Ex. *Van der Hulst*, Case 51/74, EU:C:1975:9; *Tasca*, Case 65/75, EU:C:1976:30; *Pigs Marketing Board*, note 34; *Vriend*, note 34; *Irish Creamery Milk Suppliers,* Joined Cases 36 and 71/80, EU:C:1981:62 and *Van Luipen,* Case 29/82, EU:C:1983:25.

[513] Ex. *Geddo,* Case 2/73, EU:C:1973:89*; Van Haaster,* Case 190/73, EU:C:1974:113; *Van den Hazel,* Case 111/76, EU:C:1977:83; *Denkavit v Land-Nordrhein-Westfalen*, Case 195/84, EEU:C:1985:390; *Wulro*, note 32, *Commission v Belgium (Fruit & Vegetables)*, Case 255/86, EU:C:1988:63 and *Commission v Germany (Wine Enrichment),* Case 48/85, EU:C:1986:326.

[514] P. Oliver, *Free Movement of Goods in the EEC*, *op. cit.,* p. 215.

[515] *Ibid*.

[516] *Ibid*., p. 133. See also P. Slot, 'Harmonisation', *European Law Review*, 1996, vol. 21, no. 5, pp. 378 – 397, at p. 382; R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.*, p. 202; J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *Yearbook of European Law,* vol. 4, no. 1, 1984, pp. 169 – 205 at pp. 186 – 188; I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, p. 67 and L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', *op. cit.,* p. 56.

139. Second, an analysis of the party submissions and judgement could suggest that Member States only accepted to relinquish national regulatory autonomy as part of a wider 'deal', according to which secondary rules, and national rules adopted thereunder, would enjoy comparatively lighter scrutiny by reference to the fundamental freedoms. Indeed, Member States had frequently manifested antipathy towards the pre-emptive effect of Community legislation – for example, by refusing to adopt the German draft of ex. Article 36 EEC, by claiming that Article 36 constituted a reservation of national sovereignty [517] and, more generally, by the persistent adoption of measures going beyond the Community standard. It is true that the Court consistently faced down such challenges to drive forward market integration. Yet, a more nuanced position is evident in the *Tedeschi* case, which, in fact, sought to balance the pre-emptive effect of secondary legislation with two important acknowledgements: First, Community legislation must fulfil a regulatory function in order to pre-empt national powers and second, such legislation should enjoy a presumption of constitutionality before the Court.

1.1.2 Tedeschi v Denkavit

140. The Court's judgement in *Tedeschi v Denkavit* stemmed from a dispute over the lawfulness of the safeguard clause contained under Article 5 of the Undesirable Substances Directive.[518] This directive sought to harmonise rules on animal feed with the dual aim of ensuring free movement and protecting health. To this end, it listed undesirable substances that would not be tolerated above a certain level while also ensuring market access for unlisted substances. However, Article 5 laid out a safeguard mechanism to allow national control over unlisted substances in the following conditions:

1. Where a Member State considers that a maximum content fixed in the Annex, or that a substance or product not listed therein, presents a danger to animal or human health, that Member State may provisionally reduce this content, fix a maximum content, or forbid the presence of that substance or product in feedingstuffs. It shall advise the other Member States and the Commission without delay of the measures taken and at the same time give its reasons.

2. In accordance with the procedure laid down in Article 10, an immediate decision shall be made as to whether the Annex should be modified. *So long as no decision has been made by either the Council or the Commission the Member State may maintain the measures it has implemented*. (Emphasis added).

[517] See Italy's position in *Simmenthal*, note 507, p. 1882.
[518] Council Directive 74/63/EEC on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs, OJ. L. 38, 11 February 1974, pp. 31 – 36.

141. On the basis of Article 5, Member States had to notify national safeguard measures to the Commission but could maintain such measures as long as the Council or Commission did not issue any negative decision. Significantly, the Community procedure in Article 10, which enabled the Commission to either authorise or invalidate a national safeguard measure, also allowed the Commission's decision to be blocked by a simple majority of the Council, without it having to propose an alternative solution. Together therefore, Articles 10 and 5 (2) seemed to give the Council the 'last say' on the lawfulness of a national measure, as it had ultimate control to supervise the exercise of national discretion. When Italy adopted safeguard measures to prohibit imports of feed containing a certain level of potassium nitrate (*not* listed as an undesirable substance), Denkavit raised this very argument to challenge the compatibility of the directive's safeguard clause. Specifically, it claimed that the Council could 'paralyse any decision taken by the Commission' and enable an illegal national measure, which went beyond Article 36 EEC, to remain in force.[519] In responding to this claim, the Court first found that a harmonising measure such as the Undesirable Substances Directive (understood at the time as 'exhaustive') would oust Member State competence to regulate under ex. Article 36 EEC.[520] This finding gave rise to the Court's first clear statement of the *Tedeschi* Rule. The Court started by confirming what it had already held in *Simmenthal* – that ex. Article 36 EEC did not reserve certain matters to the exclusive jurisdiction of the Member States. National derogations from the free movement of goods were only allowed if justified. It then stated:

> Where in application of Article 100 of the Treaty, Community directives provide for the harmonisation of the measures necessary to ensure the protection of animal and human health and to establish Community procedures to check that they are observed, the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by that harmonising directive and recourse to Article 36 is no longer justified.[521]

142. According to the above paragraph, the following conditions[522] must each be fulfilled before Member States will be denied recourse to Article 36:

[519] *Tedeschi*, note 7, p. 1569.
[520] *Ibid*., paragraph 36. Far from contesting this finding of harmonisation, the Council and intervening Member States relied on this fact to justify the need for a safeguard clause.
[521] *Ibid.,* paragraph 35.
[522] For analysis of these requirements, see *infra* section 2.1.

1. The directive provides for *(exhaustive) harmonisation*;
2. The directive harmonises measures that are *necessary* to protect animal and human health;
3. There are procedures to *monitor compliance* with these Community measures.

143. Although not in the operative part of the judgement, the above paragraph has generally been the focus for judges, and academic commentary, in analysing the relationship between secondary EU law and national law, namely whether and the extent to which Member States are pre-empted from adopting unilateral public interest measures.[523] In this regard, it is interesting to observe that this 'original' *Tedeschi* Rule imposed three conditions to preclude national competence, unlike the current Exhaustion Rule, which will oust Treaty-based discretion once there is a relevant and exhaustive EU measure in place (i.e. condition one). This more elaborate conditionality reflects the lack of trust between the Member States and Community at the time – with the 'necessity' condition (condition two) emphasising the need for Community rules to meet a particular regulatory standard, and the 'monitoring compliance' condition (condition three) highlighting a suspicion between the Member States *inter se*. Yet neither condition has since played a substantive role, as the Court first ignored and then excluded them completely under the current formulation of the Rule. We will assess this evolution in section two below. For now, suffice is it to note that the above statement of the *Tedeschi* Rule constituted the original building block of what would become the Exhaustion Rule. Indeed, as illustrated in Part II, it has been widely relied upon, implicitly and explicitly, for over 40 years to pre-empt national competence to regulate goods. As such, the *Tedeschi* Rule can be correctly hailed as an essential step in assuring the free movement of goods and market integration.

144. Yet the Rule's significance for our research also lies in the fact that its pronouncement went hand in hand with the Court's validation of a potentially deficient safeguard clause. In particular, the Court confirmed that Article 5 of the directive was lawful, as long as measures adopted thereunder did not discriminate against imports. This element of the case is important in understanding what we have termed the '*Tedeschi* deal'. In particular, it suggests a possible link between national acceptance of the pre-emptive effect of secondary legislation and a degree of judicial deference to regulatory decisions taken at Community/EU level.

[523] See note 516.

1.1.3 The Tedeschi Deal

145. The essence of this apparent deal becomes clear if we analyse the successful submissions made by the UK and Council (and the Commission[524]) to counter Denkavit's challenge. In particular, the first two parties argued that safeguard clauses were key to securing the necessary agreement to legislate at Community level. Without them, Member States would simply refuse to give up their residual sovereignty under Article 36. The UK argued that safeguard clauses were an 'essential feature' of such directives, as they provided the 'only means whereby in relation to the directive the Member States can legally take action which it considers necessary to protect, for example, human health where such action would otherwise be contrary to the provisions of that directive'.[525] These submissions show that Member States no longer disputed the essence of the *Tedeschi* Rule, which is that harmonising rules would oust unilateral regulatory action. This position was not, at the time, particularly revolutionary, considering that Member States could simply veto any unwanted Community rules where key national interests were at stake. At the same time, it signalled a significant shift from Italy's insistence in *Simmenthal* that Article 36 reserved certain powers to the Member States, even in the presence of harmonisation. This shift was not, however, cost-free. To the contrary, the UK and Council invoked the constraints imposed by the *Tedeschi* Rule to defend the dubious safeguard mechanism, and as a result, the ability to adopt emergency national measures thereunder. In other words, they called for the Court to validate the safeguard clause as a *quid quo pro* for imposing regulatory constraints on the Member States.

146. By validating the safeguard clause, the Court seemed to accept the Member States' perspective. In particular, rather than invalidate Article 5 of the directive or subject it to explicit review under Articles 34 – 35 TFEU, the Court relied on the second dimension to the presumption of constitutionality. In other words, it consistently interpreted the provision with the Treaty, stating that the Commission could act in the absence of Council action to prevent unlawful national safeguard measures from being prolonged indefinitely. In doing so, the Court confirmed that secondary rules could avoid systematic scrutiny by direct reference to the Treaty's free movement provisions. This, in turn, would allow Member States to defend

[524] The Commission states in its response to the fourth question that 'the Council, when it exercises its powers in the field of harmonisation, is entitled to take the view that it is only possible to undertake harmonisation which is incomplete or accompanied by a safeguard clause'. *Ibid.*, p. 1561.
[525] *Ibid.*, p. 1565 at section D, paragraph 4, point (a).

national measures by showing compliance with the harmonised standard (or procedure). Such a possibility was not immediately obvious from *Tedeschi* itself, which concerned the validity of the safeguard clause, not the Italian safeguard measure adopted thereunder. However, as noted by Mortelmans, *Tedeschi*, read in light of subsequent case-law, 'implies that a national measure which implements a Community rule can never be a measure with equivalent effect in the sense of (ex.) Article 28 EC'.[526]

147. This reading of *Tedeschi* highlights the point made in Chapter One – which is that the two legs of the Rule are necessarily interlinked. In particular, national acceptance of the pre-emptive effect of secondary legislation seems to have been contingent on such legislation enjoying a certain presumption of constitutionality. This presumption, which underlies the second leg of the Rule insofar as Articles 34 – 35 TFEU are concerned, is of particular relevance for Member States seeking to enforce the *regulatory* effect of secondary measures. However, while implicitly accepted in *Tedeschi*, it would take over a decade for this presumption to be rendered explicit beyond the CAP.[527] Indeed, while the Court often relied exclusively on the pre-empting secondary measure to resolve the dispute, its approach to review remained largely incoherent.

1.2. The Second Leg Emerges Slowly

148. The Exhaustion Rule's second leg requires the Court to rely solely on an exhaustive secondary measure to assess a national measure, to the exclusion of Articles 34 or 35 TFEU. As with the *Tedeschi* leg, it is, in principle, only concerned with establishing the normative framework to review national trade rules, and remains neutral as regards their actual fate. With the exception of the CAP, however, the Court was initially reluctant to exclude the Treaty's free movement provisions from its analysis. In some cases, this approach was prompted by the fact that the national court or Commission specifically requested a Treaty-based. review. In other cases, reliance on primary law may have been necessary to bolster an understanding of

[526] K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market – towards a Concordance Rule', *op. cit.*, p.1328. See also M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution, op. cit.*, pp. 76 – 77.
[527] As discussed below, the Court pronounced the Exhaustion Rule in the context of the CAP in *Van den Hazel,* note 513, paragraphs 27 – 28 and in *McCarran*, note 34.

free movement that was not explicitly reflected in the secondary measure.[528] In a further category of cases, the Court invoked Articles 34 – 35 TFEU to confirm that the Member State could not avoid its free movement obligations. Indeed, while reliance on such provisions becomes superfluous where a national measure violates the secondary rule,[529] different considerations might be at play when the national measure is found to be compatible.[530] Such concerns notwithstanding, the Court's hesitant approach eventually gave way to an explicit acceptance of the second leg, and to the pronouncement of the Exhaustion Rule.

1.2.1 The Exhaustion Rule and the Common Agricultural Policy

149. The Court first pronounced the Exhaustion Rule's second leg in the context of assessing national measures adopted in the presence of a Common Organisation of the Market (COM). By way of background, COMs are the legislative structures through which the CAP achieves its objectives, as required under Article 40(1) TFEU. Although one single COM governs all agricultural products today, prior to 2007 there were 21 separate COMs for fields such as beef, sheep meat, pork and wine, each with its own specific regime. COMs generally take the form of 'European market organisations' and aim to reproduce at EU level similar conditions for trade as those that exist at national level. This includes compliance with the free movement of products,[531] unless otherwise authorised by the Treaty. In the early years of Community integration however, the relationship between the CAP and the free movement prohibitions was unclear. The ambiguity stemmed from the original drafting of ex. Article 38 (2) EEC, which states: 'Save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products'. The expression 'save as otherwise provided', coupled with the Treaty's silence regarding the Community's free movement obligations, nourished a belief, first, that Member States could derogate from the fundamental freedoms in the absence of Community rules, and second, that COMs, and national agricultural rules adopted thereunder, could derogate from the Treaty's free movement

[528] Ex. the Court often relied on Article 34 TFEU over Article 5 (1) of Directive 79/112/EEC (*op. cit.)* in order to promote the principle of mutual recognition, as recognised in *Cassis de Dijon*, note 176. See *supra*, Chapter One, point 98.
[529] See ex. *Parfümerie-Fabrik*, C-150/88, EU:C:1989:594. Here, the Court first established that an Italian measure had gone beyond what was authorised under the Cosmetics Directive (Directive 76/768/EEC, *op. cit.*). It then stated that it was no longer necessary to review the matter by reference to Articles 34 – 35 TFEU.
[530] Ex. In *Commission v Italy (Grapefruit)*, note 383, the Court held paragraph 15 that 'Member States are entitled to adopt protective measures only within the framework outlined by the harmonising directive'.
[531] See *Ramel*, note 347 and *Pigs Marketing Board*, note 34, paragraph 55.

provisions.[532] The Council therefore reproduced the free movement provisions in full in the original COMs, adopted in the 1960s, to guarantee respect for the free movement of goods.[533] However, this practice changed in the 1970s following two developments. First, the Court confirmed that the Member States had to comply fully with the free movement principles in the absence of Community CAP rules.[534] Second, Articles 34 and 35 TFEU (ex. Articles 30 and 34 EEC) were found to have direct effect.[535] The Court also confirmed that the Community could neither authorise national derogations from the free movement provisions[536] nor derogate itself from such provisions. Instead, it had to respect 'the unity of the market', which included compliance with the free movement provisions.[537]

150. These developments led the Council to start excluding direct Treaty references from COMs, a practice that was found to be compatible with the free movement of goods.[538] In *Pigs Marketing Board*, for example, the Court confirmed that Articles 34 – 36 form 'an integral part' of the COMs, even if those provisions were not specifically inserted to the legislation.[539] By clarifying that CAP rules could only have precedence over other common market measures if they complied with the free movement of goods,[540] the Court opened the door to relying *exclusively* on the COM to assess relevant national measures (i.e. the Exhaustion Rule). This possibility was explicitly accepted in *Van Den Hazel*, where the Court, having found that the national measure was prohibited by the COM on Poultrymeat, stated that 'an interpretation of Articles 30 to 37 of the Treaty', which had been requested by the national court, had been rendered 'superfluous'.[541] In *McCarran*, the Court also stated that a dispute falling within the

[532] This understanding of the relationship between agriculture and free trade has been acknowledged as a reasonable interpretation of the original EEC Treaty. See J. Usher, *Legal Aspects of Agriculture in the European Community*, *op. cit.*, p.14.
[533] Ex. *Variola*, Case 34/73, EU:C:1973:101, where the Court confirmed that the free movement provisions had exactly the same meaning under primary and secondary law.
[534] *Charmasson*, Case 48/74, EU:C:1974:137. See also *Commission v France (Potatoes),* Case 68/76, EU:C:1977:48, paragraph 21; *Commission v United Kingdom (Potatoes)*, Case 231/78, EU:C:1979:101, paragraph 15 and *Commission v France (Mutton and Lamb),* Case 232/78, EU:C:1979:215, paragraphs 7 and 8.
[535] See *Meroni*, Case 74/76, EU:C:1977:51, paragraph 13 and *Pigs Marketing Board*, note 34.
[536] See also *Commission v Ireland (Potato Imports),* note 357, paragraph 22, where the Court states: '… the Commission cannot, even by approving expressly or by implication a measure adopted unilaterally by a Member State, confer on that State the right to maintain provisions which are objectively contrary to Community law'.
[537] *Ramel*, note 347, paragraph 34.
[538] *Kramer & Others,* Joined cases 3, 4 and 6/76, EU:C:1976:114.
[539] *Pigs Marketing Board*, note 34, paragraph 55.
[540] *Ibid*., paragraph 37.
[541] *Van den Hazel*, note 513, paragraphs 27 – 28.

remit of a COM must be first examined by reference to that COM, and not the general common market provisions.[542]

151. Oliver notes on this basis that '… a national measure, like a horse in a steeplechase, must first clear the fence of the common market organisation before the fence of (ex.) Articles 30 and 34. If it falls at the first fence, there is no need to consider (ex.) Articles 30 and 34'.[543] This is deemed as the appropriate approach, given that the COM often contains specific provisions related to the national measure in question.[544] At the same time, as noted by Gormley, 'whilst Oliver's steeplechase is an appropriate course for examining national measures, when the Community legislation is tested for compatibility with the provisions of the Treaty, the test is in the starting stalls'.[545] This is because Community rules – and the national rules adopted thereunder – enjoy a wider margin of discretion when it comes to justifying potential barriers to trade.[546] This margin could be particularly pertinent in cases where the national measure does not 'fall' at the first fence, but is found to comply with secondary rule. The question, in such cases, is whether the Court should presume the national measure to comply with the free movement of goods, or whether it should assess the national measures separately to ensure such compliance. As discussed throughout the research, the Court's response will be influenced by whether the national measure directly implements an EU legislative obligation, or results from the exercise of national discretion.

152. It seems, therefore, that the principles underlying the Exhaustion Rule have always influenced the Court's review of national measures adopted in the presence of CAP rules, notwithstanding sporadic reliance on the fundamental freedoms as direct norms of review.[547] The question was whether this approach would apply beyond the CAP. From one perspective, one might have considered the influence to be limited.[548] Indeed, the CAP, which has been

[542] *McCarran*, note 34. Diverging slightly from its wording in *Pigs Marketing Board*, where the Board's practices were found to violate the COM and ex. Articles 30 and 34 EEC, the Court concluded that 'having regard to the provisions of the Treaty relating to the free movement of goods', the national measures fell foul of the COM in pig meat.
[543] P. Oliver, *Free Movement of Goods in the EC*, *op. cit.,* p. 215.
[544] *Ibid*.
[545] L. Gormley, *Prohibiting Restrictions on Trade within the EEC*, 1985, Elsevier Science Publishing Company (North-Holland), p. 95
[546] Ex. *Kind,* Case 106/81, EU:C:1982:291; *Italy v Council (Potato Starch)*, Case 166/78, EU:C:1979:195*; Commission v Council (Lomé Convention)*, Case 218/82, EU:C:1983:369 *and Rewe-Zentrale,* note 347; See also L. Gormley, *ibid.,* Chapter 4 and *supra*, Chapter One, points 114 – 116.
[547] P. Oliver, *Free Movement of Goods in the EEC*, *op. cit.,* p. 214. See footnote 22 for examples of where the Court oscillated between referring exclusively to the Treaty, to the COM, and to both primary and secondary law.
[548] *Ibid*., p. 215.

described as the '*de facto* most centralised Community policy',[549] is in many respects a *lex specialis*, subject to specific Treaty provisions and policies that do not apply elsewhere. Moreover, when assessing the lawfulness of a national measure adopted in a field governed by a COM today, the Court may even opt to rely on *McCarran* as authority for triggering the Exhaustion Rule, as opposed to *Parfümerie-Fabrik* or *Vanacker*.[550] Still, the voluminous case-law generated by CAP legislation[551] has, in reality, enabled the Court to identify and expand on many of the EU's founding principles,[552] including those that govern regulatory relations more generally, such as the Exhaustion Rule. As just noted, it was in the context of the CAP that the Court first affirmed both the priority of the free movement provisions and the pre-emptive effect of EU legislation, while also acknowledging the regulatory margin enjoyed by the EU legislator and, where appropriate, the Member States. As we will demonstrate, the balance thus achieved, and its evolution over time, foreshadowed the legislative and judicial approach to internal market legislation more generally.

1.2.2 Articles 34 – 35 TFEU persist as Norms of Reference

153. The Court continued to rely on Articles 34 and 35 TFEU as direct norms of reference throughout the 1980s, to assess national measures adopted in the presence of exhaustive secondary rules. This approach was often prompted by questions asked to it. For example, in *Simmenthal*, the national court specifically asked whether the Italian measure constituted a MEEQR under the Treaty's free movement provisions. In response, the Court first found that the Italian measure was indeed a MEEQR before finding that Article 36 TFEU could no longer apply.[553] A similar approach can be observed in *Moormann*,[554] *Commission v Belgium (Fresh Meat)*[555] and *Commission v Italy (Grapefruit)*.[556] In *Commission v Germany (Animal Feed)*[557] and *Piageme I*,[558] the Court, having established that the Member State failed to fulfil its

[549] R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* p. 217.
[550] *Ulf Hammarsten,* C-462/01, EU:C:2003:33, paragraph 24. See also *CIWF*, note 329.
[551] See F. Snyder, *Law of the Common Agricultural Policy*, *op. cit*., p. 55.
[552] These included major institutional, financial and legal developments such as the Luxembourg accords, delegation of discretionary powers to the Commission under national supervision, the notion of financial solidarity, the Common Customs Tariff and extending the prohibition of charges having equivalent effect to external trade originated under the CAP. See J. Usher, *Legal Aspects of Agriculture in the European Community, op. cit.,* p. 2.
[553] *Simmenthal*, note 507.
[554] *Moormann*, Case 190/87, EU:C:1988:424.
[555] *Commission v Belgium (Fresh Meat),* Case 304/88, EU:C:1990:284.
[556] *Commission v Italy (Grapefruit)*, note 383.
[557] *Commission v Germany (Animal Feed),* Case 28/84, EU:C:1985:386.
[558] *Piageme I*, note 452.

obligations under exhaustive Community rules, reinforced its findings by referring also to Article 34 TFEU.

154. In other cases, the Court moved beyond giving a mechanical response to the question put to it by considering that the dual normative basis was necessary, either to prevent Member States from infringing the free movement principles or to justify national protective measures that might otherwise infringe the Treaty. This more considered and principled reliance on the fundamental freedoms can be seen in the Court's assessment of various national measures adopted within the framework of the Waste Oil Directive.[559] While the Court's judgement did refer directly to Articles 34 or 35 TFEU, it also assessed the relationship between primary and secondary law according to the two dimensions to the presumption of constitutionality, discussed in Chapter One – those being, deference to the EU legislative standard, and a presumption of consistent interpretation. In doing so, the Court paved the way for the second leg of the Exhaustion Rule.

155. The Waste Oil Directive was an early environmental protection measure, adopted with the dual aim of protecting against the hazards of disposing waste oils and ensuring market integration. Articles 2, 3 and 4 required Member States to ensure that waste oils were collected and disposed of safely, and preferably by recycling, while Article 5 allowed national zones of collection and/or disposal to be set up. On the face of it therefore, Article 5 appeared to grant Member States wide scope to regulate the field. The question was whether national exercise of such authorised discretion would be subject to the same level of scrutiny as applied to unilateral national rules, and if so, whether such an approach would be facilitated by the second leg of the nascent Exhaustion Rule. The Court first considered this matter in *Inter Huiles*.[560] As discussed in Chapter One, the French measure at issue in this case had relied on Article 5 to divide France into geographical zones, with one collector of waste oil per zone. When Inter Huiles began collecting waste oil without approval, proceedings were brought against the company for having contravened the French rules. Inter Huiles responded that those rules constituted an unjustified MEEQR on exports and the Court was asked to intervene. Interestingly, the referring court only mentioned Articles 34 *et seq*, not the Waste Oil Directive. However, the status of this directive was key to the applicant's submissions, which suggested that national rules adopted thereunder should be considered, not in relation to Articles 34 – 35 TFEU, but

[559] Directive 75/439/EEC, *op. cit*.
[560] *Inter Huiles,* note 369.

exclusively in the context of the directive, which specifically permitted the granting of exclusive rights to collect. It stated:

> … the French legislation is lawful in the context of that directive. The national provisions have the same fundamental objectives as the Community directive, namely the protection of the environment and the recycling of waste oils. Furthermore, the requirement of not obstructing Community trade is only a secondary objective which may be subordinated to the achievement of others and the restrictions challenged by the defendants are among the possibilities envisaged by the directive and, more specifically, by Article 5 thereof. [561]

156. The Commission unsurprisingly disagreed, holding, first, that the French measure had breached Article 35, and second, that it could not be justified under Article 36 given the availability of less restrictive alternatives. This finding in relation to Articles 36 indicates that the Commission did not view the Waste Oil Directive as instituting exhaustive harmonisation.[562] AG Rozès, however, took a different approach, and directly tackled the applicants' argument that application of the free movement principles was somehow pre-empted by the adoption of harmonising rules. Confirming, first, that the prohibition on quantitative restrictions and measures having an equivalent effect in trade under Articles 34 and 35 TFEU bind the Community institutions, she held as follows:

> '… the compatibility of the national legislation in question must be considered primarily in the light of the directive, *in so far as it may be presumed to be in conformity with the Treaty*. Any direct comparison with the Treaty without looking first at the directive would appear to be incompatible with the Court's decisions in Tedeschi and Ratti. The provisions of the Treaty need be referred to only in so far as an interpretation of the directive is necessary in order to assess the validity of the national provision and, in particular, where one of the interpretations suggested appears to be contrary to the Treaty, while others appear to be compatible with it. In such a case, I consider that the interpretation which conforms to the Treaty must be adopted.[563]

157. In short, AG Rozes interpreted *Tedeschi* and *Ratti* as requiring national measures to be assessed by reference to existing directives, presumed to conform to EU primary law. Where these directives had multiple interpretations, one of which could contravene the Treaty, direct reference to the Treaty must be made to ensure constitutionality. This meant that the goal of protecting the environment would have to be attained concurrently with the free movement of

[561] *Ibid*., p. 560, first paragraph. See also the arguments raised by France at pp. 561 – 562. These arguments were subsequently repeated in *Rhône-Alpes Huiles*, Case 295/82, EU:C:1984:48, p. 579, second paragraph.
[562] See also Commission submissions in *Commission v France (Waste Oils)*, Case 173/83, EU:C:1985:56.
[563] Opinion in *Inter Huiles*, note 200, p. 571, paragraph 3. (Emphasis added).

waste oils, as required by the directive's preamble. In other words, Article 5 measures could not prevent the free circulation of waste. The Court agreed that while Article 5 could be interpreted as authorising exclusive rights to collect waste oil, this was not the only or correct interpretation. Given the directive's dual purpose, 'an efficient and coherent system of treatment for waste oils' could not 'create barriers to intra-Community trade …'. This finding was 'reinforced by Article 34 of the EEC Treaty, which prohibits all measures having an effect equivalent to a quantitative restriction on exports'. [564] The Court then concluded that the French measures breached both the directive and the 'Community rules on the free movement of goods'.[565] This position was confirmed one year later in *Rhône-Alpes Huiles*,[566] where the Court reiterated that the Waste Oil Directive and free movement rules prevented restrictions on the export of waste to other Member States, whether by holders or collectors of waste. Notwithstanding requests by parties, the Court refused to 'dis-apply' the Treaty's free movement rules, opting instead to interpret the directive explicitly by reference to it and finding that the French measure contravened both the Waste Oil Directive and primary law.

158. By consistently interpreting secondary law to ensure compliance with the fundamental freedoms, the Court acknowledged that such legislation could be limited by the second dimension of the presumption of constitutionality, that being, the presumption of constitutional construction. However, as discussed in Chapter One, the presumption of constitutionality also assumes that adopted legislation is Treaty compliant. As a result, the Court should grant the Community legislator a wide margin of manoeuvre to balance various policy objectives, with national measures, adopted and reviewed thereunder, potentially enjoying greater scope to justify potential barriers to trade than under Treaty-based discretion. This margin is illustrated in *ADBHU*,[567] which again questioned the lawfulness of the French system for collecting and disposing of waste oils. Specifically, – the impugned national rule concerned a national prohibition on the burning of such oils, except in certain specified circumstances. The national court also asked whether the directive itself was valid by reference *inter alia* to the free movement principles. Turning first to the validity of the directive, the Court affirmed that the principles of free movement of goods and competition, while 'general principles of Community

[564] *Inter Huiles*, note 369, paragraphs 9 – 12.
[565] *Ibid*., paragraph 16.
[566] *Rhône-Alpes Huiles,* note 561.
[567] *ADBHU,* note 350.

law',[568] were not 'absolute' but were subject to certain justified limitations.[569] This included environmental protection, which the Court acknowledged for the first time as 'one of the Community's essential objectives'.[570] Against this backdrop the possibility to create disposal zones and require permits under Articles 5 and 6, while restrictive of trade and competition, was proportionate and non-discriminatory. The Court then confirmed that the French rules were allowed under the directive, since the latter required Member States to prohibit disposing waste oil in a manner that harmed the environment. The Court made no reference to the Treaty in its conclusions.[571] Nor did it classify the national discretion allowed under the Waste Oil Directive as minimum harmonisation subject to review under Treaty ceiling – as had been suggested by the Commission.[572] Rather, national options under the directive appear to have been viewed as authorised discretion (or legislation-based discretion), to be assessed within the context of an exhaustively regulating Community framework. This approach, which mirrors the Court's analysis of the safeguard clause in *Tedeschi*, is based on an implicit acceptance of the Exhaustion Rule's second leg and has real consequences for judicial review in practice. In *ABDHU* for example, it prompted the Court to assess the validity of a national rule by exclusive reference to a directive that gave more weight to environmental concerns in the balance with free trade than may have been allowed under Treaty-based discretion. Indeed, a Member State invoking the latter would have had to show its measure was proportionate. In *ABDHU,* however, compliance with the Waste Oil Directive was sufficient to validate the French measures. This interpretation of the directive was rendered explicit in *Vanacker & Lesage* where the Court stated that the collection of waste oil had been 'regulated in a harmonised manner at Community level'.[573]

1.2.3 Establishing the Exhaustion Rule

159. *Inter Huiles*, *Rhône Alpes Huiles* and *ABDHU*, while referring to primary law, show both dimensions of the presumption of constitutionality infiltrating the Court's reasoning. This, in turn, paved the way for an explicit recognition of the Exhaustion Rule's second leg. In

[568] *Ibid*., paragraph 9.
[569] *Ibid*., paragraph 12.
[570] *Ibid*., paragraph 13.
[571] *Ibid*., paragraph 29.
[572] In *ADBHU* (note 350), the Commission argued (at p.542) that the Waste Oil Directive enabled France to 'go further' than the harmonised system by allowing only industrial use of oils as fuel. However, from the Court's perspective, the French rules did not depart from the system provided by the directive because they corresponded to its environmental aims.
[573] *Vanacker & Lesage*, note 1, paragraph 9.

particular, by emphasising the obligation of consistent interpretation, these cases opened the door to excluding Articles 34 – 35 TFEU as direct norms of reference. However, they also granted national implementing measures the same presumption of constitutionality as enjoyed by the underlying secondary legislation. This logic underpinned the Court's first explicit pronouncement of the second leg outside the context of the CAP in *Parfümerie-Fabrik*,[574] and eventually led to its statement of the Exhaustion Rule in *Vanacker & Lesage*.

160. *Parfümerie-Fabrik* is, on the face of it, an unremarkable judgement. The Community legislation that led to this dispute was the Cosmetics Directive,[575] adopted in 1976 with the dual aim of furthering the free movement of cosmetic products and protecting public health and consumers.[576] The directive harmonised relevant standards for cosmetics, with a market access clause for compliant products. These standards included various consumer protection measures, such an exhaustive list of obligatory labelling requirements under Article 6 (1) as well as an option, under Article 6 (2) (or Article 6 (3) after an amendment) for Member States to adopt 'all measures necessary' to prohibit misleading statements in the labelling, presentation for sale and advertising of cosmetic products. By omitting any guideline as to the parameters of such national action, Article 6 (2) appeared to give Member States significant discretion to control misleading statements. Indeed, it was relied upon by Italy to extend the labelling requirements under Article 6 (1) by requiring references to the quality and quantity of the substances contained in the cosmetic product. Considering that such national requirements went beyond the directive, Parfümerie-Fabrik challenged the Italian rules for hindering market access of its cosmetics, in violation of the Cosmetics Directive and Article 34 TFEU. Turning first to compatibility of the Italian rules with the directive, the Court found that the requirements set out in Article 6 (1) were exhaustive and could not be extended under Article 6 (2), particularly when this required traders to adapt labels to include additional information. Moreover, Italy's aim of protecting consumers could have been achieved by less restrictive means – such as a general prohibition of any indication that could mislead consumers. Accordingly, the directive precluded the Italian rules. The Court then considered whether the Italian rules also violated Article 34 TFEU. Pronouncing for the first time the second leg of the Exhaustion Rule (outside the context of the CAP), it stated:

[574] *Parfümerie-Fabrik*, note 529.
[575] Directive 76/768/EEC, *op. cit*.
[576] While the Court generally considers the Cosmetics Directive to be concerned with consumer protection, this goal was not explicitly mentioned when the directive was first adopted.

> Since the directive has provided exhaustively for the harmonization of national rules on the packaging and labelling of cosmetic products, it is not necessary to give a ruling on the interpretation of (ex.) Article 30 of the Treaty as requested by the national court.[577]

161. Thus, the Court's negative appraisal of the Italian rule by reference to the directive disposed of the matter, rendering an additional review by reference to the Treaty 'unnecessary'. Moreover, while the Court only referred to Article 34 TFEU in the above statement, its finding implicitly incorporated the *Tedeschi* leg of the Rule, given that Italy could not rely on Article 36 or a mandatory requirement to justify its measure.

162. The Court explicitly merged these two legs four years later in *Vanacker & Lesage*.[578] This case stemmed from criminal proceedings, brought against the defendants for having collected and transported waste oil in France without approval, in violation of French legislation. A question was raised as to whether this legislation limited approval to collect and transport waste oil to French undertakings only, and if so, whether this contravened the Waste Oil Directive and the Treaty's free movement rules. AG Lenz first opined that the French measures had restricted, not the free movement of goods, but the free movement of services (Article 56 TFEU) because they prevented unapproved non-French companies from providing a service in France.[579] However, the Court did not follow this reasoning. Instead, it opened its judgement with a statement that, for the first time, joined up the *Parfümerie-Fabrik* and *Tedeschi* lines of jurisprudence in what would henceforth become – what this research refers to as – the Exhaustion Rule:

> It must be observed, first, that, since the question of the collection of waste oil has been regulated in a harmonised manner at Community level by the directive, any national measure relating thereto must be assessed in light of the provisions of the directive and not of (ex.) Article 30 to 36 of the Treaty.[580]

163. The Court then summarised the directive's aims of ensuring the safe collection and disposal of waste oils, preferably by recycling. It also emphasised that Member States could not establish a system of zones that precluded the export of waste oils, as had been confirmed

[577] *Parfümerie-Fabrik*, note 529, paragraph 28.
[578] *Vanacker & Lesage*, note 1.
[579] Opinion in *Vanacker & Lesage*, C-37/92, EU:C:1993:79, paragraph 43 *et seq*.
[580] *Vanacker & Lesage*, note 1, paragraph 9.

in previous case-law. As a result, a national zone system preventing non-national undertakings from becoming approved collectors of waste oil was incompatible with the directive.

1.3 From an *Ad Hoc* 'Exhaustion Approach' to a Systematic Rule

164. Sections 1.1 and 1.2 above outline the main steps leading to the first judicial pronouncement of the Exhaustion Rule outside the context of the CAP. However, prior to this, and throughout the 1990s, there was no explicit restriction on referring to Articles 34 – 35 TFEU as a norm of reference in the presence of harmonisation. As a result, the Court would sometimes refer to primary law in resolving regulatory disputes, while other times relying solely on the exhaustive secondary rule. In this section, we seek to explain how and why this incoherent approach eventually evolved into a systematic Exhaustion Rule. To do so, we first categorise the Court's various analytical approaches to assess national implementing measures. We then compare these approaches, noting their points of convergence and divergence. In the final section, we highlight the difficulties with relying on the Treaty in the presence of exhaustive legislation, which, when coupled with the advantages of the 'exhaustion approach', led to a more generalised 'Exhaustion Rule'.

1.3.1 The Court's Analytical Approaches

165. Judicial assessment of a national measure adopted in the presence of harmonisation until the mid-1990s followed one of four analytical approaches, which we have entitled the exhaustion approach, the classic approach, the mixed approach and dual analysis. As outlined below, each approach accepts the pre-emptive essence of the *Tedeschi* Rule, which is that exhaustive secondary measures regulating a field of shared competence will oust all Treaty-based national regulatory discretion. However, they diverge in the role afforded to primary law in the judicial assessment, which can have both procedural and substantive consequences.

A. The Exhaustion Approach

166. The exhaustion approach is the Court's earliest version of the Exhaustion Rule. Specifically, it allowed the Court to rely *exclusively* on the exhaustive secondary legislation to assess the lawfulness of implementing national measures, making no reference to primary law.

As we have noted, this approach has always applied in CAP-related cases,[581] even before the *Tedeschi* judgement. It also became relatively common outside the CAP after *Tedeschi*, despite the fact that the Court had not yet pronounced the second leg of the Exhaustion Rule. For example, in *Ratti*, the Court relied on the exhaustion approach to preclude national conditions that were 'more restrictive … more detailed or in any way different' from those of the directive, without referring to Article 34 TFEU (unlike the Commission).[582]

167. The same approach was taken in *Commission v United Kingdom (Dim Dip)*.[583] At issue was a UK safety requirement for motorcars to be equipped with 'dim-dip' lights, which was being challenged for going beyond Directive 76/756/EEC on the installation of lighting devices to cars.[584] The Court agreed, although made no reference to Article 34 TFEU. Having established that the directive exhaustively harmonised the field,[585] it held that 'Member States cannot unilaterally require manufacturers who have complied with the harmonized technical requirements … to comply with a requirement which is not imposed by that directive, since motor vehicles complying with the technical requirements laid down therein must be able to move freely within the common market'.[586] Similarly, in *Commission v Denmark (Dangerous Substances),*[587] the Court held that the Dangerous Substance Directive[588] had left the Member States with no 'scope to introduce other measures in their national legislation'.[589] Further examples of this approach can be observed in a number of CAP-related judgements delivered post-*Tedeschi,* including *Denkavit v Land-Nordrhein-Westfalen, Wulro*, *Commission v Belgium (Fruit & Vegetables)* and *Commission v Germany (Wine Enrichment)*.[590]

168. The Court generally relies on the exhaustion approach to invalidate the contested national rule and pursue the goal of market integration. However, the Rule can also be relied upon to pursue the regulatory effect of EU legislation. This arises when the Court authorises a

[581] See *supra*, section 1.2.1. (The Exhaustion Rule and the Common Agricultural Policy).
[582] *Ratti*, note 33, paragraph 27, and Commission submissions, pp. 1636 – 2637.
[583] *Commission v United Kingdom (Dim Dip),* Case 60/86, EU:C:1988:382.
[584] Council Directive 76/756/EEC on the approximation of the laws of the Member States relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers, OJ L. 262, 27 September 1976, pp. 1–31.
[585] *Commission v United Kingdom (Dim Dip)*, note 583, paragraphs 9 – 11.
[586] *Ibid*., paragraph 12.
[587] *Commission v Denmark (Dangerous Substances),* Case 278/85, EU:C:1987:439.
[588] Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ 196, 16 August 1967, pp. 1 – 98.
[589] *Commission v Denmark (Dangerous Substances),* note 587, paragraph 12.
[590] See *supra*, note 513 for references.

national measure on the sole basis that it stayed within the margins of what was authorised. In *Bodin*, for example,[591] the Court relied on the exhaustion approach to validate a Belgian rule that fixed a maximum height for lorries on the simple grounds that it complied with Directive 85/3 on the weight and height of certain vehicles.[592] The Court also confirmed that national rules which were 'in conformity with the limits laid down in the Community directive cannot be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of (ex.) Article 30 of the Treaty.'[593]

B. The Classic Approach

169. The classic approach to assessing national measures in the presence of harmonisation is so called because it mirrors how the Court generally assesses national measures in the absence of harmonisation. Accordingly, the Court first establishes whether the national measure conflicts with Articles 34 – 35 TFEU. If it does, the Court will turn to the question of whether the national measure can be justified under Article 36 TFEU or by invoking a mandatory requirement. It is at this stage that the free mover – generally the Commission or trader – invokes *Tedeschi* to preclude such justification, which, if successful, precipitates the national rule's invalidation. Indeed, strictly speaking, the classic approach will generally not result in a validation of the impugned national rule, as this would require a finding that Article 36 continues to apply, thereby transforming the situation into an 'in the absence of harmonisation' situation.[594] The classic approach, which corresponds to the first leg of the Rule, was taken in *Simmenthal*,[595] *Moormann*,[596] *Van den Burg*,[597] *Commission v Belgium (Fresh Meat)*,[598] *Commission v Italy (Grapefruit)*.[599] It can also be seen in *Ardnoldus Van der Laan*,[600] *CIWF*[601] and *Hedley Lomas*,[602] although the latter three judgements were delivered after the Court pronounced the Exhaustion Rule.

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[591] *Bodin,* Case 241/86, EU:C:1987:280. For further examples of such cases, see Part II (Chapter One), cases discussed under 'integrative effect'.
[592] Council Directive 85/3/EEC on the weights, dimensions and certain other technical characteristics of certain road vehicles, OJ L. 2, 3 January 1985, pp. 14 – 18.
[593] *Bodin*, note 591, paragraph 13.
[594] Ex. *Campus Oil,* Case 72/83, EU:C:1984:256 and *Prantl,* note 138.
[595] *Simmenthal*, note 507.
[596] *Moormann*, note 554.
[597] *Van den Burg,* C-169/89, EU:C:1990:227.
[598] *Commission v Belgium (Fresh Meat),* note 555.
[599] *Commission v Italy (Grapefruit)*, note 383.
[600] *Arnoldus Van der Laan,* C-383/97, EU:C:1999:64.
[601] *CIWF*, note 329.
[602] *Hedley Lomas,* C-5/94, EU:C:1996:205.

C. The Mixed Approach

170. The mixed approach arises when the Court treats the prohibitions and authorisations contained in the secondary measure as synonymous with Articles 34 – 36 TFEU, leading to one conclusion regarding the validity of the national rule. This can arise in two scenarios. In the first, the Court, having taken an initial exhaustion approach to its analysis, adds on a finding in relation to the Treaty in the operative part of the judgment, without carrying out any substantive analysis of the latter. For example, in *Commission v Germany (Animal Feed),*[603] the Court found that German rules aimed at protecting animal health went beyond what was authorised by relevant Community directives. As those directives were exhaustive, they triggered the *Tedeschi* Rule and prevented justification under Article 36 TFEU. Having found that Germany had failed to fulfil its obligations under Community rules, the Court then concluded that there had also been a violation of Article 34 TFEU.[604] The second type of case relying on the mixed approach arises when the Court refers to both primary and secondary law as synonymous norms of reference, as illustrated below in relation to the Cosmetics Directive saga. Reliance on the mixed approach tends to result in a negative finding regarding the national measure and has limited relevance under the Exhaustion Rule.

D. Dual Analysis

171. Under the 'dual analysis' approach, the Court relies explicitly on Articles 34 – 35 TFEU as a separate norm of reference, leading to two conclusions: one by reference to the Treaty, and the other by reference to the exhaustive secondary measure. As such, this approach can include the classic or exhaustion approaches. The dual analysis approach can be both indirect and direct. When indirect, the Court initially determines that the EU secondary rule is valid by reference to Articles 34 – 35 TFEU. It then applies the exhaustion approach to review the impugned national measure and refers exclusively to the secondary measure in the operative part of the judgement. This indirect dual analysis approach can be observed in *ADBHU* and the AG Opinion in *Denkavit Futtermittel*.[605]

[603] *Commission v Germany (Animal Feed),* note 157.
[604] See also *Piageme I,* note 452 and *Van den Burg,* note 597.
[605] Opinion in *Denkavit Futtermittel,* note 158.

172. In the second scenario, Articles 34 – 35 TFEU are relied upon as direct norms of reference to assess the national measure, in addition to its assessment by reference to the secondary rule. This *substantive* assessment of the national measure by reference to primary law distinguishes the direct dual analysis approach from the mixed approach. A clear example can be seen in the infringement proceedings brought by the Commission against Italy for subjecting plants susceptible to fire blight to a systematic prior authorisation procedure.[606] In line with the Commission's claims, the Court first assessed the Italian rules exclusively by reference to Directive 77/93 on preventing harmful organisms in plants,[607] which it found had been breached. As a second step, the Court applied the classic approach to identify the Italian rule as an MEEQR, which could not be justified under Article 36, since the exhaustive directive had triggered the *Tedeschi* Rule. Similarly, in *Inter Huiles*, the Court, having found that the French measure contravened the Waste Oil Directive, stated that its findings were 'reinforced by (ex.) Article 34 of the EEC Treaty'. However, unlike the mixed approach, the Court specifically established that the impugned rule was disproportionate and could not be justified under the mandatory requirement of environmental protection.[608] A further example of the direct dual analysis can be seen in *Forest & Others*,[609] which found the national measure to be authorised by both the secondary measure and the free movement provisions.

173. The dual analysis approach can result in a positive or negative finding in relation to the national rule. Indeed, it tends to be relied upon by the Court when there is fear that the Member State might otherwise rely on the secondary measure to avoid its obligations under the free movement principles. As can be seen in *ADBHU*, specific reliance on the Treaty in such circumstances can ensure that the secondary rule is interpreted in a consistent manner with the Treaty, which adds constitutional weight to a finding that an impugned national measure is lawful. This gives the indirect dual analysis approach continued relevance today, as can be seen in the more recent judgements in *Swedish Match*[610]and *Schwarzkopf*.[611]

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[606] *Commission v Italy (Fire Blight)*, C-249/92, EU:C:1994:335. See also *Smanor*, note 390, *Denkavit Futtermittel,* C-39/90, EU:C:1991:267, and *Douwe Egberts*, C-239/02, EU:C:2004:445.
[607] Council Directive 77/93/EEC on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, OJ L. 26, 31 January 1977, pp. 20 – 54.
[608] *Inter Huiles,* note 369, paragraphs 12 – 14.
[609] *Forest & Others*, Case 148/85, EU:C:1986:438. See also *Jongeneel Kaas*, Case 237/82, EU:C:1984:44.
[610] *Swedish Match,* note 310.
[611] *Schwarzkopf*, note 350. See also *Diageo,* note 158.

1.3.2 Comparing the Analytical Approaches

174. The analytical approaches discussed above differ with regards to the role accorded by each to Articles 34 – 35 TFEU in assessing the national rule. Under the exhaustion approach, no explicit reference is made to primary law, although the relevant secondary measure is presumed to comply with the Treaty. For the other three approaches, Articles 34 – 35 TFEU play a direct role, whether to review the national measure (classic and direct dual analysis approaches), determine the constitutionality of EU legislation (indirect dual analysis approach) or reinforce the Court's findings in relation to EU legislation (mixed approach). The main question emerging from this divergence is whether reliance on one approach over another could have any consequence in practice.

175. The response to this question must be answered, at least for the most part, in the negative. This is because each approach must converge around their respect for three interlinked principles underpinning regulatory relationships in the internal market. These principles are, first, that secondary rules can both pre-empt Treaty-based discretion under the *Tedeschi* rule and authorise national action, even if, as noted above, the classic approach will generally not result in secondary rule being validated. Second, the hierarchy of norms, as well as the principle of EU primacy, must be respected. That is, national law must comply with EU law, while secondary EU measures must comply with the Treaty. Secondary law cannot therefore authorise Member States to contravene the Treaty. And finally, Articles 34 – 36 TFEU and the secondary rule constitute two separate but complementary norms of reference in reviewing such national action. As a result, an authorisation granted to the Member States in one norm is valid only if it is not prohibited by the other norm.

176. In most cases, the exhaustion approach ensures respect for these principles by requiring the Court to consistently interpret secondary rules by reference to the Treaty, while the dual analysis and classic approaches do so by referring directly to Treaty as a norm of reference. The mixed approach presumes that a prohibition/authorisation under a secondary rule is synonymous with a prohibition/authorisation under the Treaty. This convergence helps to explain why, prior to its judgements in *Parfümerie-Fabrik* and *Vanacker & Lesage*, the Court did not seem to express a preference for any particular approach, with no 'clear criteria on the basis of which (the Court) makes such a distinction' between referring or not to Articles 34 –

36 TFEU as a norm of reference in the presence of harmonisation.[612] One decisive factor in following a particular approach was the way in which the Commission or national court had framed its question.[613] In *Ratti, Delhaize Frères*,[614] *Denkavit v Land-Nordrhein-Westfalen* and *Wulro*, for example, the national court only asked for a decision in relation to the relevant directives – leading to the exhaustion approach, while in *Simmenthal* and *Moormann* it specifically asked whether the national measure violated Article 34 TFEU, leading to the classic approach. Similar references to the Treaty were also made in response to the questions asked in *InterHuiles, ADBHU*, *Commission v Germany (Animal Feed)*, *Piageme I*, and *Commission v Italy (Fire Blight)*. Moreover, up until relatively recently, the Commission systematically opted for a 'dual track' in infringement proceedings, where it claimed that the Member States infringed both the secondary measure and the free movement provisions.[615]

177. The main factor in determining the compatibility of a national measure should therefore be the content of the relevant EU measure, interpreted consistently with the Treaty, and not whether the Court has referred to Articles 34 – 35 TFEU as a direct norm of reference. And having reviewed a vast number of judgments delivered by the Court in this field, we can conclude that this observation applies in most cases.[616] Still, closer analysis of certain judgements reveals that reliance on both norms of reference is not necessarily inconsequential. This conclusion stems from the fact that primary and secondary norms can differ fundamentally in terms of substance. This distinction is articulated by AG Trstenjak, who notes that EU legislation 'elaborates and shapes the provisions on the fundamental freedoms as specific rights and duties', while primary law provisions remain 'much more general' and can be 'complied with in different ways'. She goes on to find that 'these different depths of regulation inevitably lead to a substantive tension between primary law and fully harmonising secondary law, in particular between an 'authorisation under primary law' and a 'prohibition under secondary law' or vice versa'.[617] As a result, reliance on primary and secondary law can lead to 'different conclusions' in terms of what the Member States can and cannot do, with national discretion to regulate under Article 36 TFEU being generally broader than under secondary legislation.[618]

[612] Opinion in *Commission v Austria (Food Labelling),* C-221/00, EU:C:2002:419, paragraph. 44.
[613] See K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *op. cit*., pp. 359 – 360.
[614] *Delhaize Frères*, note 30.
[615] See *infra*, note 659.
[616] See Part II (Chapter Two).
[617] Opinion in *Commission v Germany (Ambulance Services)*, note 179.
[618] Opinion in *Unilever,* note 69*,* paragraph 56, second indent (p. 457).

178. Under the exhaustion and dual analysis approaches, the Court can rely on consistent interpretation to iron out any such substantive tensions, while maintaining a clear distinction between both norms. The mixed approach, however, risks conflating them, since it presumes that a substantive assessment carried out by reference to an EU legislative provision is the same as a Treaty-based assessment under Articles 34 – 36 TFEU. This could, in turn, mistakenly imply that discretion authorised (and restricted) by the secondary rule is synonymous with Treaty-based discretion, and that the exercise of legislation-based discretion will continue to be reviewed by reference to primary law. The matter – purportedly subject to exhaustive harmonisation – is essentially brought back under the direct purview of the broad and ambiguous Treaty provisions. As a result, regulators could consider that they have greater scope to regulate than they actually do. Free movers might also presume that the fundamental freedoms continue to apply in a systematic, strict and direct way, and that the scope of the authorisation in primary law, ex. under Article 36 TFEU, is subject to a more limited interpretation than it should be. This not only reintroduces the uncertainty that the harmonising measure had hoped to avoid. It also gives the power of deciding how to balance free movement and a public interest matter back to the Court. To illustrate these difficulties, we explore the Court's interpretation of Article 14 of the first Food Labelling Directive[619] (A), and a series of judgments delivered with respect to the Cosmetics Directive[620] (B).

A. The Piageme Saga

179. The Court had a chance to interpret Article 14 of the first Food Labelling Directive in *Piageme I*, which concerned the lawfulness of a Belgian rule that required labels of products sold in the linguistic region of Flanders to be in Dutch- without it being possible to use another language easily understood by purchasers.[621] The national court asked whether that rule was contrary to both Article 34 TFEU and Article 14 of the first Food Labelling Directive. The latter provision required information on food labels to 'appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed'. Responding to these questions, the Court, in the operative part of the judgment, found that the Belgian rule was indeed in violation of both norms. However, under the mixed approach, its

[619] Directive 79/112/EEC, *op cit*.
[620] Directive 76/768/EEC, *op. cit*.
[621] *Piageme I*, note 452.

conclusion in relation to Article 34 TFEU was not based on any substantive assessment and there was no consideration of whether the Belgian rule could have been justified under the mandatory requirement of consumer protection. Instead, the Court concentrated on establishing that the national rule was precluded under the directive before concluding that 'the obligation exclusively to use the language of the linguistic region constitutes a measure having equivalent effect to a quantitative restriction on imports, prohibited by (ex.) Article 30 of the Treaty'.[622]

180. By failing to perform a substantive review of the Belgian rule under ex. Article 30 (Article 34 TFEU), the Court seemed to equate its assessment under the directive with an assessment under primary law. In doing so, it implied that the scope of Article 14 of the first Food Labelling Directive was the same as that of the mandatory requirement of consumer protection allowed under the Treaty. This implication may have been reinforced by the traditional relationship between mandatory requirements and Articles 34 – 35 TFEU, where assessment of the former forms part of the initial analysis as to whether the latter was breached.[623] In other words, unlike Article 36 derogations that kick in once an MEEQR has been established, mandatory requirements 'are taken into account within the fabric of Article 34 and are separate from Article 36'.[624] Thus, the finding that Article 34 TFEU had been violated seemed to presuppose that the linguistic measure at issue in *Piageme I* would also be unlawful – and unjustifiable - *in the absence of harmonisation*. This, however, was an erroneous deduction. On the one hand, national regulatory discretion is often wider under Treaty-based discretion. Indeed, one reason to harmonise is to prevent national public interest rules that, while creating barriers, might otherwise be justified. On the other hand, the *de facto* scope for national action within these more restricted parameters can in some cases be broader than what Member States are authorised to do unilaterally, as long as this corresponds to the harmonised standard.[625] As a result, the Court should have separately assessed whether the Belgian rule was in fact justified under the Treaty, in line with the assessment it carries out in the absence of

[622] *Ibid*., paragraph 16.
[623] This understanding of mandatory requirements finds its origins in the necessity to narrowly construe Article 36 TFEU as an exception to the free movement of goods, which in any case could only be extended by an amendment to the Treaty. See S. Enchelmaier, 'Article 36 TFEU: General', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union*, Fifth Edition, Oxford, Hart Publishing, 2010, Chapter 8, pp. 215 – 312 at pp. 216 – 220. See also V. Hatzopoulos, 'La justification des atteintes aux libertés de circulation : Cadre méthodologique et spécificités matérielles', in E. Dubout & A. Maitrot de la Motte (éds.), *L'Unité des libertés de circulation : In varietate concordia*, *op. cit.*, pp. 202 – 229 at pp. 212 – 213.
[624] P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, p. 649.
[625] Either because the regulation must be adopted by all Member States and is no longer a trade barrier (ex. *Bauhuis*, note 349) or because the EU legislator reached a new balance between regulation and integration at EU level (ex. *ADBHU,* note 350).

harmonisation. While this would probably have led to the same conclusion under Article 34 TFEU, the Court would also have clarified that national action authorised under Articles 34 – 36 TFEU was distinct from action permitted under a harmonising measure.

181. The Court's failure to make this distinction, coupled with the general controversy surrounding the judgement,[626] resulted in further litigation[627] and prompted the Commission to issue an interpretative Communication to confirm and explain the Court's findings.[628] This included elaborating on why the Belgian rule violated Article 34 TFEU and setting out when official language requirements would or would not be considered lawful. Crucially, the Commission corrected *Piageme*'s erroneous amalgamation between primary and secondary law by specifying that language requirements applying to particulars that were not harmonised under the Food Labelling Directive would be subject to the principle of proportionality, under which Member States would have scope to justify their rules.[629]

B. The Cosmetics Directive Saga

182. The difficulties with *Piageme I* can also be seen with the case-law stemming from the 1976 Cosmetics Directive.[630] As noted in our presentation of *Parfümerie-Fabrik*, the Cosmetics Directive aimed to further the free movement of cosmetic products and protect public health and consumers by exhaustively regulating rules for the composition, labelling and packaging of cosmetics and ensuring market access for compliant products. At the same time, Article 6 (2)[631] required Member States to take "all measures necessary" to prohibit misleading labels, presentation and advertisements. Relying on this provision, Germany banned cosmetic products from using the term 'Clinique' on the basis that *Klinik* means hospital in German. The prohibition was subsequently challenged for violating both the directive and Treaty's free

[626] The European Parliament disputed the Court's judgement in *Piageme I* (note 451) and in 1992 adopted a Resolution on Consumer protection, public health and the internal market (OJ 1992 C. 94, 13 April 1992, p. 217, recital V), in which it stated that 'consumers will enjoy proper protection only if all information is always available in their own language'. This Resolution tied in with a written question to the Commission in the same year in which the European Parliament queried how *Piageme I* could be reconciled with consumer protection and asked when the Commission would propose an amendment to the directive to rectify the judgement. (OJ 1993 C. 95, p. 7).
[627] *Piageme II,* C-85/94, EU:C:1995:312. See also *Geffroy*, C-366/98, EU:C:2000:430.
[628] Interpretative Commission Communication concerning the use of languages in the marketing of foodstuffs in light of the judgement in the Peeters case, COM (93) 532 final, 10 November 1993.
[629] *Ibid*., pp. 3 – 4.
[630] Directive 76/768/EEC, *op. cit.*
[631] Or Article 6 (3) after an amendment in 1988. Both references used alternatively.

movement provisions. In his Opinion to the case,[632] AG Gulmann sought to classify Article 6 (2) as a minimum harmonisation clause, which allowed Member States to impose more stringent provisions on grounds of consumer protection [633] and submitted that it was for the national court to determine the lawfulness of the German rule. The Court did not formally follow this suggestion but instead classified the Cosmetics Directive as providing exhaustively for the harmonisation of relevant national rules. In doing so, it accepted that Article 6 (2), not Article 36, defined what protective national measures could be taken. [634] Yet despite this finding, the Court continued to review the German measure by reference to both the directive and Articles 34 – 36 TFEU. Moreover, the Court did not treat these norms of reference as distinct, as under the dual analysis approach. Nor did it consistently interpret Article 6 (2) by reference to the Treaty. Instead, it regarded both norms as synonymous – where Article 6 (2) was seen as akin to the mandatory requirement of consumer protection.[635] As subsequently noted by AG Cosmas, this approach transformed Article 6 (2) into a *de facto* minimum harmonisation clause, with national measures adopted thereunder subject to review by reference to both the directive and the Treaty ceiling (Articles 34 – 36 TFEU).[636] At the same time, the Court also scrutinised the German rule by reference to Article 34 TFEU, which resulted in that rule being struck down. The Court took the same approach in *Estée Lauder*.[637] Here, it assessed whether the national measure was proportionate by reference to both the 'exhaustive' directive and the Treaty. To do so, it relied on jurisprudence relating to the consumer protection in the framework of Article 34 TFEU and the Misleading Advertising Directive,[638] which instituted minimum harmonisation.[639] In *Unilever*, the Court did not mention the Treaty in its assessment or conclusions, but carried out a similar proportionality assessment of the national rule by reference to the Misleading Advertising Directive.[640]

[632] *Clinique,* note 35.
[633] *Ibid*., paragraphs 17 and 19.
[634] *Ibid*., paragraph 15.
[635] *Ibid*., paragraph 22.
[636] See *Unilever*, note 405, paragraph 54. Moreover, the Court based its conclusion in part on *Buet,* Case 382/87, EU:C:1989:198, which concerned the lawfulness of national measures adopted under a minimum harmonisation clause.
[637] *Estée Lauder*, note 403.
[638] Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L. 250, 19 September 1984, pp. 17 – 20.
[639] See K. Mortelmans, 'The relationship between the Treaty rules and community measures for the establishment and functioning on the internal market – towards a Concordance Rule', *op. cit.,* p. 1329.
[640] *Unilever,* note 405.

183. The Court's failure in the above cases to clearly distinguish between the impact of Articles 34 – 36 TFEU and the Cosmetics Directive simultaneously expanded and limited the scope for national regulatory discretion, which resulted in ambiguity, uncertainty and litigation. On the one hand, it allowed Member States to view Article 6 (2) as authorising scope for national action akin to what is possible under Article 36 TFEU, as implied by the French and Finnish submissions in *Estée Lauder*.[641] Yet the Court also suggested that its restrictive interpretation of what was 'necessary' to protect the consumer in the context of cosmetic products could apply to the more general mandatory requirement of consumer protection, thereby triggering the same issues as raised above in relation to *Piageme I.* National courts remained, in this context, unsure of the exact extent of discretion Member States actually retained – prompting a series of references that resulted in the abovementioned cases. The Court could have avoided at least some of this uncertainty by distinguishing the specific scope of the secondary rule from that of Articles 34 – 36 TFEU. This would have been possible under the exhaustion approach, which makes no direct reference to primary law and under the classic and dual analysis approaches, which perform a separate assessment by reference to both primary and secondary law. Yet direct invocation of Articles 34 – 35 TFEU under the classic and dual analysis approaches may also have caused difficulties, since the Court would have had to interpret and compare the primary and secondary norms.

184. The classic approach, for example, often requires the Court to first establish actual conflict between the EU legislation and Articles 34 – 35 TFEU, before explaining why Article 36 TFEU can no longer apply. This process not only ignores the second leg of the Exhaustion Rule. By engaging directly with Articles 34 – 36 TFEU, it can also prompt the Court to explicitly consider the quality of the various norms and/or their overlapping function, for example, by illustrating the adequacy of the EU standard before ousting the national rule as unnecessary. This can be seen in *Simmenthal*, where the Court first considered that national inspections at the border contravened Article 34 TFEU by making imports more difficult or costly. It then explained in detail why the exhaustive Community system protected the public interest pursued by the national rule,[642] before justifying the ousting of Member States'

[641] Opinion in *Estée Lauder*, C-220/98, EU:C:1999:425, paragraph 16.
[642] *Simmenthal*, note 507*,* paragraph 15 – 19. See in particular the AG Opinion, note 508, which refers to the 'unusually extensive and exhaustive' Community guarantees, which were 'superior' to those under the national systems. See also *Commission v Belgium (Fresh Meat)*, note 555 and *Moormann*, note 554, paragraph 11.

regulatory power. The opposite conclusion was reached in *Campus Oil,*[643] *Prantl*[644] and *Centre d'Insémination de la Crespelle*,[645] where the Court, having classified the national rule as an MEEQR, determined the Community protection to be inadequate and confirmed the persistence of national Treaty-based discretion.[646] A similar engagement with the quality of the EU norms can be seen under the dual analysis approach, where the Court often assesses – and validates – the high EU standard by reference to the Treaty, nothing the wide discretion enjoyed by the EU legislator to balance integration and public interest concerns. In doing so, it also validates the national measures adopted thereunder.[647] However, while potentially more satisfying to disputing parties, and sometimes necessary to confirm the constitutionality of EU legislation, systematic reliance on primary law to resolve regulatory disputes in the presence of (exhaustive) harmonisation can trigger the same problems experienced in the absence of harmonisation, including uncertainty, litigation and charges of judicial overreach.[648] By relying on secondary legislation as its sole norm of reference, the exhaustion approach can avoid, or at least temper, many such problems. This helps explain why it has been generally favoured by AGs,[649] commentators[650] and, eventually, the Court.[651]

1.3.3 The 'Exhaustion Approach' as the Court's Preference

185. The exhaustion approach directs the Court to refer exclusively to secondary legislation, as interpreted consistently with the Treaty, to determine the lawfulness of a national measure. This suspension of Articles 34 – 36 TFEU is possible, thanks to the pre-emption principle and the presumption of constitutionality, which, together, ensure protection for both the legislator's intention and the free movement of goods, while also reducing legal uncertainty.

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[643] *Campus Oil*, note 594.
[644] *Prantl*, note 138.
[645] *Centre d'Insémination de la Crespelle,* C-323/93 EU:C:1994:368.
[646] Reliance on the classic approach might also confirm the integrative effect of the EU legislation. For example, in *Hedley Lomas* (note 602) and *CIWF* (note 329), the Court, having established that national ban on exports constituted / could constitute a quantitative restriction, refused to consider whether it could be justified under Article 36 TFEU given that the Community rules harmonised the field. This approach allowed the Court to avoid assessing whether Article 36 TFEU would have extra-territorial application. See Part II, (Chapter Two), point 182.
[647] Ex. *ADBHU*, note 350 and *Swedish Match*, note 310.
[648] See General Introduction, point 12.
[649] See ex. Opinions in *Commission v Austria (Food Labelling),* note 612*,* paragraph 45 and in *Commission v France (Excise Duty on Tobacco)*, note 1.
[650] See K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market – towards a Concordance Rule', *op. cit.*, p. 1327 and K. Sorensen, 'Reconciling Secondary Legislation with the Treaty Rights of Free Movement' *op. cit*., p. 358.
[651] This shift is evident in *Piageme II,* note 627 and *Linhart & Biffl*, note 404, which resolved the first Food Labelling and Cosmetic Directive sagas. See *infra*, section 2.2.2. (Resolving the Cosmetics Directive Saga).

186. The convergence of these features allows the Court to rely on the comprehensiveness of EU legislation, rather than its substance, to assess and, where necessary, pre-empt overlapping national rules. In doing so, the Court essentially defers to the EU regulatory standard as it avoids analysing and comparing it with the national. This approach is evidenced in *Ratti*, where the enhanced consumer protection offered by the impugned Italian law was inconsequential to the Court, as it struck down the measure simply because it differed from the exhaustive directive. A similar analysis was undertaken in *Denkavit v Danish Ministry for Agriculture,* [652] *Commission v Denmark (Dangerous Substances)* ,[653] *Commission v UK (Dim Dip)*[654] and numerous other cases presented in Part II. Specifically, in these cases the Court invalidated the national rule, not because it was misguided or disproportionate, but simply because it went beyond what was authorised.[655] AG Mancini articulated this vision in *Dim Dip*, when he stated that the UK rule's value in terms of road safety was 'not the issue', the Court's only task being to interpret the directive and establish whether it authorised the UK to impose additional technical requirements. [656] Such disinterest in the quality of the EU legislative standard often leads to invalidation of the national regulation. Yet it also confirms operation of the *Tedeschi* deal, whereby the EU legislature is trusted to adopt measures that comply with the Treaty. This trust underlies numerous cases where national rules that comply with the EU standard are also presumed valid, without being reviewed under Articles 34 – 35 TFEU, thus reinforcing the regulatory effect of EU law.

187. This type of abstract analysis is particularly prevalent when the EU measure is considered as regulating the field, or when it directly conflicts with, or authorises, the national rule. In such cases, the Court can determine the lawfulness of that rule by exclusive reference to the EU legislation, without assessing its substantive content, and without engaging in potentially subjective or controversial constitutional interpretations. Yet this approach can also

[652] *Denkavit v Danish Ministry for Agriculture*, Case 29/87, EU:C:1988:299.
[653] *Commission v Denmark (Dangerous Substances*), note 584*,* paragraphs 12 and 22. See also *Commission v Germany (Animal Feed),* note 157 and *Denkavit v Land-Nordrhein-Westfalen,* note 513, where the Court dismissed the substantive merit of the impugned German measure, focusing instead on 'the effective scope of Community harmonisation in order to determine the precise extent of the residual powers of the Member States'. See also Opinion in *Commission v Germany (Animal Feed),* Case 28/84, EU:C:1985:305, p. 3098.
[654] *Commission v UK (Dim Dip)*, note 583.
[655] See Opinion in *Unilever*, note 69, p. 457, second paragraph. See also Opinion in *Commission v Germany (Ambulance Services)*, note 179, paragraph 108.
[656] Opinion in *Commission v UK (Dim Dip)*, Case 60/86, EU:C:1988:84, p.3928, paragraph 3.

lead to a number of difficulties, explored further in Part II (Chapter Two).[657] For example, the Court's willingness to protect the regulatory effect of EU secondary rules under the presumption of constitutionality could facilitate Member States in avoiding their obligations under the Treaty. It could also fuel the opposite fear, which is that the Court, under the guise of simply enforcing the EU measure, interprets the latter as pre-empting potentially legitimate national regulatory standards, so as to maximise free movement. Such concerns are compounded by strategic reliance on the exhaustion approach/Exhaustion Rule, where a litigating party claims – or disputes – that an EU measure is relevant and exhaustive, depending on its position in relation to free movement and regulatory protections. National courts and the Commission have often responded by asking the Court to assess the national measure by reference to primary law, notwithstanding the existence of an exhaustive EU measure. For example, the national court's request for a dual analysis in *InterHuiles* reflected its concerns that France, while appearing to comply with the Waste Oil Directive, had, in fact, contravened Article 35 TFEU. Requests for a classic approach were often made in cases that challenged national border controls of agricultural products,[658] possibly because the relevant secondary rules contained no market access clause. The Commission, for its part, has until recently dismissed the logic of the exhaustion approach/Rule, by systematically claiming in infringement proceedings that the national measure infringed both the secondary measure and the free movement provisions.[659] These trends explain why the Exhaustion Rule took so long to emerge. Indeed, while becoming more common from the late 1980s, the Court still relied on the other approaches throughout and beyond the 1990s.[660] They also highlight that suspending primary law is not always regarded as inconsequential, but rather as a mechanism to challenge the legislator's regulatory goals, or the free movement of goods, as the case may be.

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[657] See *supra*, Chapter One for the risks associated with the principle of pre-emption (point 31) and the presumption of constitutionality (point 54). See also Part II (Chapter Two), section 3.

[658] Ex. *Simmenthal*, note 507, *Moormann,* note 554, *Commission v Belgium (Fresh Meat)*, note 555, *Hedley Lomas*, note 602, *CIWF*, note 329. Although not always. See *Delhaize Frères*, note 30. See also *Arnoldus Van der Laan,* note 600, where the classic approach was relied upon to assess a national product standard.

[659] Ex. *Commission v Belgium (Fruit and Vegetables)*, note 513; *Commission v Germany (Wine Enrichment),* note 513; *Commission v Germany (Food Labelling)*, note 389; *Commission v Germany (Male Pigs)*, note 31; *Commission v Denmark (Waste Packaging),* C-246/99, EU:C:2002:477; *Commission v Austria (Food Labelling)*, note 397 and *Commission v France (Excise Duty on Tobacco)*, note 1. See also discussion *infra,* point 247.

[660] Ex. The Court relied on the classic approach in *Hedley Lomas*, note 602; *CIWF,* note 329; *Centre d'Insémination de la Crespelle*, note 645; *Commission v Italy (Grapefruit),* note 383; *Commission v Italy (Fire Blight)*, note 606 and, indirectly, in *National Farmers' Union*, C-241/01, EU:C:2002:604, while the mixed approach was relied upon in *Piageme I*, note 451 and *Clinique*, note 35.

188. For the exhaustion approach to evolve into a more generalised 'Exhaustion Rule', the Court would have to address such concerns. And indeed, it achieved this over the 1990s and early 2000s by developing a case-by-case approach to triggering and applying the Rule,[661] ensuring national acts of legislation-based discretion would be reviewed, and bolstering the hierarchy of norms through consistent interpretation or via the dual analysis approach.[662] These developments, while leading to a more active judicial role in interpreting and enforcing EU legislation,[663] are not inimical to reliance on the exhaustion approach/Rule. To the contrary, and as outlined in Chapter One, the Rule provides space to the Court to interpret EU legislation so as to determine whether the impugned national measure can stand. The Rule's added value, however, is to provide a framework of analysis that, by presuming the (exhaustive) secondary measure to be the sole norm of reference, contains and guides the Court. Within this structure, the Court is directed to defer to the EU legislative standard as a starting point, which it can then clarify to resolve a legislative ambiguity or ensure consistent interpretation, subject to justification. In this context, recourse to the dual analysis approach, while a necessary option, should remain exceptional.

189. As concluded in Chapter One, the Exhaustion Rule can, in this way, facilitate the Court in ensuring balance between the legislator's intention and the hierarchy of norms, while avoiding the difficulties associated with relying, unnecessarily, on primary law as a dual norm of reference. In particular, it allows the Court to clarify legislative ambiguities, without confounding legislative and Treaty-based discretion to wrongly expand the former or limit the latter (as under the mixed approach), and without systematically engaging in unnecessary constitutional interpretations (as under the classic and dual analysis approaches). This not only promotes economy of reasoning.[664] It also facilitates more specific rulings, better guidance for national courts and reduced uncertainty. Indeed, as discussed below, litigation regarding the interpretation of Article 14 of the first Food Labelling Directive, and Article 6(2) of the Cosmetics Directive only stopped when the Court applied the Exhaustion Rule to invalidate a national measure adopted thereunder.[665] A further, more general, advantage of the exhaustion

[661] See *infra*, section 2.1 (Triggering the Exhaustion Rule).
[662] Ex. *Swedish Match*, note 310 and *Schwarzkopf*, note 350.
[663] This is particularly so when the Court must identify and review acts of legislation-based discretion. For a critique of this process in an American context, see D. Meltzer, 'Preemption and Textualism', *op. cit.*, section II.
[664] See Opinion in *Commission v France (Excise Duty on Tobacco)*, note 200, paragraph 46. Sorensen also states that 'statistically and from the point of view of economy, it makes sense to focus on the question of whether national law complies with the secondary legislation'. See K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement' *op. cit*., p. 358.
[665] *Infra*, points 236 – 238.

approach/Exhaustion Rule is that it can apply beyond the context of free movement, such as in 'internal' CAP-related cases,[666] in private law[667] and even in relation to national restrictions on third-country imports.[668] This can encourage coherence by providing a generalised framework to assess internal market legislation that produces significant effects beyond the free movement context,[669] as well as EU regulation of situations beyond the internal market.

190. Against this backdrop, it is unsurprising that the *ad hoc* exhaustion approach overtook the other approaches to transform into the generally applicable Exhaustion Rule. In the next section, we detail the various steps taken over the 1990s and 2000s, through both the Court and Treaty changes, to facilitate this transformation.

[666] For a detailed discussion of the Court's early analysis of Community CAP legislation, see M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption – Consent and Redelegation', *op. cit*.
[667] Ex. In *María Sánchez*, C-183/00, EU:C:2002:255; *Commission v France (Product Safety)*, C-52/00, EU:C:2002:252 and *Commission v Greece (Product Safety)*, C-154/00, EU:C:2002:254, the Court adopted the exhaustion approach to establishing the pre-emptive effect of Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L. 210, 7 August 1985, pp. 29 – 33.
[668] Ex. *Monsanto Technology,* C-428/08, EU:C:2010:402 and *Budějovický Budvar*, C-478/07, EU:C:2009:521, discussed in Part II (Chapter One), point 65.
[669] As noted in *Lindqvist,* C-101/01, EU:C:2003:596, recourse to Article 114 'does not presuppose the existence of an actual link with free movement between Member States in every situation referred to by the measure founded on that basis'.

2. REFINEMENT (1990S TO THE PRESENT DAY)

191. The Court established the core principles underlying the Exhaustion Rule in the early years of European integration, with an explicit statement of the Rule being made in the wake of the Single European Act (SEA). In general, Member States seemed to understand and accept the consequences of the Rule, both procedurally (by excluding primary law as a norm of reference) and substantively (with respect to the resulting legislative obligations). Indeed, such is the advantage of relying exclusively on detailed and clear legislative measures to resolve disputes, when compared with broad and ambiguous Treaty provisions. At the same time, certain parties seemed to misunderstand the Rule as somehow facilitating a softer application of the free movement provisions. Others, while accepting the Rule in principle, relied on its *conditional effect* to dispute that it applied to the case at hand, in order to increase their chances of challenging (or justifying) national regulatory measures under the Treaty. Member States also sought to invoke newly adopted constitutional derogations, such as ex. Article 100a (4) EEC, to overturn the Rule.

192. This hesitant national reaction is not surprising, given the Rule's potential to impact the Court's assessment of an impugned national measure, whether by preventing justification under Treaty-based discretion or precluding direct application of Articles 34 – 35 TFEU. The Court's response was, in some cases, ambiguous and uncertain, as it struggled in particular to suspend the direct application of Articles 34 – 35 TFEU. However, by the early 2000s, it had clarified the conditions to trigger (section 2.1) and overturn (section 2.3) the Exhaustion Rule, while also reconciling its contentious second leg with the hierarchy of norms (section 2.2). Grounded in the pre-emption principle and presumption of constitutionality, these developments helped transform the Rule into a constitutional compass, that would guide the Court in resolving regulatory disputes in the presence of secondary measures.

2.1 Triggering the Exhaustion Rule

193. The Exhaustion Rule provides the Court with a standardised framework within which it can resolve regulatory disputes. In this context, parties no longer challenge the fact that Articles 34 – 36 TFEU will be ousted as direct norms of reference in the presence of a relevant and exhaustively regulating EU measure. Indeed, this acceptance implicitly underlies many cases of 'pure interpretation', where parties presume the EU secondary measure to be the sole norm

of reference and focus solely on obtaining an authoritative interpretation of a particular provision. Still, given the consequences that flow from the application – or not – of the Rule, disputes frequently arise over whether it should be triggered in the first place. In such cases, a party, while accepting the Exhaustion Rule in principle, might argue that the secondary measure is either irrelevant or not exhaustive, and that the national measure continues to be reviewable – and/or justifiable – by reference to primary law. The Court's resolution of these disputes, which highlight the conditional nature of the Rule, constitutes an important part of its jurisprudence regarding the interpretation and impact of secondary law. It is, moreover, a key means of maintaining respect for national regulatory autonomy, since the Court's generally nuanced and thorough approach can militate against a presumption of pre-emption. This section assesses how it carries out this task.

194. As noted earlier, the original *Tedeschi* judgement set out three conditions to trigger the *Tedeschi* Rule, namely, that the relevant directive (a) harmonised (b) the measures *necessary* to protect human or animal health and (c) established Community procedures to *monitor national compliance* with the Community's protective provisions. Yet today, the Court only requires the first condition to trigger the Rule. In this section, we first explore why conditions (b) and (c) never played a substantive role in triggering the *Tedeschi* (or Exhaustion) Rule (2.1.1), before outlining how the Court assesses whether the Exhaustion Rule does in fact apply (2.1.2) and the relevance of time (2.1.3).

2.1.1 Discarding 'Necessity' and 'Monitoring Compliance'

195. The Court's initial imposition of conditions (b) and (c) to oust Article 36 under the *Tedeschi* Rule reflected an absence of trust between the Member States and Community, and between the Member States themselves, at that time. Specifically, the 'necessity' condition ensured that pre-empting Community measures would meet a certain regulatory standard, while the monitoring compliance condition stemmed from a suspicion over whether other Member States would adhere to the Community rules. Yet the Court has never assessed whether these two conditions were in fact fulfilled. This section looks at the content of these conditions and explores the reasons for their diminished – and ultimately excluded – role.

A. Harmonising the 'Necessary' Measures

196. The 'necessity' condition to trigger the original *Tedeschi* Rule represents the regulatory function of secondary legislation. In particular, it implies that the common standard can only bar Member States from regulating a matter if it is set at a level 'necessary' to protect the relevant public interest. This interpretation is reflected both in the test of justification under Article 36 TFEU,[670] and in the Court's – related – finding that 'recourse to Article 36 … must gradually become unnecessary' as the Community legislator progressively harmonises the field.[671] Still, as discussed in Chapter One, the Court generally takes a hands-off approach when considering the appropriateness of (EU) regulatory standards. In doing so, it leaves the task of regulation to policy-makers and defers to resulting decisions, which need not be set at the 'highest level', in accordance with the most protective national regimes.[672] The EU legislator is, in this context, granted a wide margin of discretion that will not be judicially interfered with, unless a convincing argument is raised to the contrary, such as a misuse of powers or an unjustifiable breach of a fundamental freedom or right. Practically speaking, therefore, the 'necessity condition' has given way to the presumption of constitutionality, without ever playing a substantive role in assessing whether the *Tedeschi* Rule applies – so much so that it is not even referenced in the current formulation of the Exhaustion Rule.

197. Still, that the Court acknowledged this condition indicated an awareness of the national sensitivities involved in setting and maintaining Community regulatory standards. At the time of the *Tedeschi* ruling, such sensitivities were accommodated through the national veto, whereby Member States could block undesired harmonisation or, at the very least, negotiate a derogation from standards falling short of their national requirements.[673] In this context, the Court could presume that adopted legislation met the 'necessity' threshold to trigger *Tedeschi*. At the same time, by explicitly highlighting the latter as a requirement, the Court also signalled

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[670] J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *op. cit.*, p. 187. The Court has also confirmed that Member States can, under Article 36, prohibit imports, once 'necessary' to attain the particular public interest goal being pursued. See ex. *Van Bennekom*, note 96, paragraph 39.

[671] *Van Bennekom*, *ibid*., paragraph 14.

[672] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, pp. 60 – 61, Craig & de Búrca, *EU Law – Text, Cases and Materials*, *op. cit.*, p. 618 and *Safety High-Tech*, note 350, paragraph 47. Currall had previously suggested that the Community standard should correspond to the most protective national rules in place at the time, before ousting Article 36. However, he also acknowledged the difficulties that would ensue. J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *op. cit.*, pp. 187 – 188.

[673] See J. Currall., *ibid*.

that this presumption could be rebutted – for example, following a new scientific discovery or in the wake of a health crisis. In such circumstances, a Member State, no longer having faith in the Community standard, could invoke the safeguard clause, subject to compliance with the conditions laid down thereunder.[674]

198. As discussed in the General Introduction, majority voting under the SEA changed this dynamic, namely by restricting the scope for *ex ante* national solutions to undesirable harmonisation. Yet it simultaneously reinforced the Community's regulatory function under ex. Articles 100a (3) (now Article 114 (3) TFEU) and, by extension, the presumption that the 'necessity' condition would be met to oust national powers in the first place. However, ex. Article 100a also made provision for Member States to derogate from the Community standards no longer meeting the 'necessary' threshold. As such, and despite its minimal role in triggering the *Tedeschi* Rule, the necessity condition can guide the regulatory function of internal market rules, contribute to the presumption of constitutionality they enjoy and, to the extent that the common regulatory standard is inadequate, allow for certain national derogations.

199. One could nonetheless argue that the Court, by placing too much faith in the quality of the Community/EU standard, could allow low standards to proliferate or, alternatively, trigger undue deference to the EU legislator and a risk for the free movement of goods.[675] What is more, the possibility for national action in the presence of harmonisation is restricted in practice.[676] First, *Treaty*-based discretion following *Tedeschi* can only resurface if the Court deems the EU standard to be unlawful, or if a legislative amendment transfers regulatory control back to the national level. Second, Member States rarely succeed in meeting the strict requirements imposed by the legislative (safeguard clauses) and Treaty-based (Articles 114 and 193) avenues to regulate in the presence of harmonisation. Indeed, the Court generally applies a strong presumption *in favour* of the harmonised EU standard, which it will not overturn lightly. AG Saggio notes in this regard that 'if the harmonising legislation already accommodates a high level of protection in a particular area, there is no need to allow the States added powers in that respect'.[677] In such circumstances, concerned Member States, and other

[674] See ex. the Court's acceptance of national safeguard measures in the wake of the BSE crisis. For a presentation of the relevant case-law, see Part II (Chapter One), point 13.
[675] For discussion of this danger, see Part II (Chapter Two), sections 3.1.1 & 3.1.2.
[676] See *infra,* section 2.3 (Overturning the Exhaustion Rule).
[677] Opinion in *Kortas*, note 407, paragraph 24. See also Opinion in *Denmark v Commission (Food Additives)*, C-3/00, EU:C:2002:314, paragraph 66 and I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, pp. 21 – 23.

parties, have had to develop alternative avenues to challenge undesirable EU measures – for example, by taking the debate over the type and intensity of harmonisation to the political level [678] or by challenging adopted measures on other grounds, such as absence of competence[679] and violation of fundamental rights.[680]

B. Monitoring Compliance with the Community Standard

200. The third 'monitoring compliance' condition has also been cast aside, without it ever playing a significant role, either in activation of the *Tedeschi* Leg – or the Exhaustion Rule. That it was mentioned in *Tedeschi* in the first place reflected the fact that Member States can, in the absence of harmonisation, rely on Article 36 TFEU to ensure imports complied with national protective measures. In *Wursmer*, for example, the Court held that a Member State could impose non-discriminatory and proportionate requirements on importers, such as certification or other attestations, to verify that imported products conformed to national public interest regulation.[681] As noted by the AG:

> The Member States may … require that products imported from other Member States comply with their national rules in those areas. As a corollary … they may also require the importer to verify the conformity of the imported products with the rules in force, as long as that obligation applies to all products, including domestic products, which are placed on the market for the first time.[682]

201. When the Court delivered its judgement in *Tedeschi*, it seemed logical that such national powers to monitor compliance would only be pre-empted if the pre-empting Community rule also 'established Community procedures to check that the (Community's protective) measures were observed'.[683] Since Article 36 no longer applied to justify national rules, Member States would be obliged to carry out 'the appropriate checks ... within the framework outlined by that harmonising directive'.[684] This could be seen in *Simmenthal*,[685] where Italy was prevented from relying on Article 36 to justify its measure, not only because the Community system ensured

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[678] See S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, Chapter 15.
[679] *Ibid.*, pp. 166 – 175. See also I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, pp. 56 – 67.
[680] See ex. M. Möstl, 'Grenzen der Rechtsangleichung im europäischen Binnenmarkt', *op. cit.*
[681] *Wurmser,* Case 25/88, EU:C:1989:187. See also *Frans-Nederlandse Maatschappij voor Biologische Producten*, Case 272/80, EU:C:1981:312.
[682] Opinion in *Wursmer,* Case 25/88, EU:C:1988:551, paragraph 15.
[683] *Tedeschi*, note 7, paragraph 35.
[684] *Ibid*.
[685] *Simmenthal,* note 507.

that the exporting Member State conducted the necessary inspections, but because that Member State also had to certify this fact. In this regard, the Court stated:

> '… the aim of the system is to transfer supervision to the exporting Member State and to replace … the systematic measures of protection at the frontier with a uniform system so as to make multiple frontier inspections unnecessary *and at the same time to give the Member State of destination the opportunity of ensuring that the guarantees provided by the system of inspections thus standardized are in fact given*.'[686]

202. In other words, national discretion to adopt measures that monitored compliance with protective standards was only ousted because this feature had been assured by the Community measure itself. Without this guarantee of compliance, Member States may not have been willing to relinquish their powers of inspection under Article 36. This explains why the Court in *Tedeschi* duly incorporated the requirement that harmonising measures would also have to ensure compliance with their provisions.

203. Almost 20 years after *Tedeschi*, the UK raised this argument in *Hedley Lomas*,[687] where it claimed that Article 36 applied to justify an export ban on live sheep from the UK to Spain, on the grounds that Directive 74/577 on the stunning of animals before slaughter did not include a procedure to monitor compliance with its provisions.[688] Moreover, the Spanish implementing rules did not include any penalties for breach of its provisions. As a result, the UK was concerned that animals were being mistreated in Spanish slaughterhouses in contravention of the directive, which sought to avoid animal cruelty and suffering. It was on this basis that the UK complained to the Commission. However, the latter, on receipt of Spanish assurances, decided not to pursue the matter and suggested that an export ban would constitute an unjustifiable breach of Article 35 TFEU. Ignoring the Commission, the UK relied on Article 36 TFEU to refuse permission to Hedley Lomas to ship sheep to Spain. The company invariably challenged this refusal. It was in this context that the Court was asked whether Article 36 TFEU could indeed justify the export ban on the sole ground that Spain did not comply with a directive that neither included procedures to monitor application of its provisions nor imposed penalties in the event of a breach.

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[686] *Ibid*., paragraph 19. (Emphasis added).
[687] *Hedley Lomas,* note 602.
[688] Council Directive 74/577/EEC on stunning animals before slaughter, OJ. L. 316, 26 November 1974, pp. 10 – 11.

204. The Court adopted the classic approach to resolve the dispute, finding first that Article 35 had been breached, a fact that the UK did not deny. Next, in a rebuke to the UK, the Court invoked the *Tedeschi* leg to render the ban automatically unjustifiable, stating that 'recourse to Article 36 is no longer possible where Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance upon this provision.'[689] Thus, the *Tedeschi* leg was found to apply, even though the directive did not include a procedure to monitor compliance with its provisions. Instead, the Court explicitly discarded the obligation in favour of mutual trust, enshrined in ex. Articles 5 and 189 (3) EEC (Article 4 (3) TEU and Article 288 (3) TFEU).[690] These Treaty provisions required Member States to guarantee the application and effectiveness of Community law and triggered a presumption of national compliance with Community obligations. The resulting environment of mutual trust rendered the guarantee of compliance, so central to *Simmenthal*, no longer necessary to classify a Community measure as exhaustive. In the words of the Court, 'Member States must rely on trust in each other to carry out inspections on their respective territories'[691] and cannot 'unilaterally adopt … corrective or protective measures designed to obviate any breach by another Member State of rules of Community law'.[692] In doing so, it confirmed that Member States could not rely on Article 36 TFEU to compensate for a potential 'compliance gap' in the protection system. This is not to say that specific EU legislative acts cannot include such guarantees. The Waste Shipment Regulation, for example, explicitly allows one Member State to prevent waste being shipped to another Member State if it considers the standards of waste recovery in the latter to be insufficient.[693] However, the existence or not of such a guarantee was removed as a formal requirement for the Exhaustion Rule, which could henceforth be triggered on the sole basis that the EU secondary measure exhaustively regulated the field.

2.1.2 Triggering the Exhaustion Rule

205. The Court's disinterest in conditions (b) and (c) to trigger *Tedeschi* has, to a large extent, been compensated for by its focus on condition (a), which required the Community measure to

[689] *Hedley Lomas*, note 602, paragraph 18.
[690] *Ibid*., paragraph 19.
[691] *Ibid*.
[692] *Ibid*., paragraph 20.
[693] Ex. Article 12 (c) of Regulation No. 1013/2006, *op. cit.*, explicitly authorises Member States to object to a shipment of waste from its territory for recovery in another Member State, if standards of treatment in that Member State of destination are lower than its national standard.

have harmonised the field. This condition has since been broken down into two subsidiary requirements. These are that the disputed matter must come within the 'regulatory scope' of EU legislation (A) that has an exhaustive 'regulatory character' (B).[694] In other words, activation of *Tedeschi* is conditional on the existence of a relevant and exhaustive EU measure. As outlined, the Court generally takes the task of establishing such elements seriously, as it conducts, where necessary, a case-by-case investigation of whether one, or both, has been fulfilled. This helps counter any suspicion of a centralising or integration bias in its interpretation of EU legislation.

206. The Court's approach to assessing the regulatory scope (relevance) and character (exhaustion) of a particular measure often overlaps. Indeed, the fact that a matter comes within the sphere of application of the EU legislation will often be sufficient to trigger the Exhaustion Rule.[695] This stands to reason, since the more specific the legislative provisions are in delineating scope, the more likely they are to institute an exhaustive and comprehensive framework. Still, these conditions are often distinguished in the Court's analysis,[696] which might find that the national measure falls *within the scope* of a *non-exhaustive* EU legislative framework.[697] This confirms that the questions of regulatory scope and regulatory character are underpinned by a different logic and should be considered separately.

A. Establishing Regulatory Scope

207. The Exhaustion Rule will only apply to resolve a regulatory dispute if the impugned national rule comes *within* the regulatory scope of the EU legislation. It follows that a national measure that regulates a matter, or pursues an objective, *outside* the scope of EU legislation, will be assessed by reference to primary law.[698]

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[694] 'Regulatory character' is a novel term conceived of by this research, with most commentators assimilating the notion with the concepts of the regulatory scope and regulatory intensity. Indeed, Jans & Vedder suggest on this basis that where a national standard 'falls within the sphere of application of a directive, then the European legislative framework in principle given by that directive or regulation is said to be 'exhaustive''. See Jans & Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 98. See Part III (Chapter Two).

[695] *Ibid.*

[696] *A.G.M-COS.MET*, note 1. See also *Commission v Italy (Sealed Heaters)*, C-112/97, EU:C:1999:168, paragraphs 29 and 32.

[697] Ex. *RegioPost*, C-115/14, EU:C:2015:760, paragraphs 58 – 77; *Commission v Germany (Waste Packaging)*, note 1, *Radlberger*, C-309/02, EU:C:2004:799; *Valev Visnapuu*, C-198/14, EU:C:2015:751 and *Citroën Belux*, C-265/12, EU:C:2013:498.

[698] Ex. *Grunert,* Case 88/79, EU:C:1980:152; *Eyssen*, Case 53/80, EU:C:1981:35 and *Van Bennekom,* note 96.

208. To establish regulatory scope, the Court will necessarily rely on the substantive provisions and objectives of the exhaustive measure, or a series of measures.[699] Reaching a conclusion on this basis can be relatively straightforward, particularly when the EU measure explicitly confirms what it covers and/or excludes. In *Wulro*, for example, Dutch measures imposing marking requirements on eggs and egg packaging were automatically brought within the scope of the COM in eggs,[700] which set out in Article 21 that 'Packs shall not bear any indications other than those laid down in this Regulation'.[701] Such an explicit delineation of regulatory scope is increasingly common, with EU legislation often containing one or more articles devoted to this end, as well as further provisions, annexes and/or Preamble recitals elaborating on what is authorised and/or prohibited.[702] At the same time, even the most detailed and exhaustive legislative acts may not fully confirm the exact scope of an EU measure, as some words can remain ambiguous and incomplete, while also being subject to changing or unforeseen events.[703] In such cases, the Court may need to go further and specifically investigate whether the wording of the EU measure applies to the product at issue. For example, in *Commission v Germany (Garlic Capsules)*,[704] the Court took more than 30 paragraphs to establish that a garlic capsule was neither a medicinal product by presentation nor by function and that it did not come within the scope of the Medicinal Products Code.[705]

209. Faced with legislative ambiguity, the Court may need to rely on other factors to reinforce a finding in relation to scope. This can include references to the origins and/or context of the EU legislation. In *Commission v UK (Dim Dip)*, for example, the Court highlighted the findings of the technical committee to confirm that dim dip lighting was intentionally excluded from the directive's exhaustive list of lighting requirements.[706] In *Commission v Poland (Right-Hand*

[699] Ex. The Court relied on a series of measures in *ATRAL,* C-14/02, EU:C:2003:265, paragraphs 40 – 45. See also *Commission v Germany (Animal Feed)*, note 557, paragraphs 12 and 20.
[700] Council Regulation (EEC) No. 2772/75 on marketing standards for eggs, OJ L. 282, 1 November 1975, p. 56 – 63.
[701] *Wulro*, note 32, paragraph 23. See also *Commission v Italy (Sealed Heaters)*, note 696, paragraph 29; *Toolex*, C-473/98, EU:C:2000:379, paragraphs 29 – 30 and *Nijman,* Case 125/88, EU:C:1989:401.
[702] Ex. Directive 2005/29/EC *op. cit.*, which first specifies its regulatory scope under Article 3 (1) (i.e. as applying to unfair business-to-consumer commercial practices), before clarifying under Articles 3 (2) – (10) what is excluded (ex. contract law, EU health and safety measures) and the fields subject to more stringent national rules (ex. financial services, immovable property). Article 5 then defines the term 'unfair commercial practice', which is further defined under Articles 6 – 9. A blacklist of unfair commercial practices is laid down in Annex 1, with the Preamble outlining the directive's aims, explaining why certain matters are excluded or subject to minimum rules and excluding matters of taste and decency.
[703] See, recently, *Gelvora*, C-357/16, EU:C:2017:573.
[704] *Commission v Germany (Garlic Capsules)*, note 423, paragraphs 43 – 78.
[705] Directive 2001/83/EC, *op. cit.*
[706] *Commission v United Kingdom (Dim Dip)*, note 583, paragraph 10.

Steering), it referred to the UK and Ireland's accession to confirm that the position of a car's steering equipment came within the harmonisation established by the relevant directives.[707] In *Commission v Germany (Pyrotechnic Articles),*[708] the Court noted that the directive had been adopted under the new approach to harmonisation to underscore its finding that that directive also covered the regulation of pyrotechnic articles *after* being placed on the market. The 'purpose and spirit' of the EU measure may also be relevant, as confirmed in *EU Wood Trading*. Here, the Court referred to such factors to confirm that the term '*shipment* of waste', as provided for in the WSR, included the conditions in which waste was to be recovered.[709] To this end, it took account of the Regulation's environmental purpose, which required shipment to be 'perceived in its entirety', that is, from departure to the end of its processing in the State of destination.[710]

210. This nuanced and case-by-case approach to determining regulatory scope is further illustrated by the Court's willingness to find that one element of the dispute is covered by the exhaustive EU measure, while another falls outside. In *Ker-Optika*, for example, it found the selling of contact lenses via the Internet to be within the scope of the Electronic Commerce Directive,[711] while national rules relating to the conditions of the supply of contact lenses fell outside and were reviewable by reference to primary law.[712] This dual approach often follows the questions put to the Court. In *Commission v Belgium (Registration of Vehicles)*,[713] for example, the Commission challenged Belgium for having breached, first, Article 34 TFEU by subjecting vehicles previously registered in another Member State to a roadworthiness test, and second the Vehicle Registration Directive,[714] for requiring the production of a certificate of conformity with this roadworthiness test before such cars could be registered in Belgium. The Court's response simply followed the sequence of questions asked. Similarly, in *ATRAL*,[715] having found that the relevant directive precluded the bulk of a Belgian rule concerning alarm systems, the Court then assessed the elements that fell outside its scope by reference to Treaty's free movement provisions.[716]

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[707] *Commission v Poland (Right-Hand Steering)*, C-639/11, EU:C:2014:173, Paragraphs 41 and 42.
[708] *Commission v Germany (Pyrotechnic Articles)*, C-220/15, EU:C:2016:815.
[709] *EU Wood Trading*, note 300, paragraph 32.
[710] *Ibid*., paragraph 35. See also *Opus Supplies*, C-462/09, EU:C:2011:397, paragraphs 30 – 34.
[711] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L. 178, 17 July 2000, pp. 1 – 16.
[712] *Ker-Optika*, C-108/09, EU:C:2010:725.
[713] *Commission v Belgium (Registration of Vehicles)*, C-150/11, EU:C:2012:539.
[714] Council Directive 1999/37/EC on the registration documents for vehicles**,** OJ L. 138, 1 June 1999, pp. 57 – 65.
[715] *Atral,* note 699.
[716] *Ibid*., paragraphs 67 – 69.

211. Many disputes over whether the Exhaustion Rule is, or not, triggered arise because parties disagree over the *substantive* or *material* scope of the EU measure. However, national measures can also fall outside the scope of EU legislation, and remain subject to Treaty-based discretion, if they pursue an *objective* in relation to a regulated good that is 'external to the field harmonised',[717] even if that measure has an impact on the EU rule. Indeed, this possibility can be implicit in the formulation of the market access clause, which often states that 'Member States shall not, *on the grounds dealt with in this Directive*, impede, prohibit, or restrict the placing on the market in their territory of batteries and accumulators that meet the requirements of this Directive'.[718] The Court's judgement in *Holdijk* constitutes an early confirmation of such residual national powers, as it authorised national standards to protect animal welfare in the absence of Community rules, notwithstanding their effect on the COM.[719] The possibility has since been confirmed in numerous cases,[720] although it remains difficult to prove in practice. This is particularly so, given the overlap between many public interest goals. In *Nordiska Dental*,[721] for example, Sweden argued that its prohibition on exporting dental amalgams containing mercury protected the environment and fell outside the scope of the Medical Devices Directive.[722] The Court did not agree, finding instead that such grounds were covered by the directive's health and safety goals.[723] In *CIWF*, the Court held that live animal exports could not be restricted for reasons of public policy or morality since these are 'an aspect of the justification relating to the protection of animal health, which is the subject of the harmonising directive'.[724] Finally, in *Commission v Poland (GMOs)*, Poland failed to justify its national measures on ethical and religious grounds, partly because they were not considered as separate to the health and environmental justifications harmonised under the relevant directive.[725]

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[717] *Lidl*, C-132/08, EU:C:2009:281, paragraph 45. See also Jans & Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 102.
[718] Ex. Article 6 of Directive 2006/66/EC of the European Parliament and of the Council on batteries and accumulators and waste batteries and accumulator, OJ L. 266, 26 September 2006, pp. 1 – 14. (Emphasis added). See also Jans & Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 105.
[719] *Holdijk & Others,* Joined Cases 141 to 143/81, EU:C:1982:122. See also *Nertsvoederfabriek Nederland*, Case 118/86, EU:C:1987:424, paragraph 12.
[720] *Geharo*, C-9/04, EU:C:2005:593. See also *Nordiska Dental*, C-288/08, EU:C:2009:718, paragraph 31.
[721] *Nordiska Dental*, *ibid*.
[722] Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L. 331, 7 December 1998, pp. 1–37.
[723] *Nordiska Dental*, note 720, paragraphs 28 – 30.
[724] *CIWF*, note 329. See also *Wulro*, note 32, where the Court did not even engage with the argument raised by the Netherlands, that its measures were necessary to protect the welfare of hens.
[725] *Commission v Poland (GMOs),* C-165/08*,* EU:C:2009:473.

B. Establishing Regulatory Character

212. The 'regulatory character' of an EU measure refers to its regulatory framework, which can be exhaustive or non-exhaustive. It can, as such, influence the extent to which Member States can regulate in the presence of secondary legislation and how national measures will be reviewed. An EU measures with an *exhaustive* regulatory character regulates the public interest goal in a comprehensive and constitutional manner, thereby triggering the Exhaustion Rule. Legislation with a *non-exhaustive* regulatory character, while laying down certain rules, does not preclude Treaty-based discretion.[726] As previously noted, the Court's early jurisprudence sometimes presumed that the mere *existence* of (mainly agricultural) Community rules implied both an exhaustive regulatory framework and the pre-emption of all national competence over the field. Its position has now evolved considerably. As highlighted throughout this research, the Court, while not adopting any formal presumption against pre-emption/exhaustion,[727] will, if necessary, investigate the regulatory character of an EU measure. To do so, and in line with its approach to establishing regulatory scope, it will assess the wording of the EU legislation, as well as its objectives, context and general scheme.

213. The 'wording' of an EU measure refers, logically, to its substantive provisions, which, when exhaustive, includes extensive and obligatory standards, procedures and/or other requirements in the body of the act, as often supplemented by detailed annexes listing what is authorised and/or prohibited.[728] The exhaustive nature of these standards can be reinforced via an exclusivity and/or market access clause, which explicitly prevent additional national requirements under Articles 34 – 36 TFEU. As mentioned in the General Introduction, an exclusivity clause provides that only products complying with the EU standard can be placed on the market.[729] The market access clause guarantees free movement for such compliant products by disabling Treaty-based discretion – that is, preventing national restrictions on such

[726] For a more detailed discussion of these concepts, see Part III (Chapter Two), section 2 (The Relevance of Regulatory Character).
[727] See *supra*, Chapter One, point 37.
[728] See ex. Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys (the Toy Safety Directive), OJ L. 170, 30 June 2009, pp. 1 – 37. This directive has an exhaustive regulatory character, as confirmed by its exhaustive list of obligations for manufacturers, importers and distributors and obligatory safety requirements under Articles 10 and Annex II, to be complied with to enjoy market access under Article 12.
[729] Article 6 (1) of Directive 1999/5/EC of the European Parliament and of the Council on radio equipment and telecommunications terminal equipment, OJ L. 91, 7 April 1999, pp. 10 – 28 and Article 6 of Regulation (EU) No. 1169/2011 on the provision of food information to consumers, OJ L. 304, 22 November 2011, pp. 18 – 63.

free movement[730] or limiting additional national rules to domestic territory.[731]

214. The fact that the market access clause restricts national (Treaty-based) discretion gives it particular resonance in triggering the Exhaustion Rule. Indeed, such a clause could even be characterised as the legislative manifestation of *Tedeschi*, as it can only oust Article 36 TFEU if the underlying EU regime comprehensively protects the public interest goal. Together with the exclusivity clause, a market access clause can therefore provide a good indicator of regulatory character. For example, new approach directives, which generally contain both clauses, are often presumed to be exhaustive, with related disputes tending to focus on regulatory scope.[732] In contrast, EU legislation granting national regulatory discretion *without* a market access clause often indicates a non-exhaustive regulatory character, with Member States authorised to adopt national standards, subject to review under Articles 34 – 36 TFEU.[733] This implication is all the more when the grant of discretion is accompanied by an explicit reference to the Treaty.[734]

215. At the same time, the presence or absence of a market access clause does not always provide conclusive evidence of regulatory character – and of application (or not) of the Exhaustion Rule. For example, while the Marketing and Use of Dangerous Substances

[730] Ex. Article 38 (1) of Regulation (EU) No. 1169/2011, *ibid*., provides that 'As regards the matters specifically harmonised by this Regulation, Member States may not adopt nor maintain national measures unless authorised by Union law. Those national measures shall not give rise to obstacles to free movement of goods, including discrimination as regards foods from other Member States'. See also Article 4 (2) of Council Directive 80/778/EEC relating to the quality of water intended for human consumption, OJ L. 229, 30 August 1980, pp. 11–29, Article 8 (1) of Directive 1999/5/EC, *op. cit*., and Article 12 of Directive 2009/48/EC, *op. cit*.

[731] Ex. Article 11 (2) of Directive 91/629/EEC, *op. cit.*, allows Member States to 'maintain or apply *within their territories stricter* provisions for the protection of calves than those laid down in this Directive'. (Emphasis added).

[732] See Part II (Chapter One), points 32 – 35. See also *Gallaher*, note 130, where the Court did not need to justify its finding that the directive had an exhaustive regulatory character, since the UK agreed that its rules, which were subject to a market access clause, should only apply to domestic production.

[733] See ex. Article 3 (1) of Council Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft , OJ L. 18, 24 January 1980, pp. 26 – 28 and Article 3 (1)(a) of Council Directive 88/166/EEC on the protection of battery hens, OJ L. 74, 19 March 1988, pp. 83 – 87, in, respectively, *Aher-Waggon,* C-389/96, EU:C:1998:357 and *Hönig,* C-128/94, EU:C:1995:341.

[734] Ex. Article 14 (1) of Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, OJ L. 144, 4 June 1997, pp. 19 – 27; Article 5 of European Parliament and Council Directive 94/62/EC on packaging and packaging waste, OJ L. 365 31 December 1994, pp. 10 – 23 and Article 26 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L. 134, 30 April 2004, pp. 114 – 240.

Directive[735] did not contain a market access clause, it was still classified as exhaustive.[736] The Court might also read a territorial restriction into an apparent grant of Treaty-based discretion – as it did with the Wild Birds Directive.[737] Different harmonisation models can also coexist within an EU act, with the market access clause only applying to one part of the regulatory framework.[738] And finally, the presence of a market access clause, while generally indicating an exhaustive regulatory character, can coexist with a grant of legislation-based discretion, the exercise of which can impact on interstate movement.[739] In this regard, the fact that such a grant must be exercised 'in accordance with the Treaty' does not necessarily mean that the EU measure is non-exhaustive. Rather, such discretion can be legislation-based, with its exercise subject to review under Exhaustion Rule.[740]

216. These variables, coupled with the often-ambiguous language of EU legislation, drive the Court to rely on elements in addition to, or other than, the presence/absence of a market access clause to establish regulatory character. In this regard, the legal basis of the measure might reinforce a conclusion of exhaustive regulatory character. For example, in *Cindu Chemicals*, the Court's finding of exhaustion was based, in part, on the fact that the directive (and its amendments) had been adopted under ex. Article 100 EC and ex. Article 100a EEC.[741]

[735]Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparation, OJ L. 262, 27 July 1976, pp. 201 – 203.
[736] *Cindu Chemicals & Others*, Joined Cases C-281/03 and C-282/03, EU:C:2005:549. See also *Ratti*, note 33, paragraph 13.
[737] Council Directive 79/409/EEC on the conservation of wild birds, OJ L. 103, 25 April 1979, pp. 1 – 18. See *Van den Burg*, note 597.
[738] Ex. Directive 94/62/EC, *op. cit.* (the Waste Packaging Directive), guarantees free movement for packaging that complies with the harmonised product requirements while also granting Treaty-based discretion, under Article 5, to encourage the reuse of packaging, in conformity with the Treaty. See *Commission v Denmark (Waste Packaging),* note 659 and *Commission v Germany (Waste Packaging),* note 1.
[739] Ex. In *Danske Svineproducenter I* (note 34), *Opus Supplies* (note 710) and *EU Wood Trading* (note 300), the Court considered the relevant legislation as having an exhaustive regulatory character, even though it granted national leeway on implementation to disrupt the free movement of goods by establishing, respectively, precise requirements for the height of transport compartments for pigs; who should pay fair compensation to rightsholders for private copying and the circumstances under which a Member State could object to a shipment of waste to another Member State. See also Article 6 (2) of the Cosmetics Directive (Directive 76/768/EEC), *op. cit.* and Article 15 (2) of the first Food Labelling Directive (Directive 79/112/EEC), *op. cit.*
[740] *DaimlerChrysler*, note 1. For a more detailed discussion of legislation-based discretion, see Part III (Chapter Two), section 1.4
[741] Ex. *Cindu Chemicals & Others*, note 736, paragraphs 41 – 43. See also *Gintec,* C-374/05, EU:C:2007:654, paragraph 19. For discussion, see J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* pp. 111 – 112 and I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*

The Court might also explore the comprehensive[742] or minimum[743] nature of the EU regulatory standards, or refer to factors such as the aims,[744] context,[745] origins[746] and/or nature[747] of the relevant EU measure. In *CIWF*, for example, the Court looked at the 'wording', 'context' and 'objectives' of the Veal Crate Directive, which included the territoriality clause for higher national standards, to confirm that it laid down 'exhaustively common minimum standards' for housing space for calves.[748] A similar broad approach can be observed in the Court's assessment of numerous measures, including the Cosmetics Directive,[749] the Waste Shipment Regulation,[750] the Medicinal Products Code,[751] the first Trademarks Directive[752] and the Waste Packaging Directive,[753] all of which are discussed in Part II. In other cases, the Court may need to take a dual analysis approach to review, to confirm the constitutionality of the EU legislation before accepting its exhaustive regulatory character. This can be seen in *Swedish Match*, where the Court first validated the oral tobacco ban, instituted by the Tobacco Sales Directive,[754] before relying exclusively on the directive, which had an exhaustive regulatory character, to assess – and validate - the UK ban.[755]

217. When searching to establish regulatory character, the Court can also refer to the Preamble, which may set out the aim of removing national regulatory disparities,[756] emphasise

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[742] Ex. While the Commission relied exclusively on the market access clause of the directive at issue in *Dim Dip* to prove its exhaustive character, the Court also referred to the directive's comprehensive nature. See *Commission v UK (Dim Dip)*, note 583, paragraphs 9 – 11; See also *Commission v Germany (Animal Feed),* note 157, paragraphs 14 – 20; *Ratti*, note 33, paragraph 26; *Commission v Germany (Pyrotechnic Articles),* note 708, *A.G.M.-COS.MET,* note 1, paragraphs 52 – 53.

[743] *Hönig*, note 733 and *Aher-Waggon*, note 733.

[744] *Commission v Germany (Animal Feed),* note 157, paragraphs 11 – 12, *Dim Dip*, note 583, paragraph 11 and *ATRAL*, note 699, paragraph 44.

[745] *DaimlerChrysler*, note 1, paragraph 35. See also *Dim Dip*, note 583, paragraph 10.

[746] *Commission v Germany (Pyrotechnic Articles),* note 708, paragraph 47.

[747] The Court's confirmation in *DaimlerChrysler* (note 1) that the WSR instituted an exhaustive framework was supported, *inter alia*, by the fact that the measure was a 'regulation', which had been specifically chosen to 'ensure that the legislation was applied simultaneously and consistently in all Member States'. See paragraph 34. See also Opinion in *Commission v Germany (Waste Packaging)*, C-463/01, EU:C:2004:290, paragraph 37.

[748] *CIWF*, note 329, paragraphs 49 – 56. Key to this conclusion was the fact that the possibility to adopt lower national standards, being limited in time, did not undermine the exhaustive nature of the directive. A similar analysis in *Hönig*, note 733, found that the relevant directive had a non-exhaustive character.

[749] Directive 76/768/EEC, *op. cit.*

[750] Regulation (EEC) No. 259/93, *op. cit.*

[751] Directive 2001/83/EC, *op. cit.* See in particular *Gintec,* note 741.

[752] Ex. Directive 89/104/EEC, *op. cit.*

[753] Directive 94/62/EC, *op. cit*. See *Commission v Germany (Waste Packaging*), where the Court carefully distinguished *DaimlerChrysler* when interpreting Article 5 of the Waste Packaging Directive (note 1, paragraphs 47 – 50). See also the Opinion in the same case (note 795, paragraphs 35 – 38). See Part II (Chapter Two), point 136.

[754] Directive 2001/37/EC, *op. cit.*

[755] *Swedish Match*, note 310, paragraphs 79 - 83.

[756] Ex. *A.G.M.-COS.MET,* note 1, paragraph 52, *Cindu Chemicals & Others*, note 736, paragraph 42 and *Commission v Belgium (Registration of Vehicles),* C-150/11, EU:C:2012:539, paragraph 74.

the importance of certain regulatory goals[757] and sometimes specify the regulatory character of the legislative act. The latter may be by way of an explicit statement, where the measure confirms the exhaustive or non-exhaustive regulatory character of the EU legislation, as the case may be.[758] EU legislation can also imply as much, by stating that the harmonisation envisaged thereunder only represents the first stage in the process. In *Hönig*, for example, the Court confirmed that the directive instituted minimum standards by referring to its classification in the preamble 'as a first step'.[759] However, such references in the preamble will not always be conclusive. In *Antroposana*, for example, the Court dismissed that claim the Medicinal Products Code represented merely the first step in the harmonisation process, with national discretion to adopt specific procedures for certain alternative medicines. According to the Court, this reasoning was 'based on the erroneous premise that complete harmonisation … is incompatible with the fact that that field is in a state of continuing evolution'.[760]

2.1.3 The Relevance of Time

218. A final factor to consider when triggering – or not – the Exhaustion Rule is the question of time, that is, the temporal scope of the EU measure. While this element can prevent an otherwise exhaustive EU measure from ousting Treaty-based discretion, its impact is temporary by definition, and should eventually give way to the Rule's full application. Two key dates for the Court when assessing temporal scope are, first, the expiry date for implementation of the directive and second, the date upon which proceedings commenced. The exhaustive potential of an EU act can also be postponed when the EU legislator fails to adopt necessary implementing or supplementary measures, or where Member States have a possibility to derogate temporarily from exhaustive standards.

219. Turning first to the implementation date for directives, the Court has held that the Exhaustion Rule will not apply unless this date has expired. This follows from the fact that directives cannot impose their full legal effects until such a date,[761] as confirmed in *Monsees*.[762]

[757] *DaimlerChrysler*, note 1, paragraph 41.
[758] See ex. Directive 2005/29/EC, *op. cit*., recitals 14 and 15.
[759] *Hönig*, note 733, paragraph 16.
[760] *Antroposana & Others*, note 314, paragraph 41. See also Opinion in the case, note 417, paragraphs 61 – 68.
[761] *Ratti*, note 33, paragraphs 41 – 46.
[762] *Monsees*, C-350/97, EU:C:1999:242.

In the same vein, the Court found in *ERG I* that the Environmental Liability Directive[763] would not apply to damage incurred before its deadline for implementation had passed.[764] A similar approach is taken with regards to the date proceedings are launched, with the Court only triggering the Exhaustion Rule if an exhaustive regulatory framework covered the matter being litigated upon on that day. Otherwise, the national measure will be considered as an instance of Treaty-based discretion, reviewable by reference to primary law. In *Essent*, for example, the Court reviewed Dutch measures implementing the (non-exhaustive) Second Energy Package by reference to primary law (the free movement of capital) because the Third Energy Package, while subjecting some of these matters to exhaustive regulation, was not applicable when proceedings were launched against the Netherlands.[765] The date of proceedings is also relevant when considering the *content* of the EU measure, since amendments brought after that date are, in principle, immaterial. As stated in *Wulro*, 'the fact that certain elements of national legislation appear in Regulation No 1943/85 provides no retroactive justification for such legislation which was adopted in breach of Community law'.[766] This case-law is not to suggest that pending directives, or subsequent amendments, cannot influence the Court's outcome. Indeed, Member States are prohibited, during this time, from taking any measures liable to seriously compromise achieving the result of that directive.[767] Moreover, the balance struck thereunder, between the public interest being pursued and free movement, often guides the Court.[768] Still, a directive should not, in principle, become the Court's *sole* normative reference for review under the Exhaustion Rule unless its date for implementation is expired when proceedings commence.

220. Application of the Exhaustion Rule can also be postponed, even after such dates have passed, if the EU legislator has not adopted the necessary implementing or supplementary measures, or if Member States can derogate temporarily from the EU standard. In the former scenario, the Court might consider that EU inaction has left the matter in national hands, subject to compliance with Articles 34 – 36 TFEU. In *Hahn*, for example, the Commission's failure to set microbiological criteria for the production of smoked fish meant that Member States retained the power to do so.[769] Similarly, in *Forest & Others*, the Court held that 'since the

[763] Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, OJ L. 143, 30 April 2004, pp. 56 – 75.
[764] *ERG & Others*, C-378/08, EU:C:2010:126.
[765] *Essent & Others,* Joined Cases C-105/12 to C-107/12, EU:C:2013:677.
[766] *Wulro*, note 32, paragraph 23. See also *Denkavit v Danish Ministry for Agriculture*, note 652.
[767] *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628. See also *ATRAL*, note 699, paragraphs 56 – 59.
[768] See Opinion in *Essent & Others*, note 765, paragraph 71.
[769] *Hahn,* C-121/00, EU:C:2002:611, paragraph 32.

Community legislature has not adopted rules governing the flour-milling sector, the Member States remain competent to take such measures as they consider appropriate to improve structures in that sector, so long as they observe the mechanisms and principles governing the common organization of the market'.[770] As for temporary or transitional derogations, Member States can rely on such clauses to claim Treaty-based discretion during that time period,[771] or question the otherwise exhaustive regulatory character of the EU act. An example of the latter arose in *CIWF*, where the AG considered that the Veal Crate Directive,[772] which contained such transitional arrangements, had not (yet) harmonised the field.[773] The Court, however, held that the directive instituted 'exhaustively common minimum standards', since the possibility to derogate from its exhaustive provisions was limited in time and 'laid down exhaustively'.[774] As a result, the UK could not invoke Article 36 TFEU to justify an export ban on calves to Member States with lower standards of protection.

221. To conclude, the Court generally takes a nuanced and thorough approach to assessing whether the Exhaustion Rule applies, or not. While presuming that the 'necessity' requirement is fulfilled, it determines the questions of regulatory scope and character of particular EU legislation on a case-by-case basis, according to a variety of factors, without any one being determinative.[775] As we will see in Part II, this leads to a jurisprudence that swings from imposing the EU standard under the Exhaustion Rule, to determining that it does not apply in a given case. And for the most part, such variances constitute an appropriate reflection of the legislator's rich and varied regulatory programme, interpreted in accordance with legitimate judicial discretion. This reinforces the conclusion reached in Chapter One, which is that the Rule provides a framework for the Court to both enforce the legislator's intention, and ensure respect for the hierarchy of norms. At the same time, the 'Exhaustion Rule' jurisprudence is not always problem-free, but can sometimes lack transparency and consistency. This not only leads to legal uncertainty and litigation. It also heightens the risks, discussed earlier in relation to the

[770] *Forest & Others*, note 609, paragraph 14. See also *Amsterdam Bulb,* Case 50/76, EU:C:1977:13; *Jongeneel Kaas*, note 609; *Prantl*, note 138 and *Nicholas Schrieber*, Case C-443/02, EU:C:2004:453.
[771] Ex. Article 3(5) of Directive 2005/29/EC, *op. cit.*, which allows Member States to 'apply national provisions within the field approximated by (that directive) which are more restrictive or prescriptive … and which implement directives containing minimum harmonisation clauses', for a period of six years after the directive's implementation date (12 June 2007) had expired. For a general analysis of such derogations, see G. de Búrca, 'Differentiation within the Core: The Case of the Common Market', G. de Búrca & J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Hart Publishing, 2000, pp. 133 – 171.
[772] Directive 91/629/EEC, *op. cit*.
[773] Opinion in *CIWF*, C-1/96, EU:C:1997:365, paragraphs 62 – 67.
[774] *CIWF*, note 329, paragraphs 56 – 57.
[775] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit*., p. 112.

exhaustion approach, that the absence of direct reference to Articles 34 – 36 TFEU could undermine either the principle of institutional balance or the hierarchy of norms, given, in particular, the propensity for 'strategic reliance' on the Rule. Before exploring, in Parts II and III, whether such problems exist under the Court's 'Exhaustion Rule' jurisprudence, we look at how it eventually reconciled the Rule's second leg with the hierarchy of norms.

2.2 The Second Leg of the Exhaustion Rule

222. While explicitly adopted in *Parfümerie-Fabrik* and *Vanacker & Lesage*, the Court did not, initially, embrace the second leg of the Exhaustion Rule. This hesitancy led the Court, in the Cosmetics Directive saga, to both pronounce the Rule and refer to Articles 34 – 36 TFEU to resolve legislative ambiguities. As discussed earlier, this clumsy approach ultimately led to uncertainty and litigation, as it implied that authorisations (and restrictions) under that directive were synonymous with Articles 34 – 36 TFEU. In the decade following *Vanacker,* this 'have your cake and eat it' approach was progressively replaced with a more systematic application of the Rule, as the Court relied on both dimensions of the presumption of constitutionality to limit and empower the legislator, as needed. In section 2.2.1, we discuss how the judgments in *Bristol-Meyers Squibb* and *DaimlerChrysler* played a key role in this regard, while section 2.2.2 reveals how this more confident use of the Rule allowed the Court to resolve the Cosmetics Directive saga. Section 2.2.3 illustrates why the Court must remain vigilant in its application of the second leg, as certain Member States never tire of invoking it to soften their free movement obligations.

2.2.1 The Second Leg and the Hierarchy of Norms

223. Two Court judgements, delivered in the late 1990s, were key in transforming the Exhaustion Rule into a guide to distribute power in the presence exhaustive EU product rules. Relying on both dimensions of the presumption of constitutionality (outlined in Chapter One), they sought to, respectively, limit and empower the EU legislator, by ensuring respect for the hierarchy of norms, while also respecting the legislative balance achieved between regulation and integration. In the first case, *Bristol-Meyers Squibb*, [776] the Court confirmed that the presumption's second dimension imposed an obligation of consistent interpretation to prevent Member States from abusing discretion available to them under exhaustive legislation (A). In

[776] *Bristol-Myers Squibb & Others,* note 370.

DaimlerChrysler,[777] the Court applied the Rule to validate a German ban on the shipment of waste, which had been adopted under the first Waste Shipment Regulation (WSR).[778] This confirmed the Court's willingness to respect, where appropriate, EU policy choices, without referring directly to primary law (the first dimension of the presumption of constitutionality) (B). Mirroring the Court's Waste Oil judgements in *InterHuiles* and *ADBHU*, these decisions sought to reconcile the inherent tensions underlying the Rule's second leg and show how careful judicial application can help ensure balance between regulation and integration, on the one hand, and judicial review and deference, on the other.

A. Bristol-Meyers Squibb

224. Turning first to *Bristol-Meyers Squibb*, this case arose from a dispute between the parties over the interpretation of the first Trademarks Directive,[779] which had harmonised elements of the Article 36 derogation that authorise national measures to protect industrial property. In particular, Article 5 affirmed that trademark holders held exclusive rights over use of their trademark, while Article 7 (1) confirmed the 'exhaustion of rights' doctrine. Accordingly, the trademark holder could not 'prohibit its use in relation to goods which had been put on the market in the Community under the trade mark by the proprietor or with his consent'. However, Article 7 (2) confirmed that the 'exhaustion of rights' doctrine would not apply if the trademark owner had 'legitimate reasons' to oppose further commercialisation of his products, for example, where the condition of the goods was subsequently changed or impaired. This enabled 'a balance between the free movement of goods within the common market and the protection of trade mark rights … by permitting restrictions on free movement only if they are *necessary* in order to safeguard the specific subject-matter and essential function of the trade mark'.[780]

225. Against this backdrop, Bristol-Meyers Squibb, along with other trademark holders, challenged the practice of repackaging a product lawfully placed on the market, and reaffixing the trademark on it for resale, without the consent of the proprietor. This led the Court to consider what could constitute 'necessary' action on the part of the proprietor to protect a 'legitimate interest' in line with its intellectual property rights and the free movement of goods.

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[777] *DaimlerChrysler*, note 1.
[778] Regulation (EEC) No. 259/93, *op. cit.*
[779] Directive 89/104/EEC, *op. cit.*
[780] Opinion in *Bristol-Myers Squibb & Others*, note 200, paragraph 95. (Emphasis added).

The Court had already confirmed the possibility to affix trademarks to lawfully marketed products (subject to conditions) in extensive jurisprudence that predated the Trademarks Directive.[781] However, following adoption of that legislation, certain parties wished to establish whether Article 7 had incorporated this jurisprudence in legislating for the 'exhaustion of rights conferred by a trade mark'. In particular, and invoking the *Tedeschi* leg, the plaintiff(s) and Germany called for a fresh reading of Article 7 that would grant more extensive rights to trademark owners and limit the activities of parallel importers to the resale of the products as originally marketed.[782] In other words, they argued that the directive provided more protection for intellectual property rights than what the Court had previously held in its interpretation of Articles 34 – 36 TFEU. Both the Court and AG Jacobs flatly rejected this suggestion. While accepting that the directive instituted exhaustive harmonisation and became the sole norm of reference, they confirmed that Article 7 was modelled on the Treaty's free movement provisions and that the Court's case-law on the principle of exhaustion of intellectual property rights would provide the basis for its interpretation. In other words, and '(l)ike any secondary legislation, … the directive must be interpreted in the light of the Treaty rules on the free movement of goods and in particular Article 36'.[783] In such circumstances, a refusal to extend the exhaustion of rights doctrine to the practice of repackaging trademarked goods would imply 'a major alteration to the principles flowing from Articles 30 to 36 of the Treaty'.[784] This, according to the Court and AG, was not intended by the directive. Nor would it have been permitted, since EU institutions are equally bound by the free movement provisions and cannot adopt directives to 'justify obstacles to intra-Community trade save within the bounds set by the Treaty rules'.[785] The Court then proceeded to interpret whether Article 7 (2) of the directive allowed a trademark owner to oppose the marketing of repackaged products to which the trademark has been reaffixed, using the Court's Article 36 case-law as the basis for the determination. These findings were confirmed in *Plytheron*[786] where the Court repeated that Article 7 of the directive, having instituted exhaustive harmonisation, would provide it with the sole norm of reference but interpreted in the light of the Treaty, including its relevant case-law. The Court then assessed the French rule, which restricted the exhaustion of trademark rights, exclusively by reference to Article 7 of the directive and found it to be precluded.

[781] See C. Stothers, 'Article 36 TFEU: Intellectual Property', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union, op. cit.*, Chapter 9, pp. 313 – 369 at pp. 315 – 316.
[782] Opinion in *Bristol-Myers Squibb & Others,* note 200, paragraph 32.
[783] *Bristol-Myers Squibb & Others*, note 370, paragraphs 25 – 27.
[784] *Ibid*., paragraph 35.
[785] *Ibid*., paragraph 36.
[786] *Phytheron International,* C-352/95, EU:C:1997:170.

226. The Court's application of the Exhaustion Rule to review measures adopted under Article 7 (2) of the Trademarks Directive contrasts with its more hesitant approach, around the same time, to national measures adopted under Article 6 (2) of the Cosmetics Directive. This was so, even though both provisions authorise an exception to the principle of free movement via ambiguous legislative terminology. One potential reason for this difference in treatment could be that the sector-specific question raised in *Bristol Meyers Squibb* had been dealt with extensively by the Court prior to adoption of the Trademarks Directive, unlike the parameters of what would be 'necessary' to prevent misleading advertising of cosmetics products.[787] This enabled the Court to rely exclusively on the Trademarks Directive, to the exclusion of the Treaty, giving much needed clarity to the regulator and avoiding some of the problems discussed earlier in relation to the Cosmetics Directive. This approach also had a more generalised impact, as it influenced the Rule's transformation into a trusted tool, to be systematically applied by, and ultimately guide, the Court. Indeed, while the Court had previously confirmed the need to consistently interpret secondary measures, [788] its pronouncement in *Bristol-Meyers Squibb* was one of the first made in the context of an explicit application of the Exhaustion Rule. This confirmed that the presumption of constitutionality enjoyed by EU secondary measures – which enabled the Rule to apply in the first place – incorporated the second dimension, being, a duty to respect the Treaty. It also paved the way for *DaimlerChrysler,* where the Court confirmed the regulatory side of the *Tedeschi* deal – that is, that the Member States could also rely on the Rule to save a protective national measure correctly based on secondary legislation.

B. DaimlerChrysler

227. The secondary legislation at the heart of *DaimlerChrysler* was the first Waste Shipment Regulation (WSR).[789] Adopted in 1993 to replace the 1984 Waste Shipment Directive,[790] the WSR established a uniform and directly effective legal regime to control cross-border shipment

[787] K. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning on the Internal Market – towards a Concordance Rule', *op. cit.* p.1329. This observation further illustrates the importance of time when assessing secondary measures. For discussion, see Part III (Chapter Two).
[788] *Supra*, Chapter One, points 93 – 95.
[789] Regulation (EEC) No. 259/93, *op. cit.*
[790] Council Directive 84/631/EEC on the supervision and control with the EC of the shipment of hazardous waste, OJ L. 326, 13 December 1984, p. 31 – 41. This was deemed particularly necessary following *Commission v Belgium (Walloon Waste),* note 300, which exposed a number of weaknesses with the Community's waste shipment regime.

of waste. This system distinguished waste for disposal from waste for recovery. In particular, it required shipments of the former to be notified to and authorised by the Member State of destination, subject to detailed requirements regarding the information to be provided, the conditions or objections that could be imposed and the various procedures to follow. Within this context, Member States of transit and dispatch were authorised, under Article 4 (2)(b), to object to shipments of such waste, which could extend to a general objection under Article 4 (3)(a)(i). This latter provision stated:

> In order to implement the principles of proximity, priority for recovery and self-sufficiency at Community and national levels in accordance with Directive 75/442/EEC, Member States may take measures *in accordance with the Treaty* to prohibit generally or partially or to object systematically to shipments of waste. Such measures shall immediately be notified to the Commission, which will inform the other Member States. (Emphasis added)

228. Whether this provision triggered the Exhaustion Rule, particularly given its reference to 'in accordance with the Treaty', was central to the dispute in *DaimlerChrysler*. However, before presenting this case, we look first at the Court's earlier judgement in *European Parliament v Council (Waste Shipment),* [791] where it had the opportunity to explicitly confirm the constitutionality, and exhaustive regulatory character, of the WSR.

229. This institutional dispute between the European Parliament and Council arose because the former considered that the WSR, which governed the movement of waste, should have been based *inter alia* on ex. Article 100a EEC (which provided for co-decision) and not solely on the environmental protection legal basis of ex. Article 130s EEC (which did not). However, the Court confirmed that the correct legal basis had been used, since the WSR did not define the characteristics of waste that enabled it to move freely, but instead, established a 'harmonised set of procedures whereby movement of waste can be limited in order to secure protection of the environment'. [792] This was so, even though 'by harmonising the conditions in which movements of waste take place, the Regulation affects such movements and thus has a bearing on the functioning of the internal market'.[793] In other words, mere involvement of the internal market was not enough to trigger ex. Article 100a EEC. This decision therefore confirmed that the WSR complied with the Treaty, that it established a 'harmonised set of procedures' for the

[791] *European Parliament v Council (Waste Shipment)*, C-187/93, EU:C:1994:265.
[792] *Ibid*., paragraph 26.
[793] *Ibid*., paragraph 24.

movement of waste and that its essential function was to ensure environmental protection, notwithstanding the impact on the free movement of goods. All three elements had a bearing on the Court's conclusion in *DaimlerChrysler* that Article 4 (3)(a)(i) triggered the Exhaustion Rule.[794]

230. Turning to the facts of the case, the Court had been asked to interpret various provisions of the WSR in order to clarify the legality of a German *Land* Decree that required certain waste to be sent for disposal to an approved centre in Hamburg for 15 years. DaimlerChrysler challenged the Decree as amounting to a 15-year export ban in violation of Article 35 TFEU, since it (systematically) prevented shipments of waste to cheaper units in Belgium. The national court had found that the general ban was consistent with Article 4(3)(a)(i) WSR and, in particular, with the environmental principles of proximity, priority and self-sufficiency. However, it sought, *inter alia* judicial clarification on whether the expression 'in accordance with the Treaty' subjected the German export ban to a further review under the Treaty's free movement principles. In other words, did the Exhaustion Rule apply?

231. AG Léger opined that it did indeed apply, given that the WSR had an exhaustive regulatory character.[795] The regulation could, as a result, act as the sole norm of reference to review the German rule, notwithstanding the reference in Article 4 (3)(a)(i) to the Treaty. In reaching this conclusion, the AG first acknowledged that this provision authorised Member States to prohibit shipments of waste, with a view to implementing the principles of recovery, proximity and self-sufficiency. He then recalled that those environmental principles stemmed from Article 191 (2) TFEU and that measures enacted for their furtherance were justified under the mandatory requirement of environmental protection. In his view therefore, the expression 'in accordance with the Treaty' had to be interpreted as meaning 'without it being possible to allege that Member States, exercising the power to restrict the free movement of goods which is conferred on them, have infringed the Treaty'.[796] In other words, as long as national measures complied with the principles of recovery, proximity and self-sufficiency, any resulting restriction on the free movement of waste would be proportionate *by definition* and thus compatible with the Treaty. Requiring Member States to comply with the principle of the free

[794] This case also confirmed that the Exhaustion Rule, while generally associated with directives adopted under Article 114 TFEU, was not necessarily confined to such measures. For discussion of the relevance of legal basis when triggering the Exhaustion Rule, see Part II (Chapter Two), point 167.
[795] Opinion in *DaimlerChrysler,* C-324/99, EU:C:2001:459.
[796] *Ibid*., paragraph 46.

movement of goods in such circumstances became 'meaningless, since those national measures comply with the principle of proportionality.'[797] He concluded as follows:

> 'the expression 'in accordance with the Treaty' … must be interpreted as expressly authorising in such a way as to be compatible with the provisions of the Treaty on restrictions on the free movement of goods, national measures based on the principles of proximity and self-sufficiency, principles related to environmental protection'.[798]

232. The Court largely followed the logic of this Opinion, albeit with less clarity. As with the AG, it first set out the Exhaustion Rule as pronounced in *Vanacker & Lesage*, stating that 'where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of Articles 30, 34 and 36 of the Treaty'.[799] Referring to *European Parliament v Council (Waste Shipment)*, the Court then confirmed that the WSR 'regulated in a harmonised manner' the question of shipments in waste in order to ensure the protection of the environment,[800] which in turn triggered the Exhaustion Rule insofar as the lawfulness of national measures relating to shipments of waste were to be assessed.[801] The next step was to reconcile this conclusion with the expression 'in accordance with the Treaty' in Article 4 (3)(a)(i). The Court found that national measures adopted under that provision would not need a 'further and separate review' of their compatibility with the free movement provisions. However, neither would they be systematically presumed to be compatible with EU law, simply because they *'intended to implement*' one or more of the principles referred to therein (proximity, recovery, self-sufficiency). Instead, 'such national measures must also comply with the general rules or principles of the Treaty to which no direct reference is made in the legislation adopted in the field of waste shipments.'[802] The Court then concluded:

> '… where a national measure generally prohibiting exports of waste for disposal is justified by the principles of proximity, priority for recovery and self-sufficiency, in accordance with Article 4(3)(a)(i) of the Regulation, it is not necessary for that national measure to be subject to a further and separate review of its compatibility with Articles 34 and 36 of the Treaty.'[803]

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[797] *Ibid*., paragraph 49.
[798] *Ibid*., paragraph 57.
[799] *Ibid*., paragraph 32.
[800] *Ibid*., paragraph 42.
[801] *Ibid*., paragraph 43.
[802] *Ibid*., paragraph 45.
[803] *Ibid*., paragraph 46.

233. From one perspective, this pronouncement might appear to undermine the Exhaustion Rule, since it reserves for the Court the possibility to analyse national measures by reference to Articles that are supposedly no longer applicable, including presumably, Articles 34 and 35 TFEU. Yet, as emphasised in Chapter One, the Exhaustion Rule operates on the basis of a *rebuttable* 'presumption of constitutionality'. As such, the Court retains a residual power of review by reference to the Treaty, if there is a doubt over the constitutionality of the national measure.[804] With regards to implementation of Article 4 (3)(a)(i), and as explained by AG Léger, such doubt will not arise if Member States correctly apply the relevant environmental principles *during the national process,* since this will ensure a lawful balance between the imperative of environmental protection and free movement. In such circumstances, there will be no need for a further review under Article 34 *et seq*. Instead, the focal point of judicial review will shift to establishing whether the abovementioned environmental protection principles have been adhered to, since their inherent proportionality test aims, ultimately, to establish whether the measure constitutes a justifiable derogation from the free movement principles. In the case to hand, since the national court had confirmed the compatibility of the German export ban with Article 4 (3)(a)(i), no further assessment was required.

234. *DaimlerChrysler*'s expression of the Exhaustion Rule is therefore in line with AG Jacobs' statement that 'there is nothing in the (Regulation) to suggest that it was intended that implementation of the principles of self sufficiency and proximity should not be subject to scrutiny under the Treaty.'[805] In particular, the Court's apparently deferential review of the German measure, while accepting that environmental concerns could be prioritised, does not amount to a *carte blanche* for either the EU or national legislator. To the contrary, the pursuit of such goals must be subject to a number of checks and balances, which, when coupled with the principle of consistent interpretation, allows the Court to rely on the Rule to enforce both the integrative and regulatory effects of the secondary legislation, while fully respecting the hierarchy of norms. Clarity on these points, which reflects both dimensions of the presumption of constitutionality discussed in Chapter One, enabled the Court to resolve prevailing ambiguities over application of the Cosmetics Directive.

[804] See *infra,* section 2.3.1 (the Court's Residual Jurisdiction)
[805] Opinion in *Dusseldorp,* C-203/96, EU:C:1997:508, paragraph 48.

2.2.2 Resolving the Cosmetics Directive Saga

235. The Court started relying more systematically on the Exhaustion Rule from the early 1990s. Indeed, this shift can be seen in *Piageme II*, which assessed the national measure adopted by Belgium in response to the Court's negative ruling in *Piageme I*. The national court, as in the first *Piageme* case, queried whether the amended rules, which allowed food labels in other languages once this included the language of the linguistic region, contravened both Article 34 TFEU and Article 14 of the first Food Labelling Directive. However unlike *Piageme I*, the Court only referred to Article 14 in assessing and invalidating the national measure, concluding that 'in the light of the foregoing considerations, there is no need the examine the question in the context of Article 30.'[806] Following the Court's subsequent rulings in *Bristol-Meyers Squibb* and *DaimlerChrysler*, this shift became explicit and, for the most part, definitive, as exemplified with the Court's resolution of the Cosmetics Directive saga.

236. We have noted how the Court's early jurisprudence on the Cosmetics Directive failed to clarify which norms of reference would apply to review national measures based on Article 6 (2) of that directive. In particular, this jurisprudence implied that the balance achieved by the directive between consumer protection and integration was synonymous with Articles 34 – 36 TFEU, thereby perpetuating regulatory uncertainty and litigation over the 1990s. However, this uncertainty seems to have been resolved definitively in 2002, when the Court applied the Exhaustion Rule in full to settle the dispute in *Linhart & Biffl*.[807]

237. This case concerned the lawfulness of an Austrian rule forbidding cosmetic products from referring to the descriptions 'clinically tested' and 'dermatologically-tested', on grounds that such statements could mislead consumers. As with the previous cases, the Court was asked whether the Austrian rule complied with both Article 6 (2) of the Cosmetics Directive and the free movement of goods. In its preliminary observations to the case, the Court explicitly stated that the Cosmetics Directive triggered the Exhaustion Rule and, for the first time in relation to national measures adopted under Article 6 (2), confirmed that Articles 34 – 36 TFEU would not apply as norms of reference. Specifically, and relying on *Vanacker & Lesage* and *DaimlerChrysler* as authority, the Court found that 'where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light

[806] *Piageme II*, note 627, paragraph 20. See also *SARPP*, C-241/89, EU:C:1990:459.
[807] *Linhart & Biffl*, note 404.

of the provisions of that harmonising measure and not of Articles 30 and 36 of the Treaty'.[808] In a further departure from its previous cases, the Court specifically excluded the Misleading Advertising Directive as a norm of reference, stating that it 'must confine itself to interpretation (Article 6 (2)) of the Directive'.[809] As regards the substance of the judgement, the Court found that while Member States were required to adopt 'necessary measures' to prevent misleading statements, the exhaustive nature of the directive ousted Article 36 and prevented 'more stringent national measures intended to prevent misleading advertising relating to the characteristics of cosmetic products'.[810] Thus, again moving away from its judgement in *Clinique, Estée Lauder* and *Unilever*, the Court explicitly decoupled the content of Article 6 (2) from the scope for Treaty-based discretion. However, it also confirmed that any measures adopted thereunder would still have to observe the principle of proportionality. Using the benchmark of the 'reasonably observant consumer', the Court concluded that the Austrian measure amounted to a national fraud-prevention measure that went beyond what was allowed under the directive.

238. The Court's statement that the Exhaustion Rule fully applies – both in principle and practice – to assess Article 6 (2) national measures gave clarification to the Member States regarding their scope to regulate, and in doing so, prevented further uncertainty and litigation. Indeed, a case on this point that was pending at the time of *Linhart & Biffl* was suspended, presumably as a result of that judgement.[811] Yet, there seems to be a certain tension between the Court's insistence that Member States cannot adopt 'more stringent measures' and its application of the proportionality principle to assess such national measures, since the latter indicates that a degree of discretion has in fact been exercised. While its scope is not the same as under a minimum harmonisation directive, such authorised 'legislation-based' discretion might still enable national measures with different levels of consumer protection to coexist within the exhaustive regulatory regime. As AG Gulmann argued in *Clinique*, a cosmetic

[808] *Ibid*., paragraph 18.
[809] *Ibid*., paragraphs 20 – 21.
[810] *Ibid*., paragraph 24.
[811] In this regard, Mortelmans refers to the Opinion in *Moreno*, C-188/01, which sought to interpret Articles 34 – 36 and the Cosmetics Directive in light of a national advertising rule that prohibited (or permitted subject to authorisation) mention of medical expert reports. This case was subsequently removed from the Court's register with no judgement, while the AG Opinion is no longer accessible, meaning that the parties settled, that the national rule was withdrawn or that the national court withdrew the questions. One potential reason for the withdrawal is that *Linhart & Biffl* resolved the matter. Indeed, while my request to the CJEU to access the Opinion was unsuccessful, I was referred to *Linhart & Biffl,* as a 'closely neighbouring case'. See K. Mortelmans, 'The relationship between the Treaty rules and community measures for the establishment and functioning on the internal market – towards a Concordance Rule', *op. cit.,* p. 1330.

product lawfully marketed in one Member State might not necessarily satisfy Article 6 (2) of the directive, since it could still be misleading for another Member State, considering linguistic, cultural and social differences.[812] Thus, as discussed earlier in relation to establishing regulatory character, and as will be illustrated in Parts II and III, exhaustive secondary rules can simultaneously oust Treaty-based discretion, while also authorising a degree of discretion, the exercise of which should be reviewed by reference to the exhaustive secondary rule. If the resulting national measure goes beyond what is authorised thereunder, the *Tedeschi* leg of the Exhaustion Rule will kick in to pre-empt the national measure, as in *Linhart & Biffl*. However, if the national measure complies with / stays within the EU legislative framework, reliance on the Exhaustion Rule will ensure its survival, without direct reference to the Treaty, as in *DaimlerChrysler*. If there is a doubt over the lawfulness of the underlying secondary measure, the Court can generally resolve the matter through dual analysis.

2.2.3 The Need for Judicial Vigilance

239. The possibility to avoid scrutiny by reference to the Treaty can sometimes pave the way for abuse, particularly as litigating parties tend to interpret legislation so as to support their strategic goals. This includes Member States, which, as noted earlier, could seek to rely on secondary measures to avoid the full force of the free movement provisions. The Court must, and generally does, remain vigilant when the second leg is invoked to support national regulatory regimes. Two examples are highlighted below.[813]

240. The first can be seen in *Commission v Germany (Waste Packaging)*,[814] which concerned a challenge to a German system, set up under Article 5 of the Waste Packaging Directive,[815] to promote the reuse of drinks cans. Specifically, the system required a deposit to be charged on each can at every stage of the distribution chain, unless the producer recovered the empty bottles. However, this latter option would only apply if Germany had achieved certain targets regarding the proportion of reusable packaging. Thus, as long as this target was not reached, producers would have to pay a punitive charge. The Commission claimed, *inter alia*, that this system imposed a particular burden on producers of mineral water from other Member States as they were obliged to return empty packaging over long distances to their place of origin. As

[812] Opinion in *Clinique*, C-315/92, EU:C:1993:823, paragraph 18.
[813] For further examples, see Part III (Chapter One), section 3.3 (Erroneous Court Submissions)
[814] *Commission v Germany (Waste Packaging),* note 1. See Part III for discussion.
[815] Directive 94/62/EC, *op. cit*.

a result, the German measures were contrary to both the Waste Packaging Directive and Article 34 TFEU. In its defence, Germany argued that the system was in line with Article 5 of the directive, which states that 'Member States may encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty'. In particular, and relying on the Exhaustion Rule, Germany submitted that Article 5 instituted complete harmonisation, which excluded 'an assessment … in light of the Treaty provisions relating to the free movement of goods' of national measures adopted thereunder. This was so even though measures adopted under Article 5 had to be 'in conformity with the Treaty'.

241. It was here that Germany invoked *DaimlerChrysler*, arguing that Article 4 (3)(a)(i) WSR (at issue in that case) had also referred directly to the Treaty. Germany also claimed that the directive's goal of promoting the reuse of packaging would be compromised if national measures adopted on this basis were considered to violate the free movement of goods. However, the Court responded that Article 5 did no more than encourage Member States to adopt environmentally friendly systems of packaging in accordance with the Treaty. This contrasted with the exhaustive requirements laid down by the directive with respect to the marking, identification and capacity of packaging and its capacity to be reused or recovered.[816] When assessing the reference in Article 5 to the Treaty, the Court, like AG Colomer,[817] also took care to distinguish the facts from those in *DaimlerChrysler*, which had been relied upon by Germany. First, it pointed out that the WSR had harmonised the field, unlike Article 5 of the Waste Packaging Directive. [818] Secondly, the WSR allowed Member States to regulate shipments of waste in accordance with the principles of proximity, priority for recovery and self-sufficiency. Finally, *DaimlerChrysler* had also specified that measures adopted under the exhaustive regulation would not be 'systematically presumed to be compatible with Community law' but had to 'comply with the rules or general principles of the Treaty'. The AG also pointed out that *DaimlerChrysler* concerned a regulation, which was, by definition, more specific than a directive and directly applicable in its entirety.[819] Thus, notwithstanding the fact that the grant of discretion in both pieces of legislation referred to the Treaty, their respective content differed greatly. As a result, *DaimlerChrysler* could not 'be transposed to the present context, in which the power granted to the Member States to encourage the reuse of packaging

[816] *Commission v Germany (Waste Packaging)*, paragraph 44 (note 1) and *Radlberger*, note 697, paragraph 56.
[817] Opinion in *Commission v Germany (Waste Packaging),* C-463/01, EU:C:2004:797, paragraphs 35 – 38.
[818] *Commission v Germany (Waste Packaging),* note 1, paragraphs 47 – 50.
[819] *Ibid.*, paragraph 37.

is formulated in general terms and the criteria to be taken into account by the Member States which exercise it are not specified.'[820] The German measure was instead to be assessed under Article 34 TFEU, where the Court found it to constitute an obstacle to trade.[821] As regards its justification, the Court found the measure partly disproportionate since producers did not have sufficient time to adapt to the new system.

242. The second example of a dubious national invocation of the Exhaustion Rule's second leg can be seen in *Danske Slagterier*,[822] this time in relation to the Court's assessment of a state liability claim. The case arose following an action by a Danish industry association of slaughterhouses to compensate for losses arising from Germany's breach of an exhaustive EU rule. This breach had been established in *Commission v Germany (Male Pigs),* which found that German requirements with respect to the treatment of carcasses of un-castrated male pigs went beyond what was permitted under exhaustively regulating directives.[823] A subsequent claim for compensation was made, leading to the case in *Danske Slagterier*. Here, Germany argued, first, that the directives were addressed to the Member States and did not confer individual rights. As regards the second question, Germany relied on the Exhaustion Rule to claim that private parties could not rely on Article 34 TFEU, since 'the legal provision infringed and the provision conferring individual rights must be identical'.[824] In other words, since the legality of its national measures had been assessed solely by reference to the exhaustively harmonising directives, leaving the Member State with no recourse to Article 36 TFEU, the same principle had to apply to examine whether individual rights were breached. Contrarily, the claimants and Commission argued first that the directives did indeed confer individual rights by protecting traders against unnecessary inspections by the Member State of import. As for Article 34 TFEU, they insisted that this provision should apply irrespective of whether the directives accorded individual rights and irrespective of the Exhaustion Rule.

243. AG Trstenjak agreed that the directives did not confer any individual rights. However, she sided with the Commission and claimant on the second question, finding that '…whilst a

[820] *Ibid.*, paragraph 50.
[821] *Ibid.*, paragraphs 53 – 69; *Radlberger*, note 697, paragraphs 60 – 73. When making its assessment, the Court held that the German measure could not avoid being classified as a MEEQR on grounds that it was fulfilling a Community-imposed requirement. Unlike *Bauhuis* (note 35) and *Berendse Koenen* (note 394), Article 5 did not impose an obligation on Germany, but merely authorised it to encourage reuse systems in conformity with the Treaty.
[822] *Danske Slagterier,* C-445/06, EU:C:2009:178.
[823] *Commission v Germany (Male Pigs),* note 31.
[824] Opinion in *Danske Slagterier*, note 147, paragraph 29.

harmonisation of laws deprives the Member States of the possibility of relying on the justifications established by (ex.) Article 30 EC, it does not, however, preclude the application of (ex.) Article 28 EC. Whilst secondary law may give concrete expression to that Treaty provision, it cannot, however, preclude its application'.[825] She then held that the Exhaustion Rule was 'inapplicable' since the directives concerned only procedural aspects of veterinary checks, with no reference to the rights of Union citizens to market access, protected in Article 34 TFEU. Her reasoning, however, seemed to imply that the Exhaustion Rule could apply in a claim of state liability, if for example the harmonising directive concerned contained a market access clause, which could replace Article 34 TFEU as the basis for the claim.[826]

244. The Court, however, did not entertain such a possibility.[827] Assessing the two questions together, it recalled that Article 34 TFEU, which confers directly effective individual rights, was given expression in the relevant directives by ensuring market access for compliant meat and granting individuals a right to freely circulate and market their products abroad. If a Member State undermined this right through incorrect transposition, that individual could rely directly on Articles 34 – 35 TFEU to render the State liable for a breach of EU law, regardless of whether the *Tedeschi* Rule applied to oust national competence under Article 36 TFEU. The Court thus confirmed that the Treaty did indeed apply in such circumstances. In doing so, it cast the Exhaustion Rule as a guide to help the Court in resolving a particular dispute, but without replacing the free movement of goods enshrined in the Treaty.

2.3 Overturning the Exhaustion Rule

245. Sections 2.1 and 2.2 traced how the Court has refined and clarified the conditions to trigger the Exhaustion Rule since 1993, leading to its systematic application to resolve disputes in the presence of harmonisation. In this section, we explore three situations where the Court can reintroduce primary law as a *direct* norm of reference to assess the national measure, notwithstanding application of the Rule - thus, beyond incidents of consistent interpretation and indirect dual analysis. These include the Court's residual jurisdiction to invoke Articles 34 – 35 TFEU (2.3.1), reintroducing national discretion through legislative amendment (2.3.2) and adopting national measures under Treaty-based derogations (2.3.3).

[825] *Ibid*., paragraph 27.
[826] *Ibid*., paragraphs 79 – 84.
[827] *Danske Slagterier*, note 822, paragraphs 18 – 26.

2.3.1 The Court's Residual Jurisdiction

246. The Court can rely on its residual but enduring power to directly invoke Articles 34 or 35 TFEU as a norm of reference, even in the presence of harmonisation. This power is generally exercised today via the indirect dual analysis approach, where the Court first interprets (and validates) the secondary measure by reference to the Treaty, before resolving a regulatory dispute.[828] However, such direct reference to primary law remains exceptional.

247. Still, the Commission has, until relatively recently, continued to challenge the lawfulness of national measures in certain infringement proceedings by reference to both the exhaustive secondary rule and Articles 34 *et seq*.[829] This indicates an implicit refusal, on the part of the Commission, to accept the Exhaustion Rule as a general principle. The Court's traditional response to the Commission's dual track approach has been to first assess the national rule by reference to the directive, before dismissing (or ignoring) the plea in relation to the Treaty.[830] However, in the recent case of *Commission v France (Excise Duty)*, AG Cruz Villalón challenged this 'just in case' practice directly, by calling explicitly on the Commission to respect the Exhaustion Rule.[831] Having established that the impugned French measure violated the relevant exhaustive directive, the AG insisted that it was 'not necessary (for the Court) to carry out a further examination'[832] by reference to the Treaty, as had been requested by the Commission. Moreover, the AG considered such 'supersession' of primary law to be obligatory, unless the person alleging a consecutive infringement of secondary law and the Treaty could prove that the contested national measure fell outside the scope of the act and was covered by the fundamental freedom. According to the AG, the Court must, in all other cases, 'confine itself' to assessing in light of the secondary law and not the Treaty under the Exhaustion Rule. The Commission appears to have followed the AG's advice in the subsequent *Commission v Germany (Pyrotechnic Articles)* case, where it only asked whether German

[828] Although in the relatively recent case of *Granarolo,* C-294/01, EU:C:2003:611, the Court concluded that the national law imposing a use-by-date for high temperature pasteurised milk was contrary to the relevant secondary legislation (which appeared to be exhaustive) and Articles 34 – 36 TFEU.
[829] *Supra*, note 659.
[830] *Ibid*. In other cases, the Court engaged with both of the Commission's pleas. Ex. in *Commission v Italy (Fire Blight)*, note 606, the Court first assessed the impugned Italian rules by reference to Directive 77/93 on preventing harmful organisms in plants (which it found had been breached) before establishing that the Italian rule also violated Article 34 TFEU.
[831] Opinion in *Commission v France (Excise Duty on Tobacco)*, note 200.
[832] *Ibid*., paragraph 46.

national requirements went beyond what was authorised under the relevant directive, with no mention of Article 34 TFEU, even though the facts of the case concerned the free movement of goods.[833] AG Bobek highlighted this omission by stating: 'Arguably, any further obstacles to free movement might be covered by the general provisions of the Treaty on the free movement of goods. However, since the Commission has exclusively based its application on Article 6 (1) of Directive 2007/23, consideration of a possible infringement of Article 34 TFEU does not fall within the ambit of the present proceedings.'[834]

2.3.2 Legislative Amendments

248. A second way to overturn the Exhaustion Rule lies in the hands of the EU legislature, which can amend exhaustive secondary measures in order to repatriate certain Treaty-based regulatory powers back to the Member States.[835] Referred to by Schütze as 'decentralization', this possibility was not fully recognised as an option prior to adoption of the Lisbon Treaty.[836] However, it is now explicitly authorised under Article 2 (2) TFEU, which states:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. *The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*. (Emphasis added)

249. This possibility is elaborated upon further in Declaration 18 to the Treaty, which concerns the delimitation of competences, and which states at paragraph two:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in

[833] *Commission v Germany (Pyrotechnic Articles)*, note 708.
[834] Opinion in *Commission v Germany (Pyrotechnic Articles)*, C-220/15, EU:C:2016:534, paragraph 25.
[835] This possibility was confirmed in *BAT*, note 440, where the Court found that the EU legislature could amend exhaustive legislation to safeguard general interests even if pre-existing rules guaranteed free trade. For discussion, see A. Von Bogdandy & J. Bast, 'The European Union's Vertical Order of Competence: The Current Law and Proposals for its Reform', *op. cit*., pp. 243 – 244.
[836] This allowed for the erroneous assimilation between 'legislative exclusivity' and 'constitutional exclusivity', which suggested that repealing an exhaustively harmonising measure could jeopardise the integration of national markets. In other words, 'the integration bias of the Community legal order would thus have a blocking effect'. See R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* pp. 239 – 240. For examples of this perspective by the Court, see *Ramel*, note 347, paragraphs 35 – 36 and Opinion in *Bristol-Myers Squibb & Others*, note 200, paragraph 99.

particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act.

250. The repatriated national power, to the extent that it impacts on cross-border trade, must be henceforth assessed by reference to Articles 34 – 36 TFEU, as happened following the amendment of the Pre-Packaged Liquids Directive.[837] In its original form, this directive had fully harmonised the nominal volumes of liquids to be used for pre-packages, thereby triggering the *Tedeschi* leg to prevent Member States from authorising pre-packages with alternative nominal values. However, this generalised pre-emptive effect was subsequently removed for all liquids for a transitional period and for certain liquids, including cider, thereafter. As a result, the directive became one of 'partial harmonisation', where Member States could, for certain liquids such as cider, accept nominal values that differed from those indicated in the Annex. Thus, insofar as such liquids were concerned, alternative values became justifiable once more under Articles 34 – 36 TFEU. The lawfulness of this transformation was confirmed in *Ruwet*.[838]

2.3.3 Treaty-Based Derogations

251. The third possibility to overturn the Exhaustion Rule is via a Treaty-based derogation, such as Article 114 (4 – 5) TFEU or Article 193 TFEU. These derogations could be viewed as the constitutionalisation of the *Tedeschi* deal following the move to qualified majority voting, since a Member State seeking to regulate thereunder implies that the 'necessity' condition to trigger *Tedeschi* is no longer fulfilled, and that the presumption of constitutionality enjoyed by the EU standard can no longer apply. Each is considered in turn:

A. Article 114 (4 – 5) TFEU

252. Article 114 (4 – 5) TFEU, which allow Member States to derogate from exhaustive internal market measures, was first introduced under ex. Article 100 (a)(4) SEA, which stated:

> If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the

[837] Directive 75/106/EEC, *op. cit.*
[838] *Ruwet,* note 358.

working environment, it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade ...

253. Adopted to compensate the Member States for relinquishing their veto under ex. Article 100a(1) EEC, this provision appeared to upend the Court's consistent position under the *Tedeschi* Rule, whereby Member States were prohibited from invoking Article 36 in the presence of (complete) harmonisation.[839] Indeed, this possibility to reintroduce national measures following harmonisation was initially deemed as a risk to the uniformity and primacy of EU law, and the goal of market integration more generally.[840] For example, Pescatore feared it would 'herald a new era of protectionism in the Community',[841] while Ehlermann called it 'the most controversial' and 'notorious' part of the SEA.[842] In reality, however, this escape valve was necessary to balance a significant transfer of regulatory control to the EU with a means for Member States to adopt legitimate national regulation. Moreover, the fears voiced at the time have been largely unfounded in practice.

254. The relationship between ex. Article 100a (4) EEC (now Article 114 (4) and (5) TFEU) and the *Tedeschi* Rule was directly addressed by the Court in *Commission v Italy (Sealed Heaters)*.[843] This case stemmed from infringement proceedings brought against Italy for only allowing 'sealed' heaters to be installed in living areas, on the basis that this excluded other types of heaters that complied with the Gaseous Fuels Directive.[844] The directive, which had been adopted under the new approach to harmonisation, laid down essential requirements for appliances and fittings, with a market access clause for compliant products, as well as a possibility for national safeguard measures. Having noted that the heaters in question came within the scope of the directive, the Court found that the essential requirements replaced national rules on safety, health and energy conservation and were exhaustive.[845] This enabled compliant products to enjoy free movement throughout the internal market, free from any additional national rules. Of interest to our research, however, are the submissions made in

[839] C. D. Ehlermann, 'The Internal Market Following the Single European Act', *Common Market Law Review,* vol. 24, no. 3, 1987, pp. 361 – 409 at p. 391.
[840] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, pp. 151 – 152. See also J. Weiler, 'The Transformation of Europe', *op. cit*.
[841] P. Pescatore, 'Some critical remarks on the Single European Act', *Common Market Law Review,* vol. 24, no. 1, 1987, pp. 9 – 18 at p.12.
[842] C. D. Ehlermann, 'The Internal Market Following the Single European Act', *op. cit.*, p.381.
[843] *Commission v Italy (Sealed Heaters)*, note 696.
[844] Council Directive 90/396/EEC on the approximation of the laws of the Member States relating to appliances burning gaseous fuels, OJ L. 196, 26 July 1990, pp. 15 – 29.
[845] *Commission v Italy (Sealed Heaters)*, note 696, paragraph 32.

relation to the impact of ex. Article 100a (4) EEC on the *Tedeschi* Rule. In particular, Italy argued that 'the possibility for a Member State to resort to Article 36 of the Treaty is expressly provided for in Article 100a thereof, on the basis of which the Directive was adopted'.[846] In other words, Italy contended that ex. Article 100a (4) EEC had overturned the *Tedeschi* Rule by allowing Member States to rely on Article 36 in the presence of harmonisation. However, while the Court acknowledged that Member States could re-invoke Article 36 TFEU to justify national measures, they would first have to comply with ex. Article 100a (4) EEC, that being, give formal notification to and receive authorisation from the Commission. Since Italy had not followed this procedure, the *Tedeschi* Rule continued to apply.

255. This decision confirms that ex. Article 100a (4) EEC, as with legislative safeguard measures, could displace the *Tedeschi* Rule in principle. Yet in her extensive study on the application of the Article 114 derogations, Maletic concludes that the scope for such an effect has been extremely limited. Not only do Member States rarely rely on these provisions, but when they do, the Commission will more often than not deny authorisation to depart from the harmonised standard.[847] This restrictive approach, which flows logically from the priority afforded by Article 114 TFEU to the goal of market integration,[848] imposes a high threshold on Member States wishing to derogate from a harmonised standard. Indeed, as noted by AG Tesauro, Member States cannot rely on 'the inadequacy of the standard of protection guaranteed by the harmonisation measure to be authorised to maintain or introduce a derogation from that measure'.[849] Thus, while ex. Article 100a (4) EEC remains important in principle, neither this provision nor its successors have had much substantive impact on the invocation or application of the Exhaustion Rule in practice.

[846] *Ibid*., paragraph 53.
[847] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., Chapters 4 and 5. See also J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* pp. 122 – 133. For relevant case-law, see *Land Oberösterreich and Austria v Commission (GMOs)*, Joined Cases T-366/03 and T-235/04, EU:T:2005:347 and *Land Oberösterreich and Austria v Commission (GMOs)*, Joined Cases C-439/05 P and C-454/05 P, EU:C:2007:510.
[848] See ex. Opinion in *Kortas*, note 407, paragraph 26 and Opinion in *Commission v Denmark (Food Additives)*, note 677, paragraph 66.
[849] Opinion in *Commission v Denmark (Food Additives)*, *ibid.*

B. Article 193 TFEU

256. Member States can also overturn the effects of the Exhaustion Rule insofar as it applies to environmental measures adopted under Article 192 TFEU. This possibility, which first appeared under ex. Article 130t EEC, is now set out in Article 193 TFEU and states:

> The protective measures adopted pursuant to Article 192 *shall not prevent any Member State from maintaining or introducing more stringent protective measures*. Such measures must be compatible with the Treaties. They shall be notified to the Commission. (Emphasis added)

257. The Court had an opportunity in *Dusseldorp* to consider whether Member States could enact more stringent measures based on Article 193 TFEU in the presence of the first Waste Shipment Regulation (WSR), discussed earlier in relation to *DaimlerChrysler*.[850] As regards the facts of the case, the Netherlands had sought to implement the (EU) environmental principles of self-sufficiency and proximity by prohibiting the shipment of dangerous waste for recovery, unless processing abroad was superior. However, unlike waste for disposal, the WSR did not expressly mention these environmental principles in relation to the management of waste for recovery. As a result, it was unclear whether and on what basis Member States could seek to implement these principles in this latter context.

258. Looking first to the text of the WSR, the Court confirmed that the exhaustive EU framework did not extend the principles of proximity and self-sufficiency to waste for recovery. This contrasted with the legal regime for waste for disposal, where these principles were expressly mentioned. The Court supported this regulatory distinction by referring *inter alia,* to the need to grant a more flexible procedure to waste for recovery, in line with the overall Community goal of encouraging waste for recovery as a more environmentally friendly option.[851] As a result, the Dutch measure could not be justified by reference to the WSR. However, the Court then considered whether such justification could be based on ex. Article 130t EEC (currently Article 193 TFEU). The Commission and Dusseldorp argued not, given the exhaustive nature of the Regulation,[852] while the Netherlands maintained that all environmental measures adopted under ex. Article 130s EEC were, by definition, instruments

[850] *Dusseldorp,* C-203/96, EU:C:1998:316.
[851] *Ibid*., paragraph 33.
[852] *Ibid*., paragraph 35.

of minimum harmonisation.[853] Neither the AG nor the Court expressly addressed this question.[854] Still, both proceeded to review the Dutch measure under the Treaty's free movement provisions, concluding that it constituted an unjustified barrier to trade.[855]

259. The negative finding in *Dusseldorp* should not detract from the significance of the Court's reasoning. In particular, by accepting to review the national measure by reference to the Treaty, it implied that the Exhaustion Rule was not applicable, even though the WSR had exhaustively regulated the field.[856] Otherwise, the fact that the WSR excluded the principles of proximity and self-sufficiency in the context of waste recovery plans would have been sufficient, on its own, to preclude the Dutch measure.[857] The Court has since confirmed this position. In *Fornasar*, for example, it held that Italy could rely on ex. Article 130t EEC to classify certain waste not listed under the Hazardous Waste Directive[858] as hazardous:[859]

> '…Community rules do not seek to effect complete harmonisation in the area of the environment. Even though Article 130r of the Treaty refers to certain Community objectives to be attained, both Article 130t … and Directive 91/689 allow the Member States to introduce more stringent protective measures. Under Article 130r …, Community policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the Community.'[860]

260. Much of the scholarship therefore accepts that Member States can *always* adopt more stringent environmental protection rules, even in the presence of seemingly exhaustive EU measures.[861] As against this, there is a minority view, articulated by Jans & Vedder, which interprets Article 193 TFEU as *not* extending to exhaustive secondary measures.[862] In

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[853] *Ibid*., paragraph 36.
[854] AG Jacobs expressly advised the Court not to proceed with resolving any of the issues that could arise under ex. Article 130t EEC. See Opinion in *Dusseldorp,* note 805, paragraph 74.
[855] *Ibid*., paragraph 47.
[856] See G. Winter, 'Die Steuerung Grenz*u*berschreitender Abfallstrome', *DVBL,* 2000, pp. 657 – 669 at p. 666, as referred to by J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* pp. 118 – 119.
[857] In the subsequent judgement in *FFAD/Kobenhavns Kømmune*, C-209/98, EU:C:2000:279, the Court ruled that national measures adopted to ensure environmental damage should be rectified at source, as required under ex. Article 130r (2) EEC would also be subject to a Treaty control.
[858] Council Directive 91/689/EEC on hazardous waste, OJ L. 377, 31 December 1991, pp. 20 – 27.
[859] *Fornasar*, C-318/98, EU:C:2000:337. See also *Commission v Belgium (Birds in Captivity),* C-100/08, EU:C:2009:537; *Dimos Agiou Nikolaou*, C-82/09, EU:C:2010:220, paragraph 24; *Azienda Agro-Zootecnica Franchini*, C-2/10, EU:C:2011:502, paragraph 48 and Opinion in *EU Wood Trading*, C-277/02, EU:C:2004:547, paragraph 69.
[860] *Fornasar*, *ibid*., paragraph 46.
[861] Jans & Vedder note that 'the prevailing view is that Member States can *always* adopt more stringent measures following harmonisation under Article 193 TFEU' (Emphasis in original). J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 118 and N. de Sadeleer, *EU Environmental Law and the Internal Market*, Oxford, Oxford University Press, 2014, pp. 350 – 358.
[862] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* pp. 118 – 121.

particular, these authors consider that the provision simply codifies legislative practice before the SEA. Minimum harmonisation is therefore authorised as the most desirable solution, but without making exhaustive harmonisation impossible. As a result, the EU legislator should be able to restrict the possibilities to invoke Article 193 TFEU by adopting exhaustive rules.[863] This view could have some merit, considering the logic of exhaustively regulation. Indeed, as we have discussed, an EU measure that fully regulates a field should adequately protect the public interest (in this case, environmental protection), and can include legislation-based discretion to give Member States some regulatory leeway. In such circumstances, national action under Treaty-based derogations should be unnecessary and unjustified by definition. Slot notes this fact in relation to Article 193 TFEU when he says 'the question must be asked whether the national measure is necessary given the level of protection provided by the community measure and whether the effect on trade between the Member States of the additional protection provided is proportionate to the aims pursued'.[864] At the same time, denying Member States the possibility to invoke stricter environmental standards could stifle innovation, flexibility and higher levels of protection in an area that is increasingly requiring more radical action. Indeed, the very fact that a Member State invokes Article 193 TFEU could rebut the presumption that the 'necessity' requirement to trigger *Tedeschi* in the first place is fulfilled. The Court may have implied as much in *Safety Hi-Tech*, when it justified the fact that the EU's environmental policy did not 'have to be the highest (level of protection) that is technically possible' by highlighting the possibility for more stringent national protective measures.[865] That said, successful reliance on Article 193 remains exceptional.[866] First, it can only apply as a justification if the harmonising rule was adopted pursuant to Article 192 TFEU. Secondly, it cannot be used by Member States to avoid obligations under EU law.[867] Third, Article 193 TFEU will only apply as a defence if Member States have specifically based national measures thereunder,[868] with the purpose of ensuring greater protection of the objectives pursued by the EU rule. And finally, while the Court appears more sympathetic to national measures adopted under Article 193 TFEU when compared to Article 114 derogations,[869] such measures must still comply with the free movement of goods.

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[863] *Ibid*.
[864] P. Slot, 'Harmonisation', *European Law Review*, 21, 1996, pp. 378 – 397 at p. 393.
[865] *Safety High-Tech*, note 350, paragraph 47.
[866] N. de Sadeleer, *EU Environmental Law and the Internal Market*, *op. cit.* See also J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, p. 113.
[867] *Ibid*.
[868] Opinion in *DaimlerChyrsler*, note 795, paragraphs 54 – 55.
[869] Ex. Opinion in *Kortas*, note 407, paragraph 26.

CONCLUSION OF CHAPTER TWO

261. In the early years of Community integration, the Court generally considered the impact of secondary legislation in terms of its pre-emptive effect on national competence, relying frequently on the *Tedeschi* leg to remove unnecessary national trade rules and ensure market integration. This prompted an impression that the Court and Commission were driven by an integration and deregulatory bias, which sought to achieve the common market by downgrading national standards and centralising regulatory power in the Community. As discussed in Part II, this claim was not entirely unfounded. Even though the Court had abandoned its 'conceptualist federalist' approach to review, under which the mere existence of (mainly agricultural) Community rules would automatically pre-empt national rules, it continued to ignore the quality of the Community norm when applying *Tedeschi* and, in some cases, may even have interpreted the regulatory potential of Community standards in a restrictive manner. Yet such fears of integration bias were also incomplete. Indeed, while *Tedeschi* may have undermined certain legitimate national standards, it was often simply completing the task initiated in the absence of harmonisation, that being, to 'weed out unrepresentative and outdated manifestations of national-level decision making that (were) hostile to, and inappropriate in, an integrating European market'.[870] What is more, a closer look at the *Tedeschi* case itself rejects any vision of a one-dimensional Court. To the contrary, the Court showed an awareness of both the Community's regulatory obligations and national sensitivities, illustrated by the 'necessary' condition to trigger *Tedeschi* and the Court's acceptance of the (dubious) safeguard mechanism under the *Tedeschi* deal. The Court thus recognised, at an early stage, that pre-emption of national competences would be contingent on ensuring adequate regulatory protections at Community level and providing an exit for dissatisfied Member States to re-regulate if the 'necessity' condition was no longer fulfilled. It did not, however, go so far as to police the adequacy of the Community standard by systematically assessing whether it met a particular threshold of necessity. Rather, this would be presumed under a generalised but rebuttable presumption of constitutionality accorded to the Community legislator.

262. Such judicial acknowledgement of the conditionality of pre-emption was insufficient, on its own, to counter the deep distrust that characterised early regulation of the

[870] A. Menon & S. Weatherill, *Democratic Politics in a Globalised World: Supranationalism and Legitimacy in the European Union*, LSE Law, Society and Economy Working Papers 13/2007, p. 11. Available at http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS13-2007MenonandWeatherill.pdf. Last accessed 2 September 2019.

common/internal market. While the supranational Community institutions still feared that secondary legislation would reintroduce unlawful barriers to trade, Member States, suspicious of the centralising and deregulatory tendencies of Community law, continued to challenge its pre-emptive effects via 'additional' national measures, while also wielding their veto to prevent being locked into unsatisfactory harmonisation in the first place.[871] Distrust between the Member States was also evident in the requirement for pre-empting Community rules to provide mechanisms to monitor compliance with their provisions. Still, the fact that the Court recognised the complexity of internal market regulation not only facilitated the acceptability of the *Tedeschi* Rule. It also foreshadowed key institutional and Treaty developments over the 1980s, including the 'new approach to harmonisation' (NAH), the Commission's White Paper on Completing the Internal Market,[872] and the SEA. As discussed in the General Introduction, the NAH focused on harmonising essential health and safety requirements that would otherwise survive under the negative integration regime, while leaving the principle of mutual recognition to take care of the rest. Pursuing both an integration and a regulatory function, it relied on the two core tenets of the Exhaustion Rule, those being, to preclude national regulation under the *Tedeschi* Rule, and to grant national regulatory standards based on the harmonised Community standards a presumption of compliance with the Treaty. As a result, while guaranteeing market access for producers, the new approach also, at least in principle, reassured the Member States that (re)regulatory goals were being taken seriously by the EU legislature – for example by setting standards and preventing the circulation of non-compliant products. As for the Commission's White Paper and the SEA, the former gave the Community a renewed impetus to complete the single market, while the latter made this possible by introducing qualified majority voting, emphasising the need for high regulatory standards in internal market legislation, and providing new legal bases to accommodate sectoral concerns. Regulation of non-agricultural products proliferated, with profound consequences for the relationship between the Member States, the EU's approach to regulation and the very nature of the internal market itself.[873]

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[871] K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique européen*, *op. cit.*, paragraph 468, p. 565.
[872] Commission White Paper on completing the internal market, COM (85) 310 final, 14 June 1985.
[873] For two well-known papers on this transformation, see J. Weiler, 'The Transformation of Europe', *op. cit.,* and C. Joerges, *The Market Without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics,* European Integration online Papers (EIoP), vol. 1, no. 019, 1991. Available at http://eiop.or.at/eiop/pdf/1997-019.pdf. Last accessed 1 September 2019.

263. At their core, these developments expressed a new relationship of trust between the various levels of internal market governance within which the fundamental principles of the Exhaustion Rule became more acceptable. The result was an expanded legislative *acquis*, which bolstered the regulatory role of the EU, and gave the Court more opportunities to consider regulatory disputes arising in the presence of (non-CAP) harmonisation – and develop the *Tedeschi* leg, and Exhaustion Rule, beyond the CAP. Still, the Commission, Court and other parties remained suspicious of some exhaustive legislation, and national implementation thereof, insofar as compliance with the free movement of goods was concerned. This explains, at least in part, the Court's initial refusal to grant such legislation with a presumption of constitutionality under the Exhaustion Rule's second leg, opting instead to refer directly to Articles 34 – 35 TFEU. However, as uncertainty and litigation ensued, the Court sought to bolster the acceptability of the Rule by clarifying the conditions to trigger and overturn it, and by reconciling its second leg with the hierarchy of norms. The Exhaustion Rule could, in such circumstances, transform into a sort of 'constitutional compass', where it would guide the Court in resolving regulatory disputes in a balanced yet Treaty-compliant manner.

CONCLUSION OF PART I

264. Part I aimed to provide a comprehensive understanding of the Exhaustion Rule's role in resolving regulatory disputes that arise in the presence of EU product rules. It has, to this end, highlighted the constitutional principles upon which the Rule is based, and that govern the interaction between national, secondary and primary law, and by extension, between the Member States, EU legislator and judiciary. As outlined in Chapter One, these principles include the principle of pre-emption, which concerns the relationship between the national and EU legislator, and the presumption of constitutionality, which governs the relationship between the EU legislator and primary law. The former is expressed through the *Tedeschi* leg of the Rule, and precludes national regulatory competence in the presence of exhaustive legislation, while also respecting the principle of subsidiarity and the shared nature of internal market competences. The latter allows the Court to suspend direct application of Articles 34 – 35 TFEU on the basis that EU legislation successfully reconciles, or balances the goals of integration and regulation and that it complies with free movement of goods. The Court can, as a result, defer to EU policy decisions but also ensure that such decisions respect the Treaty.

265. As illustrated through our discussion of the *Tedeschi* deal, these two principles, as expressed through the two legs of the Rule, are distinct but interlinked and, together, can facilitate the Court in enforcing the principles of institutional balance and the hierarchy of norms. In particular, national acceptance of the pre-emptive effects of secondary legislation (first leg) appears to have been contingent on such legislation enjoying a presumption of constitutionality (second leg), whereby the Court would defer to EU policy decisions, and the regulatory standard laid down thereunder, while also ensuring compliance with the Treaty. At the same time, the very fact that a harmonising measure pre-empts national regulatory competences in the first place, grants it the internal market dimension necessary to presume compatibility with Articles 34 – 35 TFEU, thereby countering any risk that such secondary legislation would violate the free movement of goods. What is more, by casting exhaustive legislation as the exclusive norm of reference, the Exhaustion Rule avoids numerous difficulties associated with systematically referring to, and interpreting, primary law in tandem with exhaustive secondary legislation. In particular, the Court can defer to that EU legislative standard as a starting point, which it can then clarify, for example to resolve an ambiguity, but subject to justification. Indeed, it is on this basis that its predecessor, the exhaustion approach, was considered as preferable to the classic, mixed and dual analysis approaches to review.

266. This assessment leads a key claim of this research, which is that the Exhaustion Rule can act as the Court's constitutional compass for distributing power in the presence of EU product legislation. Part II conducts an extensive review of relevant case-law to test whether this claim holds up in practice.

PART II

THE EXHAUSTION RULE BEFORE THE COURT

1. We have noted that the Treaty remains ambiguous as regards the nature of the internal market for goods. In specific cases, however, this ambiguity must be clarified, for example to determine the scope for, and lawfulness of, a particular national product rule. The Court generally carries out this task in the absence of harmonisation by interpreting Articles 34 – 36 TFEU. Yet this 'negative integration' regime remains incomplete and unsatisfactory, from the perspective of market integration, regulation and democracy. The EU legislator is therefore granted a key role in clarifying and codifying the law, and reconciling tensions that persist in different product markets. When regulatory disputes emerge in this context, the Court must, once again, confirm what such secondary law means, and how it interacts with national and primary law. It does so by interpreting, enforcing and, where necessary, limiting secondary rules in a manner that respects both the legislator's intention and the Treaty. As noted by Unberath & Johnston, 'while much depends on the actual drafting and ambit of legislation it is in the end the Court's task to mediate between the Community rule and national implementation'.[1]

2. By establishing which norm of reference applies to resolve the dispute, the Exhaustion Rule impacts on the Court's procedural approach to interpretation. Yet it can also impact the *substance* of the Court's decision, for example, by directing it to focus on the integrative or regulatory function of the legislation, as the case may be. The Court can, in this regard, be influenced by strategic positions taken by disputing parties. As discussed, such parties can, depending on their divergent aspirations, rely on one or other of the Rule's legs, or its conditional nature, to privilege free movement at the expense of protective (EU or national) regulatory standards, or *vice versa*. For example, parties generally rely on the first *Tedeschi* leg to pursue the *integrative* effect of secondary legislation by ousting national regulatory competence. In contrast, they often rely on the second leg to promote its *regulatory* effect by shielding national measures, which have been adopted thereunder, from being reviewed under Articles 34 – 35 TFEU. In a further category of cases, a party may argue that the conditions to

[1] See H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *Common Market Law Review*, vol. 44, no. 5, 2007, pp. 1237 – 1284 at p. 1256.

trigger the Rule are not fulfilled, and that Member States can continue to regulate under Articles 34 – 36 TFEU. Given the unsettled nature of the internal market, it is neither surprising, nor necessarily illegitimate, that the various market actors would seek to interpret legislative ambiguities in such a manner. And indeed, many claims are based on divergent but plausible interpretations of an ambiguous legislative provision (or of Articles 34 – 36 TFEU). Such interpretations can, for example, seek to secure free movement rights, protect worthy regulatory standards or preserve/limit the scope for national regulatory diversity. Pursuing market integration *at the expense of* higher regulatory standards (or *vice versa*) could, however, challenge the presumption that such goals are in fact reconciled by the EU legislative act.

3. We concluded in Part I that the Exhaustion Rule provides the Court with a framework to resolve such disputes in a fair, balanced and constitutional manner. In particular, it facilitates the Court in enforcing EU legislation that can, legitimately, favour the market integration aspect of a fundamental freedom over its justification aspect, or, conversely, its justification aspect at the expense of free movement,[2] while ensuring a consistent interpretation with the Treaty. We now test this claim by examining case-law in which the Exhaustion Rule was invoked and applied. Chapter One presents relevant jurisprudence where the Rule was relied upon to enforce the integrative and regulatory effects of EU legislation, or dis-applied, because the conditions for its application were not met. This exercise gives an insight into how the Court interprets, enforces and limits the EU's extensive legislative programme. It also feeds into Chapter Two, which latter assesses whether the Rule could undermine the principles of institutional balance and/or legality by providing cover to promote an inappropriate liberal bias, or, alternatively, allowing a national trade barrier to escape review.

[2] See Part I (Chapter One), points 77 – 78.

4. Chapter One presents relevant jurisprudence where the Rule was relied upon, with or without success, to determine the lawfulness of mainly national products rules.[3] While many cases are referred to in the General Introduction and Part I, their consolidation illustrates more clearly the varied impact of the Exhaustion Rule and the legislative programme it seeks to enforce. It also provides material for analysis in Chapter Two. The review, while sufficiently comprehensive to give an overview of such matters, is not an exhaustive summary of the case-law relating to a particular legislative act or sector.[4] Indeed, given the EU's extensive activity in this field, such an exercise is simply outside the scope of the research.

5. The case-law is categorised under five sectors, which each sector regrouped under three sections. The first section looks at secondary rules that regulate the CAP (1). Section two covers the regulation of two public interest goals laid down under Article 36 TFEU, those being human health and safety (2.1), and intellectual property rights (2.2). Section three deals with the regulation of two mandatory requirements, those being consumer protection (3.1) and environmental protection (3.2). It should be emphasised that this sectoral categorisation is purely for ease of reference, and to facilitate a contextual understanding of the EU legislation and resulting case-law. It should not, therefore, call into question the fact that EU measures often regulate numerous public interests simultaneously. For example, many CAP measures also protect animal and human health, the environment and/or the consumer, while there is also strong overlap between EU health and safety rules and consumer protection, and to a lesser extent, the environment.[5] Where possible, our choice to classify a particular matter was made based on the legal basis of the measure,[6] or in accordance with its main objective.[7] Where a field of regulation had two or more equally important objectives, such as the regulation of dangerous substances, and GMOs, we sought to distribute these evenly to ensure balance

[3] As mentioned in the research Methodology, most of the case-law concerns the free movement, and thus regulation, of goods. However, some cases do concern the Exhaustion Rule, as it is invoked and applied to enforce (or challenge) EU legislation covering free movement of services and establishment.
[4] For a more detailed presentation of how the cases were selected, see research Methodology.
[5] Ex. *Nordiska Dental*, C-288/08, EU:C:2009:718, paragraphs 30 and 31.
[6] It is on this basis that certain judgements regarding animal welfare measures have been classified as relating to the CAP as opposed to environmental matters.
[7] We sought to classify as health and safety measures directives/regulations that harmonise product standards (ex. new approach directives, regulation of automobiles, regulation of medicinal products). We also classified as a health and safety matter the labelling of tobacco products and dangerous substances. Labelling of food, cosmetics shoes and alcohol, and the advertising and marketing of products are classified under consumer protection.

between the various sectors.[8] Nor should the sectoral classification undermine the need to appreciate each case in its chronological context. Indeed, as outlined in Part I, the Court, until at least the late 1990s, took different approaches to assess national measures in the presence of harmonisation. Time is also important when considering the relevance of an exhaustive EU measure to the dispute,[9] as well as its political and sectoral context, all of which may impact on the Court's review and which will be considered in Chapter Two.

6. Within each of the five sectoral categories, the case-law is further divided into three subsections that explore the effects of, and limits to, relying on the Rule. Specifically, we classify cases as enforcing an *integrative effect* if they rely on the Rule (usually the first leg) to invalidate a national measure going beyond the exhaustive EU measure. The cases classified as having a *regulatory effect* concern those where the Rule (usually the second leg) was invoked (or implied) to enforce a protective interpretation of the EU standard, either to validate the compliant national measure or to oust a national measure falling below that EU standard. The cases classified under *conditional effect* are those where the Rule did not to apply, either because it was not exhaustive (ex. minimum harmonisation), or because the matter fell outside its scope (ex. partial harmonisation).[10] This subdivision of the 'sectoral' case-law *by effect* should not undermine the fact repeated throughout this research, which is that all EU product rules should have, in principle, both an integrative and regulatory impact. As such, when the Court relies on the Exhaustion Rule to enforce the integrative effect of EU legislation, for example by striking down a disparate national rule, that legislation continues to have a regulatory effect, albeit at a different level than what was claimed by the Member State. By the same token, relying on the Rule to enforce the regulatory effect of EU legislation should not, in theory, challenge its integrative effect, since all Member States must apply the same regulatory standard. Thus, the regulatory function of EU legislation contributes to its integrative goal. These cases recall the core pre-emptive function of the Exhaustion Rule, which is to enforce uniform EU standards over disparate national rules, rather than pursue a more or less

[8] Ex. Regulation of dangerous substances is classified as a health and safety matter, although could equally be classified under environmental protection, while regulation of the release of GMOs and waste packaging are classified as environmental matters, notwithstanding their reliance on Article 114 TFEU as a legal basis. The Cosmetics Directive is classified under consumer protection, although it also concerns setting standards for cosmetics. EU rules governing the advertising of medicinal products are classified under health and safety.

[9] Key dates in this context are the date upon which the proceedings commenced and the expiry date for implementing directives. See Part I (Chapter Two), section 2.1.3, point 218.

[10] This is not to say that non-exhaustive EU rules cannot influence national regulatory behaviour. See ex. *Denkavit Futtermittel,* C-39/90, EU:C:1991:267; *Solgar Vitamin's France*, C-446/08, EU:C:2010:233; *Regiopost*, C-115/14, EU:C:2015:760 and *Noria Distribution*, C-672/15, EU:C:2017:310.

protective EU regulatory regime. And indeed, the Rule is often invoked, or disputed, on this basis, as parties disagree over whether it has been triggered in the first place, and not over its pre-emptive effect once triggered. There are cases, however, where parties rely on the Rule to promote one effect *at the expense of* the other. For example, free movers might seek to enforce an integrative effect that necessarily requires downgrading certain regulatory standards, either by precluding Treaty-based discretion or by challenging a more protective interpretation of an EU standard. The regulator, for its part, could call for the opposite result, that is, a protective interpretation of the EU regulatory standard, which prevents the free movement of non-compliant products. As outlined in the introduction, such strategic litigation is to be expected, given the various interests at play in the internal market. Yet, it also reveals a tension that could undermine the delicate balance between these interests, as protected under the Treaty.

7. Our categorisation of the case-law by effect reflects this tension by highlighting the goal that prevailed, and in doing so, facilitates the case-law assessment in Chapter Two. Specifically, in cases classified under 'integrative effect', the regulatory effect of the EU measure, as enforced under the Exhaustion Rule, was set at a lower level than what had been claimed by one party (usually the national regulator) by relying (unsuccessfully) on Treaty-based discretion *or* a more protective interpretation of EU legislation. In cases categorised under 'regulatory effect', the Court's protective interpretation of an EU standard, again under the Exhaustion Rule, excluded the free movement of goods meeting lower standards, thereby restricting the potential for deeper market integration. The cases where the Court deemed the Exhaustion Rule not to apply are classified under conditional effect and favour national regulatory competence, whether this leads to higher or lower regulatory standards.

1. THE COMMON AGRICULTURAL POLICY

8. Article 39 TFEU provides that 'the Union shall define and implement a common agriculture and fisheries policy', which shall form part of the internal market. To achieve this objective the EU must regulate the production of and trade in the agricultural products listed in Annex I TFEU. As discussed in Part I, these products are generally subject to special rules under Common Market Organisations (COMs), [11] which, together with supplementary regulations, have been progressively adopted and refined since the 1960s to reproduce similar

[11] Article 40 (1) TFEU.

conditions for trade at EU level as exist at national level,[12] including the right to unhindered movement. To this end, COMs create and regulate an open EU market for agricultural products to which every producer has free access, with common rules on public intervention in agricultural markets, quota and aid schemes, marketing and production standards and trade with third countries. By the 1980s, a COM had been set up for almost all agricultural products, the most developed of which had created an integrated market with a single price structure. However, the initial regulatory approach of the CAP changed in 1992, when the "MacSharry reforms" shifted focus from supporting products through prices (which led to overproduction) to producer support through income support and direct payments. This trend was consolidated in 2003 with the single payment scheme.[13] Four years later, a Single COM Regulation was adopted to govern all agricultural products.[14]

9. As noted in Part I (Chapter Two), the CAP is, in many respects, a *lex specialis*, subject to specific Treaty provisions and policies that do not apply elsewhere. Still, as the first field to be subjected to extensive secondary measures, the CAP generated litigation that enabled the Court to identify many founding EU principles, including those governing regulatory relations, such as the Exhaustion Rule. Indeed, the Court has always relied on the logic of the Rule to resolve regulatory dispute arising under the CAP, as it enforced both the integrative effects (1.1) and regulatory effects (1.2) of relevant secondary measures, while respecting Member States' residual Treaty-based discretion (1.3).

1.1 Enforcing the Integrative Effect

10. The Court has always acknowledged that secondary CAP measures have a strong pre-emptive effect on national competence to regulate agricultural matters, which has, in turn, allowed it to successfully integrate agricultural markets. In this regard, the Court has stated that:

> '…it is one of the fundamental characteristics of a common organization of the market that in the sectors concerned the Member States can no longer take action through

[12] Article 43 (4) (b) TFEU.
[13] Council Regulation (EC) No. 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L. 270, 21 October 2003, pp. 1 – 69, replaced by Council Regulation (EC) No. 73/2009, OJ L. 30, 31 January 2009, pp. 16 – 99, which was in turn replaced by Regulation (EU) No. 1307/2013 of the European Parliament and of the Council, OJ L. 347, 20 December 2013, pp. 608 – 670.
[14] Council Regulation (EC) No. 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single COM Regulation), OJ L. 299, 16 November 2007, pp. 1 – 149. Replaced by Regulation (EU) No. 1308/2013, OJ L. 347, 20 December 2013, pp. 671 – 854.

national provisions adopted unilaterally. Their legislative competence can only be residual; it is limited to situations which are not governed by the Community rules and to cases where those rules expressly give them power to act.'[15]

11. As noted in Part I, the mere presence of a COM was, until the late 1970s, often sufficient to pre-empt all national regulatory competence in that field, regardless of the existence or not of regulatory conflict with the national rule. However, since the mid-1970s, the Court started adopting a more 'pragmatic approach' where it accepted that non-exclusive powers must be shared between the EU and the Member States – even in the presence of EU rules – once national law does not jeopardise, impede or undermine the objectives or functioning of the normatively superior COM.[16] In other words, while the Court agreed that such EU rules could oust Article 36 TFEU powers,[17] it no longer presumed that the simple adoption of a COM would trigger such a pre-emptive effect.[18]

12. This approach can be seen in cases such as *Pigs Marketing Board*, *McCarran, Vriend* and *Le Campion*, where the Court invalidated national attempts to intervene in the sale and/or marketing of an agricultural product because they undermined or created exception to the relevant COM.[19] It is also prevalent in the Court's assessment of national border controls, which, while clearly constituting a MEEQR, were, in principle, justifiable in the absence of harmonisation on health and safety grounds.[20] One early Community goal was therefore to replace such national border controls with general[21] and specific[22] harmonised rules, while also limiting import bans and restrictions to exceptional safeguard measures subject to Community

[15] *Commission v Germany (Wine Enrichment),* Case 48/85, EU:C:1986:326, paragraph 12.
[16] The Court has repeated this formula in numerous cases. Ex. *Le Campion,* Case 218/85, EU:C:1986:440 paragraph 13 and *Danisco Sugar*, C-27/96, EU:C:1997:563 paragraph 24. See also *Tasca,* Case 65/75, EU:C:1976:30, *SADAM*, Joined Cases 88-90/75, EU:C:1976:32 and *Bussone*, Case 31/78, EU:C:1978:217. For discussion, see Part I (Chapter Two), point 41.
[17] Ex. *Simmenthal*, Case 35/76, EU:C:1976:180.
[18] Ex. *Amsterdam Bulb,* Case 50/76, EU:C:1977:13.
[19] *Pigs Marketing Board*, Case 83/78, EU:C:1978:214; *McCarran*, Case 177/78, EU:C:1979:164; *Vriend*, Case 94/79, EU:C:1980:50 and *Le Campion,* note 16.
[20] Although subject to the principle of mutual recognition and proportionality. In this context, the obligation for imported goods to be accompanied with a health certificate is generally sufficient to ensure its right to unhindered free movement, in the absence of scientific uncertainty. Ex. *Commission v France (Italian Wine)*, C-42/82, EU:C:1983:88; *Commission v Greece (Pasteurised Butter)*, C-205/89, EU:C:1991:123 and *Commission v Italy (Fish)*, C-228/91, EU:C:1993:206. See S. Enchelmaier, 'Article 36 TFEU: General', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union*, Fifth Edition, Hart Publishing, Oxford and Portland, Oregon, 2010, Chapter 8, pp. 215 – 312 at pp. 261 – 262.
[21] Ex. Council Directive 83/643/EEC on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States, OJ L. 359, 22 December 1983, pp. 8-11.
[22] Ex. Council Directive 90/425/EEC concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market, OJ L. 224, 18 August 1990, pp. 29 – 41.

control.[23] These initiatives were, and continue to be, grounded in the notions of home country control and (eventually) mutual trust between the Member States.[24] This Community-wide system of protection was quickly relied upon by the Court to significantly curtail parallel national inspections under the logic of *Tedeschi*. This can be seen in cases such as *Simmenthal,*[25]*Delhaize Frères*,[26] *Moormann,*[27] *Commission v Sweden (Veterinary Checks)*[28] and numerous other judgments,[29] with the Court often taking the classic approach – that is, first classifying the national border control measure as a MEEQR before applying the *Tedeschi* Rule to prevent reliance on Article 36 as justification.

13. A similar intolerance of 'additional' national measures can be seen in the Court's review of national import bans and export bans, adopted outside the Community safeguard procedures. For example, following the Bovine Spongiform Encephalopathy (BSE) crisis in 1996, where a probable link was confirmed between BSE and the human Creutzfeldt-Jakob disease, the Commission instituted a worldwide ban on UK beef exports. When the ban was subsequently lifted in 1999, France sought to maintain a prohibition on imports of UK beef national level. However, in *National Farmers' Union*[30] the Court held that Article 36 TFEU could not be relied on for such an end, since the Community scheme ensured 'the protection of public health upon the resumption of exports of beef and veal from the United Kingdom to the other Member States and (laid) down Community procedures to monitor compliance with them'.[31]

14. As regards national export bans, the Court invoked the *Tedeschi* Rule in *Hedley Lomas*[32] and *Compassion in World Farming* (*CIWF*)[33] to confirm that the UK could not rely on animal welfare concerns to prevent live animals from being shipped to other Member States. *CIWF* arose following a challenge by animal welfare NGOs to the continued export of live calves

[23] Ex. *Ibid*., Articles 8 and 9.
[24] Ex. *Hedley Lomas,* C-5/94, EU:C:1996:205.
[25] *Simmenthal*, note 17.
[26] *Delhaize Frères*, Joined Cases 2/82, 3/82 and 4/82, EU:C:1983:268.
[27] *Moormann,* Case 190/87, EU:C:1988:424.
[28] *Commission v Sweden (Veterinary Checks),* C-111/03, EU:C:2005:619.
[29] Ex. *Commission v Germany (Health Controls)*, C-186/88, EU:C:1989:601; *Commission v Belgium (Fresh Meat),* Case 304/88, EU:C:1990:284; *Commission v Italy (Grapefruit),* C-128/89, EU:C:1990:311; *Ligur Carni*, Joined Cases C-277/91, C-318/91 and C-319/91, EU:C:1993:927; *Commission v Italy (Fire Blight)*, C-249/92, EU:C:1994:335 and *Deutsches Milch Kontor (II),* C-272/95, EU:C:1997:191.
[30] *National Farmers' Union*, C-241/01, EU:C:2002:604. See also arguments made by Commission in *Commission v France (BSE)*, C-1/00, EU:C:2001:687*,* paragraph 112.
[31] *Ibid*., paragraph 62.
[32] See Part I (Chapter Two), points 200 - 204.
[33] *Compassion in World Farming (CIWF)*, C-1/96, EU:C:1998:113.

from the UK to Member States with lower welfare standards, on grounds that an export ban could be justified under Article 36 TFEU. However, the applicability of Article 36 TFEU was open to question, given the existence of a directive laying down minimum standards for the protection of calves.[34] This directive laid down provisions for the size of the crates in which calves were to be housed before slaughter, although transitional arrangements allowed temporary national derogations. Article 11 (2) also authorised Member States 'to apply within their territories stricter provisions for the protection of calves', which the UK invoked to prohibit the veal crate system on its territory. Yet its calves were being exported to countries that maintained standards below the directive's minimum requirements under transitional arrangements. The question was whether an export ban on calves in such circumstances could be justified under Article 36 TFEU. As with *Hedley Lomas*,[35] this question required an assessment of whether the relevant directive had harmonised the field. Taking the classic approach, the Court first found that an export ban constituted a quantitative restriction under Article 35 TFEU before confirming that the directive had instituted 'exhaustively common minimum standards',[36] notwithstanding Article 11 (2) and the temporary derogations. The former did not undermine the exhaustive nature of the directive, since any higher standards adopted thereunder could only apply in the national territory, while the latter was limited in time.[37] As a result the *Tedeschi* Rule was activated, with the Court finding that 'Member State(s) cannot rely on Article 36 of the Treaty in order to restrict the export of calves to other Member States for reasons relating to the protection of the health of animals, which constitutes the specific objective of the harmonisation undertaken by the Directive.'[38]

15. The Court maintains this strict approach when assessing national regulatory standards, imposed on agricultural products in the presence of exhaustive Community rules. In *Van den Hazel*, for example, it struck down Dutch rules fixing quotas for the slaughter of poultry on the basis that the Community intended 'market forces to attain the desired balance'.[39] In *Commission v Germany (Animal Feed)*,[40] the Court precluded German measures seeking to regulate the levels of sodium and iron in animal feed since they conflicted with relevant

[34] Council Directive 91/629/EEC on laying down Minimum Standards for the Protection of Calves, OJ L. 340, 11 December 1991, pp. 28 – 32.
[35] *Hedley Lomas,* note 24. See Part I (Chapter Two), points 200 - 204.
[36] *CIWF,* note 33, paragraph 56.
[37] *Ibid*., paragraphs 57 – 63.
[38] *Ibid*., paragraph 64.
[39] *Van den Hazel*, Case 111/76, EU:C:1977:83, paragraph 16.
[40] *Commission v Germany (Animal Feed)*, Case 28/84, EU:C:1985:386.

harmonising measures.[41] In particular, the Court found that the directives formed a coherent, exhaustive regime that triggered *Tedeschi*. In *Denkavit v Land-Nordrhein-Westfalen*,[42] which stemmed from the same facts, the Court reached the same conclusion, although did not explicitly cite *Tedeschi*. Instead, it confirmed that the mere fact of national measures falling 'within the scope' of the Community scheme rendered them invalid. There was therefore no need to refer directly to primary law or discuss the merits of the national rule. The Danish measures at issue in *Denkavit v Danish Ministry for Agriculture*[43] met the same fate. Here, national rules had fixed quality criteria of additives in animal fodder, notwithstanding the fact that the matter was covered by Community legislation. Relevant to the case were amendments that had been made to the directive to enhance protection of health, albeit after proceedings were initiated against Denmark. The Court however insisted on assessing the degree of harmonisation instituted by the directive at that time, which it found to be exhaustive and which ousted Denmark's legislative discretion under Article 36. The Court's invalidation of a German requirement for boar carcasses containing certain quantities of a chemical to be marked and treated in *Commission v Germany (Male Pigs)*[44] was made on similar grounds. While Germany claimed that its rule could be justified under Article 36, the Court found that an exhaustive Community system was in place, and that new national procedure could only be introduced if the safeguard procedure to do so had been followed.[45] 'Additional national requirements' were also invalidated in cases such as *Apple and Pear Development Council*,[46] *Wulro*[47] and *Commission v Belgium (Vegetables & Fruit)*[48] More recently, in *Ulf Hammarsten*,[49] the Court struck down a Swedish ban on hemp for exceeding the relevant EU legislation. In particular, the ban prevented Swedish farmers from claiming aid allowed thereunder, without pursuing any additional public interest objective. Having resolved the matter in relation to the secondary rules, the Court concluded that 'it is not necessary to consider the relevance in this case of other provisions of Community law, such as Articles 28 EC to 30 EC.'[50]

[41] These included Council Directive 74/63/EEC on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs, OJ L. 38, 11 February 1974, pp. 31 – 36, which is particularly relevant to the Exhaustion Rule given that it was at issue in the original *Tedeschi* case.
[42] *Denkavit v Land-Nordrhein-Westfalen*, Case 195/84, EU:C:1985:390.
[43] *Denkavit v Danish Ministry for Agriculture*, Case 29/87, EU:C:1988:299.
[44] *Commission v Germany (Male Pigs)*, C-102/96, EU:C:1998:529.
[45] *Ibid*., paragraph 38.
[46] *Apple and Pear Development Council*, Case 222/82, EU:C:1983:370, paragraph 23.
[47] *Wulro*, Case 130/85, EU:C:1986:260.
[48] *Commission v Belgium (Vegetables & Fruit)*, Case 255/86, EU:C:1988:63, paragraphs 10 – 11.
[49] *Ulf Hammarsten,* C-462/01, EU:C:2003:33.
[50] *Ibid*., paragraph 37.

16. A final case to mention is *Danske Svineproducenter II*,[51] where the Court invalidated Danish rules laying down the minimum internal height of compartments, as well as inspection criteria for the transport of pigs over more than eight hours, and in doing so enforced the integrative effect of the Animal Transport Regulation.[52] However, it also confirmed that Member States had the *capacity* (and thus, legislation-based discretion) to regulate the height of the compartments, once this was necessary to implement the regulation and did not 'obstruct its direct applicability', 'conceal its Community nature' or diverge from the parameters of the discretion granted thereunder.[53] To this end, the Court would have to explore the exact scope for national action, and, in particular, whether the regulation prohibited, required or granted discretion for national measures of application.[54] Applying this test to the case at hand, the Court concluded that discretion to regulate the height of animal compartments, while authorised under the Animal Transport Regulation, had been exercised in a disproportionate manner with respect to the transitional requirements, given that less restrictive standards existed under the Danish system of general law. It also held that criteria relating to the inspection of pigs in transit went beyond what was authorised by the regulation. At the same time, and as discussed in the next section, the Court also authorised Danish requirements regarding the minimum surface area for the animals.

1.2 Enforcing the Regulatory Effect

17. The Court often relies on the Exhaustion Rule to validate national measures that comply with CAP rules, without reviewing such national action under Articles 34 – 36 TFEU. In doing so, it can enforce a regulatory effect, as Member States translate (what are often) high EU regulatory standards[55] into national policy, either by directly implementing an EU obligation or by correctly exercising legislation-based discretion. *Bahuis*, for example, confirmed that fees imposed by the Netherlands for inspections of animal exports would be presumed to comply with the Treaty, to the extent that they had been mandated 'in the general interest of the Community' by the relevant directives.[56] This approach was confirmed six months later in

[51] *Danske Svineproducenter II*, C-316/10*,* EU:C:2011:863.
[52] Council Regulation (EC) No. 1/2005 on the protection of animals during transport and related operations, OJ L. 3, 5 January 2005, pp. 1 – 44.
[53] *Danske Svineproducenter II*, note 51, paragraph 41. This principle of national procedural autonomy, subject to conformity with EU law, was stated by the Court in *Fleischkontor,* Case 39/70, EU:C:1971:1, p. 58.
[54] *Ibid*., paragraphs 43 – 44.
[55] The EU is recognised as having broad discretion in this regard, which includes wider scope than the Member States to justify trade restrictions. See Part I (Chapter One), point 116.
[56] *Bauhuis*, Case 46/76, EU:C:1977:6.

Commission v Netherlands (Plant Inspections),[57] which concerned the legality of Dutch fees charged for the inspection of plants under the International Convention of Plant Protection (1951). Since all Member States had signed the Convention, the inspections, like those in *Bahuis*, were not considered to be unilateral trade obstacles but were 'designed to encourage the free movement of goods'. In such circumstances, the fees were not considered as charges having equivalent effect, once their amount did not exceed the actual cost of the operation.[58]

18. This reasoning also explains *Berendse-Koenen*,[59] which concerned a challenge to a Dutch prohibition on certain growth promoters in cattle. Defending the national rule, the Commission noted that it had been adopted to implement Community requirements. As such, and in line with *Bahuis*, the measures did not hinder trade, but were 'operations designed to promote the free movement of goods, especially by neutralising the obstacles which might result from national measures taken in accordance with Article 36.'[60] The Court agreed, noting that the national rule had not been adopted to 'protect individual interests of Member States' but 'to comply with a directive … in the general interests of the Community'.[61] It then concluded that 'a rule …whereby a Member State discharges its obligations under Directive 86/469, cannot be characterised as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty'.[62]

19. We have also observed that an exhaustive EU rule can explicitly or implicitly authorise the exercise of national discretion, once resulting measures respect the EU legislative objectives, remain within the limits of the authorised discretion and comply with the principle of proportionality. Such legislation-based discretion can be seen in *Danske Svineproducenter I*.[63] Mirroring the facts that emerged subsequently in *Danske Svineproducenter II* (discussed above), the applicant challenged Danish measures for exceeding the requirements of the Animal

[57] *Commission v The Netherlands (Plant Inspections),* Case 89/76, EU:C:1977:123. See more recently, *Association Kokopelli*, C-59/11, EU:C:2012:447, paragraphs 80 – 81.
[58] *Ibid*., paragraphs 15 and 16.
[59] *Berendse-Koenen,* C-246/98, EU:C:2000:153. See also *Deutsches Milch-Kontor (I),* C-426/92, EU:C:1994:260*,* where the lawfulness of a German border inspection was contingent on it being 'expressly provided for under Community law'. In this case, as Community rules did 'not require the inspections which are the subject-matter of the proceedings to be carried out at the frontier', the national inspections were deemed to be contrary to the Treaty. A similar logic underlies *Commission v Italy (Grapefruit),* note 30.
[60] *Berendse-Koenen, ibid*., paragraph 21. See also *Escalier & Bonnarel,* C-260/06, EU:C:2007:659, paragraph 26.
[61] *Ibid.*, paragraph 24. See also the AG Opinion at EU:C:2000:11.
[62] *Ibid*., paragraph 25.
[63] *Danske Svineproducenter I,* C-491/06, EU:C:2008:263. See also *Romkes*, Case 53/86, EU:C:1987:288 and *Pontini & Others*, C-375/08, EU:C:2010:365.

Transport Directive.[64] Specifically, Denmark had set more precise standards for the height and surface area of compartments to transport pigs beyond eight hours. In assessing these measures, the Court first confirmed that Member States had to adopt 'within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues',[65] which, in this context, concerned the protection of animals during transport. However, the Court also specified that such standards must comply with the objectives of eliminating technical barriers to trade and ensuring the smooth functioning of the internal market, as well as the principle of proportionality. Applying this test to the Danish height standards, the Court found that, in the absence of precise Community standards, Member States had 'a clear margin of discretion'. However, while the resulting national provisions met the goal of animal protection, the Court could not ascertain whether they complied with the market integration goals or whether they were proportionate, given the potential for additional costs and technical difficulties. It therefore sent the matter back to the national court. The Court also assessed Denmark's surface area standards, and noted that they fell within the margin authorised by the directive. In particular, the directive expressly allowed Member States to increase the minimum Community standards by up to 20%, depending on the weather conditions and journey times. In 2005, the Animal Transport Directive was replaced by the Animal Transport Regulation,[66] raising questions as to whether Member States enjoyed the same margin of discretion to set height and surface area standards. As noted above, *Danske Svineproducenter II* explicitly confirmed that Member States did retain such capacity, albeit subject to compliance with EU law.[67] Against this backdrop, the Court validated elements of the Danish measure, such as minimum surface area and compartment height standards, while striking down others, such as certain transitional or detailed standards.

20. Legislation-based discretion can also include safeguard clauses, the possibility for which was confirmed in *Tedeschi.*[68] The scope for such action is generally limited, as safeguard measures must comply with strict evidentiary and notification requirements, as supervised by the Commission. Given this burdensome procedure, Member States have often preferred to argue that they retain discretion under Article 36 TFEU, rather than subject their national rules

[64] Council Directive 91/628/EEC on protecting animals during transport, OJ L. 340, 11 December 1991, pp. 17 – 27.
[65] *Danske Svineproducenter I,* note 63, paragraph 29.
[66] Regulation No. 1/2005, *op. cit.*
[67] *Danske Svineproducenter II*, note 51.
[68] *Tedeschi*, Case 5/77, EU:C:1977:144.

to this mechanism.[69] Still, the Court's acceptance of national safeguard measures in the wake of the BSE crisis shows that the system can work when it needs to. Indeed, as the Court upheld the Commission's ban on UK beef exports against a challenge by the UK,[70] it was also sympathetic to unilateral national safeguard measures. In *Denkavit v Minister van Landbouw*,[71] for example, the Court agreed that Dutch measures requiring the surrender and slaughter of UK cattle on its territory had been correctly based on the safeguard procedures laid down in the relevant COM. While repeating that Member States were prohibited from undermining or creating exceptions to the COM, the Court also noted that they could order the slaughter of diseased animals subject to notification. In *Staat der Nederlanden v Denkavit,* the Court held that the EU regulatory regime did not preclude Member States from temporarily prohibiting the production of and trade in processed animal proteins to feed farm animals, insofar as such measures were justified by an urgent threat to public or animal health and were proportionate.[72] In *Lennox* the Court confirmed that Italian safeguard measures, which required sheep importers to declare the animals had no contact with the BSE infection, complied with the conditions laid down under the relevant EU directives and were therefore lawful,[73] while in *Müller Fleisch*, it accepted that national rules could require all bovine animals over the age of 24 months to be screened for the BSE infection.[74] The Court has been similarly sympathetic when assessing national safeguard measures adopted to combat the foot and mouth disease in animals.[75]

1.3 The Conditional Effect

21. The impact of CAP legislation on national discretion depends on whether, first, the latter regulates a matter within its regulatory scope and second, the EU rule regulates the field exhaustively i.e. has an exhaustive regulatory character.[76] If either of these factors is not present, the Member States can continue to rely on Treaty-based discretion (or residual national discretion in the absence of a cross-border element) to adopt unilateral national measures that do not 'undermine', 'create exceptions to'[77] or 'interfere with the proper functioning of the

[69] Ex. *Commission v Germany (Animal Feed)*, note 40 and *Ratti*, Case 148/78, EU:C:1979:110.
[70] *United Kingdom v Commission (BSE)*, C-180/96, EU:C:1998:192.
[71] *Denkavit v Minister van Mandbouw,* C-507/99, EU:C:2002:4.
[72] *Staat der Nederlanden v Denkavit*, C-346/09, EU:C:2011:414.
[73] *Lennox,* C-220/01, EU:C:2003:390.
[74] *Müller Fleisch*, C-562/08, EU:C:2010:93.
[75] *Tempelman & Others,* Joined Cases C-96/03 & C-97/03, EU:C:2005:145.
[76] The 'regulatory character' of an EU measure refers to its regulatory framework and can be exhaustive or non-exhaustive. See Part I (Chapter Two), points 212 – 217.
[77] *Pigs Marketing Board*, note 19, paragraph 56.

mechanisms provided by the common organisation of the market'.[78] This position accepts that the effect of EU regulation is conditional and acknowledges that Member States can regulate matters not dealt with exhaustively by a COM (or supplementary agricultural measures). The Court's judgement in *Denkavit v Minister for Food, Agriculture and Forestry*[79] is an early case in point. Here, the plaintiff had suggested that, in the absence of specific secondary rules to govern the presence and supervision of salmonellae in animal feedingstuffs, similar harmonising directives could apply by analogy to trigger the *Tedeschi* Rule and prevent Member States from unilaterally regulating the matter. However, the Court dismissed this rather far-fetched argument as failing 'to take into account the gradual and methodical action taken by the Council for the harmonisation of national veterinary and public health laws'.[80] Instead, it confirmed that Article 36 continued to apply until relevant harmonising rules were adopted. A similar position was taken in *Holdijk*,[81] where the Court allowed national standards on the size of enclosures to fatten calves, given the absence of Community protections at the time. It held that Community silence on the matter could not be interpreted as rendering all national rules inapplicable pending harmonisation, as this would go against the Community's concern for animal welfare under Article 36.[82] Member States therefore retained this power, even if national rules had an effect on the functioning of the COM. In this regard, the Court stated that 'the prohibition of any discrimination between producers in the Community … refers to the objectives pursued by the common organization and not to the various conditions of production resulting from national rules which are general in character and pursue other objectives'.[83]

22. More recently, in *Centre d'Insémination de la Crespelle*[84] the Court considered the French system of granting approved bovine insemination centres certain exclusive rights within a defined area. Taking a classic approach, it first found that the French measure was a MEEQR and then considered whether it could be justified. Quoting the *Tedeschi* Rule, the Court held that secondary rules had fully harmonised zootechnical and pedigree requirements for insemination. However, they did not regulate the storage or use of semen in the State of destination. France could therefore impede the free movement of bovine semen on health

[78] See citations *supra*, note 16.
[79] *Denkavit v Minister for Food, Agriculture & Forestry of North-Rhine-Westphalia*, Case 251/78, EU:C:1979:252.
[80] *Ibid*., paragraph 19.
[81] *Holdijk & Others,* Joined Cases 141 to 143/81, EU:C:1982:122. See also *Nertsvoederfabriek Nederland*, Case 118/86, EU:C:1987:424, paragraph 12.
[82] *Ibid*., paragraph 13.
[83] *Ibid.,* paragraph 12.
[84] *Centre d'Insémination de la Crespelle,* C-323/93, EU:C:1994:368.

grounds once proportionate.[85] It was for national court to determine whether this was the case. In *Hönig*, the Court confirmed that Member States could adopt stricter national rules regarding the cage area for laying hens kept in battery cages, even if this resulted in some inequalities in competition.[86] In *CIWF*, the Court, having assessed that Member States could not rely on animal health grounds to restrict the export of calves, considered whether Article 36 could be invoked for reasons relating to 'the protection of public policy or public morality, which are not the subject of the Directive'.[87] Although concluding in the negative, the Court also confirmed that the *Tedeschi* Rule would only apply to oust reliance on those public interest justifications that had been subject to harmonisation.

23. Many early instances of Treaty-based discretion to regulate agricultural products otherwise subject to a COM arose because the Community had failed to legislate an element of its production, pricing or marketing. In *Jongeneel Kaas*, for example, the Court first found that the relevant COM neither regulated the designation and quality of cheese nor imposed an intervention system to support the market. It then considered that this silence did 'not mean that the Community has consciously and of necessity decided to impose on the Member States in that sector an obligation to adhere to a system of absolute freedom of production'.[88] As a result, Member States could, in the absence of Community rules, unilaterally regulate the quality of cheeses produced on its territory. Similar findings were made in *Van der Hulst*, where the Court looked 'not only to the express provisions of the legislation but also to its aims and objects' before confirming that the Netherlands could impose levy on trade in certain flower bulbs within the context of the COM in live plants.[89] In *Amsterdam Bulb*, the Court looked at the express provisions and aims of the relevant COM to confirm that the Netherlands could impose minimum export prices for flower bulbs where this had not been set at Community level. In particular, the Court held that the Commission's silence on this matter, with respect to certain bulb varieties, did not imply an intention to leave the matter to market forces.[90] This logic also led the Court to dismiss the Commission's arguments in *Prantl*.[91] Relying on the Court's

[85] *Ibid*., paragraph 35.
[86] *Hönig,* C-128/94, EU:C:1995:341.
[87] *CIWF*, note 33, paragraph 65.
[88] *Jongeneel Kaas*, Case 237/82, EU:C:1984:44, paragraph 13. See also *Apple and Pear Development Council*, note 46 and *Forest & Others*, Case 148/85, EU:C:1986:438, paragraph 14.
[89] *Van der Hulst*, Case 51/74, EU:C:1975:9, paragraph 26.
[90] *Amsterdam Bulb*, note 18, paragraph 30.
[91] *Prantl,* Case 16/83, EU:C:1984:101.

'conceptualist-federalist' approach to interpretation,[92] the Commission had submitted that the mere existence of the COM in wine automatically rendered Member States 'no longer competent to adopt or to retain in force provisions on the use of containers which enable wines to be distinguished with regard to their quality or origin'.[93] The Court disagreed, finding that Council regulation of the 'flûte d'Alsace' did not imply that it had fully exhausted its competence to regulate how other shapes of bottles could be used.[94] As a result, Germany could adopt rules to protect the 'bocksbeutel bottle' shape provided this was justified and proportionate, which was to be assessed by the national court. Similarly, in *Hahn*, the Commission's failure to set microbiological criteria for the production of smoked fish meant that Member States retained the power to do so,[95] while in *Forest*, the Court held that 'since the Community legislature has not adopted rules governing the flour-milling sector, the Member States remain competent to take such measures as they consider appropriate to improve structures in that sector, so long as they observe the mechanisms and principles governing the common organisation of the market'.[96]

24. The exercise of such national powers is subject to the overarching requirement that it cannot undermine or create exceptions to the COM – which includes, although is not necessarily limited to, compliance with the general principle of non-discrimination, and more specifically, the fundamental freedoms.[97] In particular, national action must not 'alter the pattern of imports or exports or influence the formation of market prices by preventing producers from buying and selling freely … in conditions laid down by Community rules'.[98] As noted earlier, the Court has not always specified whether assessment of the national measure should take place by reference to the COM and/or primary law, particularly in early CAP cases. In *Holdijk* and *Hönig*, for example, it did not even mention that such a review was necessary – although this should have been implicit in both judgements. The need for such review has been subsequently confirmed, where the Court assessed impugned national measures by reference to Articles 34 -

[92] This term describes the Court's early approach to interpreting (mainly agricultural) Community rules as automatically pre-empting national rules. In other words, the 'Community's competence is construed as necessarily exclusive'. See General Introduction, point 17.
[93] *Prantl*, note 91, p. 1318.
[94] *Ibid.,* paragraphs 15 – 16.
[95] *Hahn,* C-121/00, EU:C:2002:611, paragraph 32.
[96] *Forest & Others*, note 88, paragraph 14.
[97] *CIWF*, note 33, paragraph 41.
[98] *Pigs Marketing Board*, note 19, paragraph 58.

36 TFEU and found them to be proportionate and valid,[99] disproportionate and invalid,[100] or sent the matter back to national court for review.[101]

25. One last case to mention is *Denkavit Futtermittel*,[102] where the Court confirmed that, in the absence of exhaustive legislation, Articles 34 – 36 TFEU would continue to operate as norms of reference. In this case, a German rule had been adopted under Article 5 (4) of Directive 79/373 on the marketing of compound feedingstuffs,[103] which allowed Member States to require the ingredients of such feed to be indicated 'in descending order of their proportion'. The Court first found that the German rule, while constituting a trade restriction, was justifiable under Article 36 TFEU because the directive had not fully approximated national laws in this field.[104] In other words, the *Tedeschi* Rule did not apply. However, since the German measure had been *authorised* under the directive, the referring court also wished to confirm the validity of that directive. The Court responded that the Community institutions enjoyed discretion in relation to the stages in which harmonisation was to take,[105] which included granting regulatory discretion to the Member States, as *in casu*. In this context, obstacles from resulting disparities between national laws had to be accepted for the same reasons the German rules had been judged as justified, thus, the protection of human and animal health, consumer protection and fair-trading.

[99] See *Motte,* Case 247/84, EU:C:1985:492, *Nertsvoederfabriek Nederland*, note 81, *Forest & Others*, note 88 and *Hahn,* note 95.
[100] See *Van der Hulst*, note 89, paragraph 26, where the Court held that a Dutch levy on trade in certain flower bulbs was incompatible with the prohibition of discrimination.
[101] See *Prantl*, note 91 and *Centre d'Insémination de la Crespelle*, note 84.
[102] *Denkavit Futtermittel,* note 10. Although reaching the same conclusion, the AG took a different analytical approach by classifying Article 5 (4) as an example of legislation-based discretion and reviewing the national measure exclusively by reference to the Community framework.
[103] Council Directive 79/373/EEC on the marketing of compound feedingstuffs, OJ L. 86, 6 April 1979, pp. 30 – 37.
[104] *Denkavit Futtermittel*, note 10, paragraph 19.
[105] *Ibid*., paragraph 26.

2. (CERTAIN) EXPRESS DEROGATIONS

26. Article 36 TFEU explicitly limits the deregulatory potential of Articles 34 – 35 TFEU by authorising national trade rules that are neither discriminatory nor a disguised restriction, and that are justified on one or more of the following grounds:

1. Public morality, public policy or public security;
2. Protection health and life of humans, animals or plants;
3. Protection of national treasures;
4. Protection of intellectual property.

27. These express derogations play a key role in protecting such public interests. Yet, in terms of reconciling the overarching goal of market integration with high regulatory standards, they remain fundamentally unsatisfactory. For, as discussed in the General Introduction, the negative integration regime, of which Article 36 TFEU forms part, allows national trade barriers to persist, while also casting public interest protection as an exception to the higher constitutional value of free trade, enforced through strict application of the proportionality test.[106] To compensate for these shortfalls, the Treaty of Rome included a positive integration regime to regulate the internal market, which has been strengthened with successive Treaty amendments. Accordingly, the EU can rely on various legal bases to harmonise national rules and standards, which, when exhaustive, will trigger the Exhaustion Rule to pre-empt national trade rules while ensuring regulatory protection at EU level.

28. In this section, we explore the substantive impact of EU measures adopted to protect human health and safety (2.1) and intellectual property rights (2.2), as the Court relies on the Exhaustion Rule to enforce their integrative and regulatory goals. We have focused on these two fields as they have generated a relatively higher level of EU legislation and, as a result, litigation in which the Rule has been invoked and applied. The other public interest goals listed in Article 36 TFEU, namely the protection of public morality, security and policy, and of national treasures, are generally left within the hands of the Member States, with limited EU

[106] The Court has confirmed this strict scrutiny in numerous cases, in line with its early decisions in *De Peijper*, Case 104/75, EU:C:1976:67, paragraphs 16 – 17 and *Commission v Ireland (Irish Souvenirs)*, Case 113/80, EU:C:1981:139. See General Introduction.

regulation.[107] Where such rules have been adopted, they often overlap with other public interest goals,[108] and in any case, are subject to the same principles.[109]

2.1 Protecting Human Health & Safety

29. A key State prerogative is to protect the health and safety of its citizens. Article 36 TFEU reflects this duty by explicitly authorising national prohibitions or restrictions on the free movement of goods for this purpose. To remove resulting trade barriers, the EU has always enjoyed a correspondingly broad competence to regulate health, even in the early years when this was not explicitly referred to in the Treaties. Indeed, while the Community adopted several health-related measures in the 1980s with no connection to the internal market, such action was not challenged, despite its, at times, dubious legality. [110] The EU's legislative focus on strong health and safety standards is today reflected under Article 114 (3) TFEU as well as the mainstreaming provisions of Articles 9 and 168 (1) TFEU.[111] More generally Article 168 TFEU provides a specific legal basis for public health protection, although unlike the environmental and consumer protection, excludes the possibility to harmonise.

30. The Court famously addressed the question of how to reconcile this prohibition on harmonisation with the EU's internal market competence in *Tobacco Advertising*, where it confirmed that Article 114 directives could pursue health-related goals as a decisive factor, once they had as their object and effect the establishment or functioning of the internal market.

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[107] Although see ex. Directive 2014/60/EU of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L. 159, 28 May 2014, pp. 1 – 10. For a discussion of the impact of the pre-emptive and regulatory impact of this Directive (and its predecessor, Directive 93/7), see M.-S. De Clippele & E. Ni Chaoimh, 'The Intensity of EU Regulation with Regards to Cultural Goods', in C. Romainville (ed.), *European Law and Cultural Policies*, Brussels, Peter Lang, 2015, pp. 233 – 256.

[108] Ex. In *CIWF*, the applicant argued that the UK could restrict live animal exports on grounds of public policy or morality. However, the Court held that these grounds did not constitute 'a separate justification but are an aspect of the justification relating to the protection of animal health, which is the subject of the harmonising directive'. *CIWF*, note 33, paragraph 66. See also *Commission v Poland (GMOs),* C-165/08*,* EU:C:2009:473.

[109] See ex. *Campus Oil*, Case 72/83, EU:C:1984:256, where the Court authorised Ireland to continue regulating trade in fuels to ensure public security. The Commission had argued (paragraph 25) that the directives ensured sufficient protection of supplies and triggered the *Tedeschi* Rule. AG Slynn agreed that if this was the case, further national measures could not be justified. The Court confirmed it was not, finding that the directives did not provide 'an unconditional assurance' that deliveries would be maintained. Ireland could therefore continue to rely on Article 36 to justify complementary national measures (paragraph 31).

[110] See T. Hervey, 'Community and National Competence in Health after *Tobacco Advertising', Common Market Law Review,* vol. 38, no. 6, 2001, pp. 1421– 1446.

[111] This mainstreaming element was inserted in response to the UK argument in *United Kingdom v Commission (BSE)*, note 70, that the Community measures were *ultra vires* for having been adopted on the basis of economic requirements and to reassure consumers and protect the beef market. This provision, in line with Article 114 (3) TFEU, reinforces the Court's position in that case, which was that the EU has a fundamental duty to pursue health protection in implementing other policies. See T. Hervey, *ibid*., p. 1424, at footnote 12.

As discussed in the General Introduction, this saga had an important impact on the question of EU competence. However, it also illustrated the core and legitimate role played by health and safety regulation in the EU's internal market legislative programme, where a vast number of internal market rule are devoted to this end. As we reveal below, such rules are frequently relied upon to both pre-empt protective national regulation under the *Tedeschi* Rule (2.1.1) and validate national health measures adopted pursuant to such EU rules (2.2.2). Following the same structure as our analysis of CAP rules, we first outline these various effects before assessing their conditional nature (2.2.3).

2.1.1 Enforcing the Integrative Effect

31. The integrative effect of EU health and safety standards is far-reaching and goes to the core of internal market regulation. In this section, we look at how the Court has enforced this effect in relation to industrial and consumer products (A), medicinal products (B) and dangerous substances (C).

A. Industrial and Consumer Products

32. Industrial and consumer products refer to the vast array of goods used in the manufacturing process and by end consumers and professionals, and include products as wide-ranging as toys, cars, medical devices, electronic and radio equipment, construction products and weighing instruments. With the exception of certain sectors such as automobiles and food, such products are generally subject to the new approach to harmonisation (NAH), as updated by the New Legislative Framework (NLF).[112] EU regulation of textiles and footwear, which are also subject to a similar pattern of authorisation and labelling, are considered below in relation to consumer protection, as is the regulation of cosmetics (Section 3.1). In this section we look at the integrative effects of new approach directives and regulation of the automobile sector, as relied upon by free movers to pre-empt national regulatory standards.

33. The NAH developed in the 1980s as the legislative response to key judgements from the 1970s, including *Cassis de Dijon*, which recognised the principle of mutual recognition,

[112] Regulation (EC) No. 765/2008 of the European Parliament and of the Council establishing a legal basis for accreditation and market surveillance and consolidating the meaning of the CE marking, OJ L. 218, 13 August 2008, pp. 30 – 47 and Decision No. 768/2008/EC of the European Parliament and of the Council on a common framework for the marketing of products, OJ L. 218, 13 August 2008, pp. 82 – 128.

and *Tedeschi*, which confirmed that exhaustive harmonisation would oust regulatory competence under Article 36 TFEU. As discussed in the General Introduction, its very purpose was to adopt technical standards that would trigger the *Tedeschi* Rule and prevent Member States from erecting new technical barriers to trade while assuring the protection of health and safety by harmonising essential requirements and setting voluntary technical standards. Compliance with the latter would ensure market access for products concerned.

34. Directives adopted under the NAH include general measures, such as the General Product Safety Directive,[113] and sector specific measures, such as EU legislation on gas appliances, construction products, machinery, electrical equipment, toy safety, pyrotechnics, lifts and medical devices.[114] Relying on the logic just outlined, the Court can invoke such measures to invalidate national measure going beyond what is authorised thereunder. For example, in *ATRAL*, it struck down a Belgian Decree that required alarm systems bearing the CE marking to get prior approval before being placed on the market. Belgium had defended its measure by claiming that the alarm systems fell outside the scope of the relevant directives, and could be justified under Articles 34 – 36 TFEU. The Court, however, considered that most of the products were covered by exhaustive NAH directives and could enjoy market access once they conformed to the Community standard. In such circumstances, and in line with the Exhaustion Rule, Belgium could not impose a prior approval procedure.[115] The same approach is seen in numerous other cases, including *Commission v Germany (pyrotechnic articles),*[116] *Commission v Italy (Sealed Heaters)*,[117] *A.G.M.-COS.MET,*[118] *Nordiska Dental*[119] and *Lidl*,[120] all of which precluded national rules limiting trade in goods bearing the CE sign.

35. These cases exemplify how the NAH achieves both the integrative – and regulatory – aims of EU regulation. Moreover, as highlighted in Part I, the exhaustive character of such directives, and the resulting pre-emptive effect on national regulation, is generally accepted by the Member States, the main question being whether the national rule falls under their scope.

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[113] Directive 2001/95/EC of the European Parliament and of the Council on general product safety**,** OJ L. 11, 15 January 2002, pp. 4 – 17.
[114] For a full list of sectors currently subject to the new approach / NLF, see the Commission's 'Blue Guide' on the implementation of EU product rules 2016, OJ. C. 272, 26 July 2016, pp 1 – 149 at pp. 14 – 15.
[115] *ATRAL*, C-14/02, EU:C:2003:265, paragraph 49.
[116] *Commission v Germany (Pyrotechnic Articles)*, C-220/15, EU:C:2016:815.
[117] *Commission v Italy (Sealed Heaters)*, C-112/97, EU:C:1999:168.
[118] *A.G.M-COS.MET*, C-470/03, EU:C:2007:213.
[119] *Nordiska Dental*, note 5.
[120] *Lidl,* C-132/08, EU:C:2009:281.

This task is facilitated by EU notification requirements, where Member States must inform the Commission and other Member States of technical regulations before their adoption, thereby reducing the potential for further litigation.[121]

36. The NAH does not cover all industrial and consumer products, with the automobile industry in particular still subject to the more traditional approach to harmonisation.[122] Still, the Court takes the same approach under the latter when enforcing the pre-emptive and integrative effects of resulting directives. The main EU legislative act regulating cars is Framework Directive 2007/46/EC,[123] which, like its predecessor Directive 70/156/EEC, ensures type-approval of motor vehicles, with specific directives to regulate various technical specifications. It is on this basis that a manufacturer can certify a vehicle type in one Member State and enjoy EU-wide market access, without being subjected to further tests or requirements. Three successful infringement proceedings reveal both the Commission's zeal in ensuring national adherence to this core principle and the Court's willingness to pre-empt what may seem like legitimate national safety concerns.

37. The first such case was in *Dim Dip*,[124] where the Court confirmed that Directive 76/756 on the installation of lighting devices to cars[125] ousted all residual national autonomy, including the impugned UK safety requirement for all motorcars to have 'dim-dip' lights. While no direct reference was made to primary law, the UK measure, had it been authorised, would have been assessed under Article 36 TFEU. The Exhaustion Rule's logic was therefore implicit in pre-empting the UK measure and enforcing the integrative effect of the directive. The Commission also succeeded in its proceedings against Belgium,[126] for infringing Directive 1999/37 on

[121] Directive (EU) 2015/1535 of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L. 241, 17 September 2015, pp. 1 – 15. The procedure was first set up under Council Directive 83/189/EEC, which was replaced by Directive 98/34/EC and which is now governed by the 2015 directive. See also Regulation (EC) No. 764/2008 of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, OJ L. 218, 13 August 2008, pp. 21 – 29.

[122] This largely because this sector is governed 'by international traditions and/or traditions which cannot be changed unilaterally'. See Commission Blue Guide, *op. cit.,* p. 6, paragraph 1.1.1.

[123] Directive 2007/46/EC of the European Parliament and of the Council establishing a framework for approval of motor vehicles and their trailers, OJ L. 263, 9 October 2007, pp. 1 – 160.

[124] *Commission v United Kingdom (Dim Dip)*, Case 60/86, EU:C:1988:382.

[125] Council Directive 76/756/EEC on the approximation of the laws of the Member States relating to the installation of lighting and light-signalling devices on motor vehicles and their trailers, OJ L. 262, 27 September 1976, pp. 1 – 31.

[126] *Commission v Belgium (Registration of Vehicles),* C-150/11, EU:C:2012:539.

Registration Documents for Vehicles.[127] At issue was a road safety and consumer protection measure requiring car owners to produce a certificate of conformity with a roadworthiness test, before registration in Belgium, even if that car had been registered in another Member States. Citing Article 4 of the directive, however, the Court confirmed that a registration certificate issued thereunder 'shall be recognised' for re-registration purposes, and that Member States had no discretion to add further requirements. In other words, they could not rely on Treaty-based discretion to require vehicles previously registered in other Member States to produce documents other than the registration certificate. To find otherwise would have rendered the principle of mutual recognition 'meaningless'. Citing the Exhaustion Rule, the Court concluded in the Commission's favour.[128]

38. A similar conclusion was reached in *Commission v Poland (Right-Hand Steering)*,[129]which found Poland (and Lithuania) to have gone beyond the Framework Directive (type approval of vehicles)[130] and Directive 70/311 (steering equipment for vehicles)[131] by requiring the driver's seat to be moved to the side opposite the direction of traffic, before the car could be registered in its territory. The Commission argued that the directives had exhaustively regulated the field, leaving no national discretion with respect to the position of the steering equipment.[132] However, Poland claimed that the position of the steering wheel was a question of safety, and not of technical requirements, and that its measures fell to be assessed under the Treaty. The Court opened its judgement by noting that the relevant directives laid down technical specifications for cars, and steering equipment, and mandated market access for all complying vehicles. While the position of the steering wheel was not determined by EU rules, it did not follow that 'that element does not come within their scope'. To the contrary, 'it must be considered that the Union legislator granted … a freedom … that may not be cancelled or impeded by national legislation'.[133] In other words, Member States could choose whether to facilitate left or right-hand steering without market access being hindered. In this regard, the Court referred to Article 2 (a) of the Steering Equipment Directive, inserted after the accession of Ireland and the UK, which provides that vehicle registration may not be refused 'on grounds

[127] Council Directive 1999/37/EC on the registration documents for vehicles**,** OJ L. 138, 1 June 1999, pp. 57 – 65.
[128] *Commission v Belgium (Registration of Vehicles)*, note 126, paragraph 79.
[129] *Commission v Poland (Right-Hand Steering)*, C-639/11, EU:C:2014:173.
[130] Directive 2007/46/EC, *op. cit.*
[131] Council Directive 70/311/EEC on the approximation of the laws of the Member States relating to the steering equipment for motor vehicles and their trailers, OJ L. 133, 18 June 1970, pp. 10 – 13.
[132] *Commission v Poland (Right-Hand Steering)*, note 129, paragraph 29.
[133] *Ibid*., paragraph 38.

relating to (the) steering equipment' once the vehicle satisfies other requirements. This showed a legislative intention to allow left-hand drive vehicles to enjoy free movement, even if this incurred 'a certain risk connected with road traffic'. Moreover, while Member States could 'adapt' the vehicle to the direction of traffic, this could not cover fundamental elements of the vehicle, but only elements such as lighting, windscreen wipers or indirect vision systems.[134]

B. Medicinal Products

39. Trade in medicinal products in the EU is currently subject to a specific legal framework, which includes Directive 2001/83/EC establishing a Community code relating to medicinal products for human use (the Medicinal Products Code).[135] The Medicinal Products Code consolidates a number of pharmaceutical measures adopted since 1965[136] and is based on ex. Article 95 EC. As outlined in the Preamble, the Code aims to both 'safeguard public health' by guaranteeing high standards of quality and safety in medicines, and promote the good functioning of the internal market (through the removal of national regulatory disparities), as well as encouraging innovation and competitiveness (to ensure the development of the pharmaceutical industry). It regulates a wide range of subject matters, including the classification of a product as medicinal and its authorisation in the Member States of sale. In particular, Article 6 requires all medicinal products to obtain market authorisation in accordance with a mandatory and exclusive harmonised procedure that pre-empts all other national requirements.[137] Member States must, as a result, subject a product classified as medicinal to the Code's market authorisation procedure and cannot rely on Article 36 TFEU to add any new grounds of refusal.

40. The Medicinal Products Code also legislates for when and how medicines can be advertised. EU intervention in this field was deemed necessary because, as noted in Recital 43, specific national rules on advertising of medicinal products cause regulatory disparities that impact on the functioning of the internal market. At the same time, advertising, while

[134] *Ibid*., paragraphs 42 – 43.
[135] Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use, OJ L. 311, 28 November 2001, pp. 67 – 128.
[136] Council Directive 65/65/EEC on the harmonisation of laws relating to proprietary medicinal products, OJ L. 22, 9 February 1965, pp. 369-373.
[137] *Orthica & Others,* Joined Cases C-211/03, C-299/03 & C-316/03 to C-318/03, EU:C:2005:370, paragraph 59. See also *Delattre,* C-369/88, EU:C:1991:137, paragraph 22, *Ter Voort*, C-219/91, EU:C:1992:414, paragraph 19 and *Commission v Germany (Garlic Capsules)*, C-319/05, EU:C:2007:678, paragraph 38.

sometimes necessary, could harm public health. Articles 87 and 88 therefore prohibit the advertisement of, respectively, medicines without market authorisation and prescription drugs. However, Article 88 (2) of the Code provides that other medical products, such as non-prescription medicines, may be advertised to the general public. In a series of cases the Court confirmed that such rules instituted total harmonisation, thereby preventing Member States from laying down more restrictive or different rules.[138] In *Doc Morris*, for example, the Court held that the Code prohibited a German ban on advertising non-prescription medicines for sale over the internet, on the basis of an alleged need for a pharmacist to be present.[139] In doing so, it dismissed the Austrian suggestion that Member States retained some latitude in this sphere.[140] The exhaustive nature of the Code's advertising rules was also relied upon in *Gintec*. At issue was Gintec's use of third-party statements of gratitude, recognition or recommendation to advertise non-prescription medicines. Considering such advertisements as contrary to national law, a German consumer protection organisation asked for their withdrawal, prompting the case to hand. In its response, the Court ruled that the Code, which completely harmonised the advertising of medicines, precluded a national ban on the use of third-party statements to advertise medicines to the general public, as *in casu*,[141]

41. A similar approach can be seen in *Vanderborght*,[142] although this time with respect to the Court's interpretation of the Electronic Commerce Directive.[143] The case arose following the prosecution of Mr. Vanderborght for having advertised his dental services, contrary to a Belgian prohibition on such advertisements Considering that the matter had a cross-border element, the national court asked, *inter alia*, whether the Belgian prohibition was contrary to the directive. The Court, answering in the affirmative, confirmed that the Electronics Commerce Directive did not allow such a general and absolute prohibition on the advertising of oral and dental care services, inasmuch as it excluded any form of electronic commercial communications, including via a website created by a dentist.

[138] *Gintec,* C-374/05, EU:C:2007:654, paragraph 26.
[139] *Doc Morris,* C-322/01, EU:C:2003:664, paragraphs 140 – 144.
[140] *Ibid*., paragraph 142.
[141] *Gintec,* note 138, paragraph 39.
[142] *Vanderborght*, C-339/15, EU:C:2017:335.
[143] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L. 178, 17 July 2000, pp. 1 – 16.

C. Dangerous Substances & Chemicals

42. The chemical industry is intrinsically connected to other industries, such as industrial products, manufacturing (ex. textiles, cosmetics, shoes, detergents), agriculture, medicines and food. Given its importance, as well as the hazards involved, regulation of chemicals and dangerous substances has been high on the Community's agenda since the early years of integration. In the 1960s and 70s, the Council adopted a series of directives to protect a range of public interests, including human health and the environment, while also pursing market integration. One of the most important pieces of legislation was Directive 67/548 on the classification, packaging and labelling of dangerous substances (the Dangerous Substances Directive),[144] which was supplemented by Directive 73/173 on solvents (the Solvents Directive)[145] and Directive 76/769/EEC on the marketing and use of certain dangerous substances and preparations (the Marketing and Use Directive).[146] These directives have been since repealed and replaced by the new regulatory framework to govern dangerous substances, which includes Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures (the 'CLP Regulation')[147]and Regulation No 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).[148]

43. Early judicial interpretation of these directives was key in confirming both the relevance of the *Tedeschi* Rule beyond the CAP and the far-reaching impact of exhaustive harmonisation on national regulatory discretion. The first of these cases is the well-known *Ratti* judgement,[149] which was also one of the Court's first explicit applications of the *Tedeschi* Rule. As discussed in the General Introduction, it concerned the lawfulness of Italian packaging requirements that differed from the Solvents Directive, being more stringent on some aspects and less so in others. Adopting the 'exhaustion approach', the Court held that conditions that were 'more restrictive … more detailed or in any way different' could not be introduced once the directive's

[144] Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ 196, 16 August 1967, pp. 1 – 98.
[145] Council Directive 73/173/EEC on the approximation of Member States' laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous preparations (solvents), OJ L. 189, 11 July 1973, pp. 7 – 29.
[146] Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ L. 262, 27 September 1976, pp. 201 – 203.
[147] Regulation (EC) No. 1272/2008 of the European Parliament and Council on classification, labelling and packaging of substances and mixtures, OJ L. 353, 31 December 2008, p. 1 – 1355.
[148] Regulation (EC) No. 1907/2006 of the European Parliament and Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals, OJ L. 396, 30 December 2006, pp. 1 - 520.
[149] *Ratti*, note 69.

transposition date had passed. It then repeated the *Tedeschi* Rule to confirm that recourse to Article 36 TFEU was neither necessary nor justified in the presence of a harmonised system, and that any additional protective measures would have to be adopted under the safeguard clause. In *Commission v Denmark (Dangerous Substances)*,[150] the Court established that the Dangerous Substances Directive had exhaustively harmonised the rules on notification, classification and labelling of dangerous substances. As a result, Member States had no 'scope to introduce other measures in their national legislation'. The Court then invalidated the Danish measure for exceeding the directive's provisions, without referring to the *Tedeschi* Rule, to Article 34 TFEU or to the public interest objective being pursued by Denmark. Member States simply had no residual discretion to adopt further protective measures to protect man and the environment. In the words of the Court '…the rules of the directive … are not meant to be rules providing a minimum degree of protection which leave the Member States free to widen the obligations provided for therein, but are intended to be exhaustive'. [151] Finally, in *Cindu Chemicals*, the Court found that Member States could not impose national conditions on the marketing and use of a biocidal product in addition to what was foreseen by Marketing and Use Directive.[152] The Court reached this conclusion on grounds that the directive had an exhaustive character, which it confirmed by referring to the directive's legal basis (ex. Article 100 EEC), its 'internal market' goal of eliminating barriers, and the abovementioned cases of *Ratti* and *Commission v Denmark (Dangerous Substances)*. The exhaustive regulation of dangerous substances has been maintained under REACH[153] and the CLP Regulation.[154]

2.1.2 Enforcing the Regulatory Effect

44. The Court will validate national health and safety measures adopted in the presence of exhaustive EU legislation, without referring to Articles 34 – 36 TFEU, provided they have correctly implemented EU health and safety standards, or have stayed within the boundaries of authorised legislation-based discretion.

45. This can be seen with the Court's assessment of national measures adopted within the framework of an NAH directive. For example, in *Van Gennip & Others*,[155] the Court held that

[150] *Commission v Denmark (Dangerous Substances),* Case 278/85, EU:C:1987:439.
[151] *Ibid*., paragraph 22. See also paragraph 12.
[152] *Cindu Chemicals*, Joined Cases C-281/03 & C-282/03, EU:C:2005:549.
[153] See in particular Recitals 114, Article 33, Article 67 (1) and Article 115 of the REACH Regulation, *op. cit*. See also *Lapin elinkein*, C-358/11, EU:C:2013:142, paragraphs 30 – 38.
[154] Regulation (EC) No. 1272/2008, *op. cit*.
[155] *Van Gennip & Others*, C-137/17, EU:C:2018:771.

a Belgian ban (subject to authorisation) on the possession and sale of fireworks containing more than one kilogram of pyrotechnic material constituted a proportionate exercise of national discretion, in line with Article 6 (2) of the (exhaustive) Pyrotechnic Directive.[156] Indeed, while Article 6 (1) of the directive required market access for products complying with the harmonised standards, Article 6 (2) explicitly allowed national derogations on grounds of public order, security or safety, or environmental protection. According the Court, Belgium had validly relied on this latter provision, given, in particular, the inherently dangerous nature of the product and the fact that a less restrictive measure, such as registration, would not be as effective in protecting public order and safety.

46. The Court took a similar approach in assessing national implementation of the obligatory market authorisation procedure laid down in the Medicinal Products Code.[157] In a series of cases, the Court confirmed that such national rules would not fall foul of the Treaty's free movement provisions, even though they restricted trade. This point was explicitly made in *Doc Morris*,[158] discussed in section 2.1.1 above. A further question put to the Court in this case was whether a Member State could prohibit the import of medicines that were authorised in the exporting Member State, for the sole reason that they had not been granted market authorisation in the host Member State under the Medicinal Products Code. Answering in the affirmative, the Court referred to the fact that Member States were *obligated* to submit such medicines to the harmonised market authorisation procedure, even if that same medicine had been authorised in another Member State. As a result, Articles 34 – 36 TFEU could not be relied on 'to circumvent the system of national authorisation provided for by Directive 65/65 and the Community Code' as implemented in national law.[159] The Court also found that the German ban on advertising (a) unauthorised medicines and (b) prescription medicines was correctly based on the Code and exempt from review under the Treaty.[160]

47. In the same vein, *Antroposana* considered whether the Code's market authorisation procedure applied to anthroposophic medicines, or whether certain alternative medicines could

[156] Directive 2007/23/EC of the European Parliament and of the Council on the placing on the market of pyrotechnic articles, OJ L 154, 14 June 2007, pp. 1 – 21.
[157] Directive 2001/83/EC, *op, cit.*
[158] *Doc Morris*, note 139.
[159] *Ibid*., paragraph 53.
[160] *Ibid*., paragraphs 138 – 139. See also *Novo Nordisk,* C-249/09, EU:C:2011:272, which interpreted the advertising prohibitions in Article 87 (2) of the Code strictly to prohibit the use of certain quotations taken from specialised medical journals.

be subjected to a simplified national procedure.[161] The defendant, Antroposana (and others), had argued that the Code did not completely harmonise the field and that Member States could, as a result, subject certain categories of medicines, such as anthroposophic medicines, to tailored authorisation procedures. However, siding with the Netherlands, as supported by the Commission and Italy, the Court found that anthroposophic medicines, while not specifically mentioned, fell within the Code's definition of medicinal products 'by presentation'[162] and had to be authorised under the harmonised procedure, before being marketed in a Member State.[163] In such circumstances, and in line with the Exhaustion Rule, Member States could not rely on Article 36 TFEU to justify an alternative authorisation procedure. As discussed in Part I, this finding also implicitly triggered the second leg of the Rule since reliance on the Code's rigorous market authorisation procedure was not reviewed under Article 34 TFEU, even though it prevented the free movement of anthroposophic medicines.

48. A further example of this approach to compliant national rules can be seen in *Bodin*,[164] where judicial tolerance of EU road safety measures can be contrasted with its suspicion towards national rules. The case arose from criminal proceedings taken against a lorry driver whose vehicle exceeded four metres, which, while authorised in France, was the maximum height for lorries under Belgian law. The question was whether the Belgian rule was compatible with *inter alia* the free movement of goods. In its response, the Court first considered the provisions of Directive 85/3 on technical characteristics of certain road vehicles.[165] In particular, it noted that the directive prohibited a Member State from preventing the use of vehicles registered in another Member State on its territory for reasons relating to dimensions, once the vehicle complied with the directive's maximum height of four metres. Moreover, the directive specified that this maximum rule applied, even where another Member State had authorised vehicles that exceeded four meters. The Belgian prohibition therefore complied with the directive's obligations and was not precluded. Relying on the *Bahuis* approach,[166] the Court

[161] *Antroposana & Others*, C-84/06, EU:C:2007:535. See also the AG Opinion at EU:C:2007:301.
[162] The Code harmonises the definition of 'medicinal product' under Article 1 (2) as a product that (a) presents itself as treating or preventing human disease (medicinal product by presentation) or (b) impacts on human physiological functions (medicinal product by function). This allows certain substances, such as vitamins and supplements, while not being suitable for curing, treating or preventing an infection, to constitute a 'medicine' and be subjected to the Code's authorisation procedure. In certain concentrations, such substances may also constitute medicinal products by function.
[163] *Ibid*., paragraph 35 (AG paragraph 31).
[164] *Bodin,* C-241/86, EU:C:1987:280.
[165] Council Directive 85/3/EEC of 19 December 1984 on the weights, dimensions and certain other technical characteristics of certain road vehicles, OJ L. 221, 7 August 1986, pp. 48 – 50.
[166] See General Introduction, point 23.

noted that free movement was hindered, not by regulatory standards, but by disparities, which the directive had sought to remove by establishing common rules. Member States could only exceed these standards for domestic traffic, with common standards governing cross-border movement. As a result, national rules 'in conformity with the limits laid down in the Community directive cannot be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.'[167]

49. EU regulation of the tobacco industry, and national rules adopted thereunder, has enjoyed similar leeway. In *Swedish Match,*[168] also discussed earlier, the Court adopted the dual analysis approach to confirm, first, the validity of the Tobacco Sales Directive[169] and second, the lawfulness of a UK measure taken to implement the oral tobacco ban. In particular, while Article 8 had banned the sale of tobacco for oral use, this prohibition was without prejudice to a derogation for Sweden, where tobacco for oral use could continue to be lawfully sold. The question was whether such tobacco could then move freely throughout the EU. The Court first confirmed that the directive had been correctly based on ex. Article 95 EC, given that current and future national prohibitions on marketing created / would create obstacles to free movement that required harmonisation at EU level.[170] It then assessed *inter alia* whether the directive was proportionate and valid under the free movement rules.[171] As regards the former, the Court noted that the high standard of protection adopted at EU level was not manifestly inappropriate. As regards the latter, it found that the Community legislature could validly restrict free movement principles on public interest grounds such as protection of human health, provided such restrictions complied with the principle of proportionality. Since the Court had already found this to be the case, Article 8 could not be regarded as breaching Articles 34 or 35 TFEU.[172] The Court also dismissed the remaining grounds raised to question the validity of Article 8. It then considered whether UK implementation of the ban was lawful under the Treaty's free movement rules. The Court noted that, since the matter had been exhaustively regulated for, Article 8 was its sole norm of reference under the Exhaustion Rule. And since

[167] *Bodin*, note 164, paragraph 13.
[168] *Swedish Match*, C-210/03, EU:C:2004:802. See also *Arnold André*, C-434/02, EU:C:2004:800.
[169] Directive 2001/37/EC of the European Parliament and of the Council on the manufacture, presentation and sale of tobacco products, OJ L. 194, 18 July 2001, pp. 26-35. The latter was replaced in 2014 by Directive 2014/40/EU of the European Parliament and of the Council on the manufacture, presentation and sale of tobacco and related products, OJ L. 127, 29 April 2014, pp. 1 – 38. Its validity was confirmed in *Poland v Parliament and Council,* C-358/14, EU:C:2016:323.
[170] *Swedish Match,* note 168, paragraph 45.
[171] *Ibid*., paragraphs 59 – 62.
[172] *Ibid*., paragraph 61.

the UK ban was 'in accordance with Article 8' there was no need to separately ascertain Treaty compliance. In other words, since the UK measure complied with the exhaustive secondary rule, its validity could be presumed without reference to the Treaty.

50. The national measure at issue in *Gallaher*[173] was also validated as being in conformity with exhaustive EU rules, although unlike *Swedish Match*, had stemmed from the exercise of legislation-based discretion. This case, like *Philip Morris*, [174] arose following the UK's implementation of the 1989 Tobacco Labelling Directive,[175] which harmonised the labelling of tobacco products with 'common rules (that) were not always identical in nature'.[176] On the one hand, the directive contained provisions, such as a market access clause under Article 8, which gave Member States 'no discretion to impose requirements stricter than those provided for in the directive, or even to impose more detailed or at any rate different requirements, with regard to the labelling of tobacco products.'[177] On the other hand, certain provisions, such as the exact content of the health warning, 'allow(ed) the Member States a degree of discretion to adapt the labelling of tobacco products to the requirements of public health protection.'[178] In *Gallaher*, the Court was called upon to assess the extent of national discretion under Articles 3 (3) and 4(4) of the directive, which provided that health warnings and indications of nicotine/tar levels had to cover 'at least 4%' of the surface area of the cigarette package. The UK had implemented these provisions by requiring relevant labels to cover 6% of the surface area of cigarette packs, as far as domestic production was concerned. These stricter national rules did not apply to imports from other Member States that complied with the directive's 4% threshold, which resulted in reverse discrimination. Following a complaint by a number of tobacco companies, the Court confirmed that the UK rules complied with the directive, since Articles 3 (3) and 4 (4) gave Member States 'a degree of latitude' as regards the size of the health warning and tar/nicotine yields. Accordingly, the term 'at least' contained therein 'must be interpreted as meaning that, if they consider it necessary, Member States are at liberty to decide that the indications and warnings are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption.'[179] By limiting its stricter rules to domestic production, the UK had complied with the market clause. Although resulting

[173] *Gallaher,* C-11/92*,* EU:C:1993:262.
[174] *Philip Morris,* C-222/91, EU:C:1993:260.
[175] Council Directive 89/622/EEC on the labelling of tobacco products, OJ L. 359, 8 December 1989, pp. 1 – 4.
[176] *Gallaher*, paragraph 11, *Philip Morris,* paragraph 8.
[177] *Gallaher,* paragraph 12, *Philip Morris,* paragraph 9.
[178] *Gallaher*, paragraph 14; *Philip Morris,* paragraph 11.
[179] *Gallaher*, note 173, paragraph 20.

in reverse discrimination, such consequences are, as noted the Court, 'attributable to the degree of harmonization sought by the provisions in question, which lay down minimum requirements.'[180] Another example of legislation-based discretion was identified in *Gintec*, which, while interpreting the Medicinal Products Code as forbidding 'an absolute and unconditional prohibition' on third party statements to advertise medicines, also confirmed that Member States could prohibit misleading claims regarding recovery or improving health, as well as advertising medicinal products via a prize draw.[181]

51. A final point to mention is that the Court will, as with agricultural safeguard measures, authorise national health and safety safeguard measures once they follow the correct procedure. In *Commission v Germany (Labelling of Dangerous Substances)* for example, the Court concluded that Germany had correctly relied on the safeguard clause under the Dangerous Substances Directive[182] and that, contrary to the Commission's submissions, it could provisionally require special labelling for certain carcinogenic substances otherwise in compliance with that directive.[183] As such, the Court dismissed the claim that Germany had not followed the correct procedure to notify the Commission of its actions.

2.1.3 The Conditional Effect

52. The Exhaustion Rule will only oust Treaty-based discretion to regulate for health and safety reasons if there is a relevant secondary measure that institutes the necessary degree of harmonisation. Where this is not the case, Member States can continue to regulate, once it complies with the Treaty 'ceiling', and in particular the obligations under Articles 34 – 36 TFEU. In *Grunert* for example, the Court held that there was no exhaustive system in place, since the directives at issue, which related to the amount of preservatives and antioxidants authorised in food,[184] constituted 'merely the first stage in the approximation of national laws'.[185] As a result, Member States were not obliged to authorise all the substances listed by the

[180] *Ibid.,* paragraph 22.
[181] *Gintec*, note 138, paragraphs 39 and 52.
[182] Directive 67/548/EEC, *op. cit*.
[183] *Commission v Germany (Dangerous Substances)*, C-43/90, EU:C:1992:121.
[184] Council Directive 64/54/EEC on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption, OJ, English Special Edition 1963 – 1964, p. 99 and Council Directive 70/357/EEC on the approximation of the laws of the Member States concerning antioxidants authorized for use in foodstuffs intended for human consumption, OJ, English Special Edition 1970 (II), pp. 429-433.
[185] *Grunert,* Case 88/79, EU:C:1980:152. See also *Eyssen*, Case 53/80, EU:C:1981:35, paragraph 15.

directives as being safe, but could determine this on a case-by-case basis, subject to the condition that national rules did not impose a total ban (the legislation 'floor').

53. This early finding of minimum harmonisation was shortly followed by *Van Bennekom,*[186] where the Court confirmed that matters outside the scope of a harmonising Community rule, in this case the 1965 Medicinal Products Directive,[187] remained within the competences of the Member States. The national court had asked whether Member States could subject certain vitamins falling outside the directive's definition of 'medicinal products' to a registration requirement. The defendant argued not, on grounds that the harmonised Community system of precluded the Netherlands from relying on Article 36 to justify the registration requirement for products not classified as medicinal.[188] Neither the Commission nor the Court concurred. The fact that the directive did not cover vitamins did not mean such substances were automatically exempt from an authorisation procedure. Instead, Member States could continue regulating the sale of such products, although subject to evaluation in accordance with primary law.[189]

54. Member States could therefore impose a national authorisation procedure on substances, such as vitamins, food supplements and other novel or grey-area products, notwithstanding their free circulation in other Member States, subject to compliance with Articles 34 – 36 TFEU. This possibility, which was maintained under the 2001 Medicinal Products Code,[190] explains why some Member States seek to classify a product as medicinal. As with the Netherlands in *Antroposana*, they hope to benefit from the presumption of constitutionality enjoyed by the Code's authorisation procedure and avoid direct review by reference to primary law. That such attempts are not always successful confirms that the conditional effect of EU rules can also operate against Member State interests. In *Commission v Germany (Garlic Capsules)*, for example, Germany had classified garlic capsules as medicinal and subjected the product to the Community's mandatory authorisation procedure.[191] However, the Commission claimed that garlic capsules were not medicinal and that Germany's measure violated Articles 34 – 36 TFEU. Referring to the aims of the Code, it noted that 'the term medicinal product … cannot

[186] *Van Bennekom,* Case 227/82, EU:C:1983:354.
[187] Directive 65/65/EEC, *op. cit*.
[188] *Ibid*., p. 3890, paragraphs 5 – 6.
[189] *Ibid*., paragraph 35. See also *Delattre,* note 137 and *Commission v Austria (Food Supplements)*, C-150/00, EU:C:2004:237.
[190] *Solgar Vitamin's France*, note 10, paragraph 35 and *Orthica & Others*, note 137, paragraph 56.
[191] *Commission v Germany (Garlic Capsules)*, note 137.

result in obstacles to the free movement of goods which are entirely disproportionate to the pursued aim of protecting health'.[192] Moreover, while Member States could subject products outside the Code's scope to an authorisation procedure, this had to be proportionate, which was not the case *in casu*. These submissions led the Court, in contrast to *Antroposana*, to focus on exploring whether garlic capsules did in fact come within the Code's definition of medicinal product, as claimed by Germany. That such medicines would have to follow the Code's authorisation procedure was not in dispute. However, the Court, like the AG,[193] concluded that garlic capsules were not a medicinal product. Germany's requirement to subject this product to market authorisation was therefore assessed, and struck down, under primary law.

55. Similar unsuccessful attempts were made to classify certain food supplements as medicinal in *Commission v Austria (Food Supplements)*[194] and *Commission v Germany (Food Supplements)*,[195] while in Commission proceedings against France[196] and Denmark,[197] the Member States argued that national restrictions on the free movement of certain food supplements were justified under Article 36 TFEU. These cases, all of which invalidated the national rule, highlighted the persisting uncertainty and potential for trade distortions in this field, whereby a foodstuff circulating freely in one Member States could be prohibited or controlled in another.[198] This prompted the adoption of the Food Supplements Directive,[199] although, as recently seen in *Noria Distribution*, the absence of total harmonisation in classifying such products means that scope for unilateral national rules, and resulting trade barriers, continues.[200]

56. The conditional effect of EU rules, and the resulting scope for national discretion, has also been acknowledged in the field of dangerous substances. For example, in *Toolex,*[201] the Commission argued that the regulatory framework governing dangerous substances established a complete system of protection that rendered Sweden's prohibition on the *use* of the substance trichloroethylene 'superfluous'. The Court did not agree. Instead, it held that this system, while

[192] *Ibid*., paragraph 16.
[193] Opinion in *Commission v Germany (Garlic Capsules)*, C-319/05, EU:C:2007:364.
[194] *Commission v Austria (Food Supplements)*, note 189.
[195] *Commission v Germany (Food Supplements)*, C-387/99, EU:C:2004:235.
[196] *Commission v France (Food Supplements),* C-24/00, EU:C:2004:70.
[197] *Commission v Denmark (Food Supplements),* C-192/01, EU:C:2003:492.
[198] *Commission v Germany (Food Supplements)*, note 195, paragraphs 52 – 53.
[199] Directive 2002/46/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements, OJ L 183, 12 July 2002, pp. 51 – 57.
[200] *Noria Distribution*, note 10.
[201] *Toolex*, C-473/98, EU:C:2000:379. See also *Burnstein,* C-127/97, EU:C:1998:456.

harmonising various elements, did not prevent Member States from regulating the industrial use or marketing of the substance, subject to compliance with the Treaty's free movement rules. In *Nicolas Schreiber*, the defendant argued that red cedar blocks, having natural anti-moth properties, constituted a 'basic substance' under Directive 98/8 on Biocidal Products,[202] and could not be subjected to a national prior authorisation requirement.[203] The Court however considered that the product was not a 'basic substance' but a biocidal product. Moreover, while the directive obliged Member States to authorise biocidal products listed in Annex I or IA, these Annexes had not been completed at the time of the proceedings. In such circumstances, the Court, taking a precautionary approach, found that Member States could subject the product to a national authorisation procedure, even if it had been lawfully marketed in another Member State.

57. Finally, in *Geharo*[204] and *A.G.M.-COS.MET*,[205] the Court repeated its finding in *CIWF* that Member States could regulate for public interest justifications that had not been harmonised. The first case stemmed from criminal proceedings against Geharo for stocking toys containing a level of cadmium, above what was authorised under Dutch rules implementing the Marketing and Use Directive.[206] However, Geharo claimed its toys complied with the standards set for cadmium levels under Toy Safety Directive.[207] The Court found that both directives regulated cadmium content but for different objectives. While the Marketing and Use Directive sought to protect the general public against cadmium in the environment, the Toy Safety Directive protected the health and safety of the toy user. As a result, the Netherlands could rely on the former to require toys covered by the latter to comply with a higher limit of cadmium content. The second case, *AGM-Cos Met*, concerned an action against Finland by an Italian importer of car lifts that bore the CE sign, arguing that claims made by a Finnish official that its lifts were dangerous made imports more difficult and violated the free movement of goods. The Finnish Government responded that the warnings did not reflect its position and could not be attributed to the State to render it liable. The official submitted that his statements were covered by his right to free expression under Article 10(1) of the European Convention

[202] Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market, OJ L. 123, 24 April 1998, pp. 1 – 63.
[203] *Nicholas Schrieber*, Case C-443/02, EU:C:2004:453. See also *Nijman,* Case 125/88, EU:C:1989:401.
[204] *Geharo*, C-9/04, EU:C:2005:593.
[205] *A.G.M.-COS.MET*, note 118.
[206] Directive 76/760/EEC, *op. cit*.
[207] Council Directive 88/378/EEC on the approximation of the laws of the Member States concerning the safety of toys, OJ L. 187, 16 July 1988, pp. 1 – 13.

on Human Rights. In its response, the Court confirmed that Directive 98/37 on machinery[208] exhaustively harmonised the field and triggered the Exhaustion Rule, and that the obstacle could be attributable to the State. As regards justification, the Court first found that the protection of health could not be invoked, since Article 36 TFEU could not apply and Finland had not adopted safeguard measures under the directive's safeguard clause. As regards the freedom of expression, the Court acknowledged that individuals could invoke this right since, presumably, it was not harmonised by the directive. However, Member States could not 'rely on their officials' freedom of expression to justify an obstacle and thereby evade their own liability under Community law'.[209]

[208] Directive 98/37/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to machinery, OJ L. 207, 23 July 1998, pp. 1 – 46.
[209] *A.G.M.-COS.MET*, note 118, paragraph 72.

2.2 Protecting Intellectual Property Rights (IPR)

58. Intellectual property (IP) refers to 'creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.'[210] It is protected under various types of IPRs, including patents, copyright, and trademarks. These IPRs enable rightsholders to get recognition and/or remuneration for their inventions or creations as well as providing guarantees to users. In the context of European market integration, Article 36 TFEU authorises Member States to derogate from the free movement of goods in order to protect 'industrial and commercial property' – thus by granting trademark, copyright,[211] patent, design and plant breed protection, and, to a more limited extent, protection of geographical indications. Moreover, Article 345 TFEU provides that 'the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. It is on this basis that the Court has consistently confirmed that Member States can legislate IPRs in the absence of harmonisation, which includes laying down national rules on the acquisition, transfer or extinction of rights. On the one hand, this protective stance[212] contrasts with the Court's more intrusive scrutiny of other national derogations.[213] On the other, the Court must still reconcile the Treaty's explicit recognition of national IP competence with EU competition and free movement rules. It achieves this by distinguishing between the existence of IPRs, which refers to the specific subject matter of the right and is not affected by EU law, and the exercise of such rights, which, as a derogation to Articles 34 – 35 TFEU, must be viewed and assessed as an exception to free movement and fair competition.[214]

59. Stothers notes on this basis that national IPR protection is subject to three exceptions.[215] These include (i) the principle of non-discrimination on grounds of nationality or place of

[210] As defined by WIPO (The World Intellectual Property Organisation). Available at http://www.wipo.int/about-ip/en/ . Last accessed 18 August 2017.
[211] Initial doubts over whether 'industrial and commercial property' covered copyright and neighbouring rights were put to rest in *Musik-Vertrieb Membran*, Case 55/80, EU:C:1981:10.
[212] Cases where the Court has upheld national IP rules restricting free movement include *Terrapin v Terranova,* Case 119/75, EU:C:1976:94; *Nancy Kean Gifts,* Case 144/81, EU:C:1982:289; *Maxicar*, Case 53/87, EU:C:1988:472; *Hag II,* C-10/89, EU:C:1990:359 and *Generics,* C-316/95, EU:C:1997:347.
[213] One exception is the Court's position regarding geographical indications. While traditionally seen as part of consumer protection and preventing unfair competition (ex. *Prantl*, note 91), the Court now accepts that geographical indications constitute intellectual property. However, they remain subject to 'a weaker form of intellectual property than patents, trade markets, copyright and plant breeders' rights'. see C. Stothers, 'Article 36 TFEU: Intellectual Property', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union*, *op. cit.*, pp. 313 – 369 at pp. 360 – 369.
[214] Ex. *Centrafarm*, Case 16/74, EU:C:1974:115, paragraphs 7 to 11. See also *Bristol-Myers Squibb & Others,* Joined cases C-427/93, C-429/93 & C-436/93, EU:C:1996:282 paragraph 3. See C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* pp. 315 – 316.
[215] *Ibid*., paragraph 9.13.

manufacture, (ii) the right of goods to transit Member States and (iii) the exhaustion of rights doctrine[216] (not to be confused with the Exhaustion Rule!) that applies to trademarks, certain copyrights, design rights and patent protection within the EU.[217] This latter doctrine acknowledges that rightsholders have the exclusive right to use, manufacture and sell their product within the State that has granted the right. However, a rightsholder that consents to use in another Member State cannot then rely on the IPR to block free movement throughout the internal market, or back to the Member State of origin (parallel imports), unless there are legitimate reasons to do so. A fourth 'exception' arises when secondary legislation pre-empts Member States from enacting national measures to protect IPRs. This is particularly so when the EU legislation harmonises national law, as it has done for certain aspects of trademark[218], design,[219] copyright[220] and geographical indications[221] protection. However, where the EU legislator creates new EU IPRs, such as the Union patent[222] and trademark,[223] national protection is not pre-empted but coexists with Union protections.

60. In terms of volume, it seems that the Court has been confronted with less regulatory disputes arising between EU rules, national measures and the Treaty's free movement provisions, at least when compared to the other fields surveyed in this research. We have identified three reasons why this might be so. First, as again noted by Stothers, EU IPR legislation is still the exception rather than the rule, even if is growing in importance. This means that national measures – and primary law – continue to hold central importance in this field, with a large amount of cases falling into the 'in the absence of harmonisation' category. Second, IP enjoys such strong protection under harmonised measures that free movers may have less incentive to rely on *Tedeschi* to oust national regulatory competence. Third, IPRs are

[216] This principle was first established in *Deutsche Gramaphon*, Case 78/70, EU:C:1971:59.
[217] Ex. *Centrafarm,* note 214, paragraphs 7 to 11; *Hoffmann-La Roche*, Case 102/77, EU:C:1978:108; *HAG II*, note 212, paragraph 12 and *Ideal Standard,* C-9/93, EU:C:1994:261, paragraphs 33 and 34.
[218] Ex. Directive (EU) 2015/2436 of the European Parliament and of the Council to approximate the laws of the Member States relating to trademarks, OJ L. 336, 23 December 2015, pp. 1 – 26 (third Trademarks Directive).
[219] Ex. Directive 98/71/EC of the European Parliament and of the Council on the legal protection of designs, OJ L. 289, 28 October 1998, pp. 28 – 35.
[220] Ex. Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L. 167, 22 June 2001, pp. 10 – 19 (the Copyright Directive).
[221] Ex. Regulation (EU) No. 1151/2012 of the European Parliament and of the Council of on quality schemes for agricultural products and foodstuffs, OJ L. 343, 14 December 2012, pp. 1 – 29.
[222] For information on the Union patent, see the European Patent Office website at: http://www.epo.org/index.html. Last accessed 18 August 2017.
[223] Ex. Council Regulation (EC) No. 207/2009 on the Community trademark, OJ L. 78, 24 March 2009, pp. 1 – 42.

often exercised by private parties, where redress for unlawful action must be – and often is - sought under EU competition rules.[224]

61. This is not to say that such litigation has not arisen. As we will see, the Court has considered the relationship between national and EU IP protection and free movement rules, in establishing the scope of the exclusive right [225] and considering the likelihood of confusion[226]; enforcing the exhaustion of rights doctrine, such as laying down rules on repackaging for parallel imports,[227] considering opposition to the use a trademark and the question of consent[228]; and interpreting discretionary terminology in EU secondary rules such as the notion of 'reasonable compensation'.[229] And in such cases, the Court adopts the same approach to assessing and enforcing the integrative (2.2.1) and regulatory (2.2.2) effects of EU IP rules, while also confirming that national competence to regulate such matters remains intact in the absence of a relevant, and exhaustively harmonising, rule (2.2.3).

2.2.1 Enforcing the Integrative Effect

62. EU secondary harmonising measures sometimes codify jurisprudence that, in the absence of harmonisation, precluded Member States from disrupting the free movement of certain protected goods. This can be seen in relation to EU rules harmonising the exhaustion of rights doctrine under the Copyright Directive, the Patent Regulation, the Design Directive and the Trademarks Directives.[230] As noted, the exhaustion of rights doctrine prevents a rightsholder from relying on his/her IPR to limit free movement, once he/she has consented to its sale on the internal market. This means that once the conditions for this doctrine are present, Member States cannot frustrate its application by reinforcing the rights of IP holders at national level.

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[224] Articles 101 and 102 TFEU. Ex. *Consten & Grundig,* Cases 56/64 & 58/64, EU:C:1966:41.
[225] *Länsförsäkringar,* C-654/15, EU:C:2016:998.
[226] *Loutfi Management Propriété intellectuelle,* C-147/14, EU:C:2015:420.
[227] For an early discussion on this issue (in the absence of harmonisation), see *Hoffmann-La Roche,* note 217. The Court confirmed same principles in the presence of the Trademarks Directive in *Bristol-Myers Squibb & Others,* note 214. See also *Boehringer Ingelheim,* C-348/04, EU:C:2007:249.
[228] Ex. *Copad,* C-59/08, EU:C:2009:260 and *Zino Davidoff & Others,* Joined Cases C-414/99 to 416/99, EU:C:2001:617.
[229] Ex. *Nikolajeva,* C-280/15, EU:C:2016:467 and *SENA*, C-245/00, EU:C:2003:68.
[230] Article 7 of the first Trademarks Directive (Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks, OJ L. 40, 11 February 1989 pp. 1 – 7; Article 7 of the second Trademarks Directive (Directive 2008/95/EC of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks**,** OJ L. 299, 8 November 2008, pp. 25 – 33 and Article 15 of the third Trademarks Directive (*op. cit*.). See also Article 4 of the Copyright Directive (Directive 2001/29/EC, *op. cit*.).

63. As discussed in Part I, *Bristol-Myers Squibb & Others* confirmed that this limitation on national powers would be maintained in the presence of harmonisation. [231] Specifically, Article 7 of the first Trademarks Directive[232] had exhaustively regulated this doctrine in respect of trademarks, thereby becoming the Court's sole norm of reference in deciding matters falling within its scope. At the same time, the Court relied on jurisprudence developed in the absence of harmonisation to ensure consistent interpretation with the free movement provisions. In doing so, it confirmed that the exhaustion of rights doctrine would apply fully in the presence of harmonisation, and that secondary legislation could not alter the balance struck by the Court. As a result, free movers could continue to rely on the exhaustion doctrine, as protected by the Trademarks Directive, to engage in parallel importation, although henceforth as protected under secondary law.[233] The Court has taken the same approach when interpreting sector specific directives. In *Servoprax* for example,[234] it found that Directive 98/79 on *in vitro* diagnostic medical devices[235] did not require a parallel importer of such devices, which bore a CE marking and that had been subject to a conformity assessment, to undergo further assessment to ensure that the label and instructions on the device conformed to the official language of the importing Member State.

64. In addition to codifying the Court's jurisprudence, the EU legislator may also impose additional limitations on the rights of IP holders. This can be seen with regards to establishing what could cause confusion between trademark signs. Prior to the adoption of the first Trademarks Directive, the Court deferred to national choices over how to protect trademarks against the use of confusingly similar marks, even if, objectively, such confusion seemed unlikely and caused trade barriers.[236] The Court, however, reassessed its deferential approach following the adoption of Article 4 (1)(b) of the first Trademarks Directive, which required a 'likelihood of confusion' with an earlier trademark in order to refuse or invalidate registration of a subsequent trademark. Interpreting this provision in *Sabel*, the Court held that a 'likelihood of association' between two trademarks could not, on its own, constitute a likelihood of

[231] *Bristol-Myers Squibb & Others,* note 214. See also *Phytheron International*, C-352/95, EU:C:1997:170.
[232] Directive 89/104/EEC, *op. cit*.
[233] *Ibid*. See also *Orifarm & Others,* Joined Cases C-400/09 and C-207/10, EU:C:2011:519 and *Merck, Sharp & Dohme,* C-443/99, EU:C:2002:245.
[234] *Servoprax*, C-277/15, EU:C:2016:770.
[235] Directive 98/79/EC of the European Parliament and of the Council of 27 October 1998 on in vitro diagnostic medical devices, OJ L. 331, 7 December 1998, pp. 1 – 37.
[236] *Terrapin v Terranova,* note 212, *Hag II,* note 212 and *Deutsche Renault*, C-317/91, EU:C:1993:908. For a criticism of this approach, see the Opinion in *Hag II,* C-10/89, EU:C:1990:112, paragraph 36.

confusion.[237] In doing so, it restricted how certain Member States could interpret the concept.[238] Indeed, in *Sabel*, the Court challenged the traditional Benelux approach of assuming that a risk of confusion could arise on the basis of a purely associative nature between two trademarks.[239] Another example of an EU measure imposing additional restrictions on IP holders is Article 1 (8) of Directive 2004/27, which amended the Medicinal Products Code[240] to restrict certain rights of patent holders. Prior to the amendment, patent holders could prevent third parties from submitting samples and tests of patented medicinal products, which would facilitate market authorisation for those medicines on expiry of the patent. The Court supported this stance, even though a delay resulted between the expiry of the patent and the ability of the third party to market the generic product.[241] However, following the adoption of secondary legislation, it now accepts that third parties can use patented medicines to make such submissions.[242]

65. The integrative effect of EU IP legislation has also been demonstrated in relation to national restrictions on third country imports to the EU. While not specifically related to free movement within the internal market, the Court's approach is interesting as it highlights the pre-emptive effect of secondary legislation on national freedom to protect IPRs. For example, in *Monsanto Technology*,[243] the Court held that Article 9 of Directive 98/44/EC on the legal protection of biotechnological inventions[244] precluded the patent holder from opposing imports of products from Argentina that contained unauthorised traces of its patented genetic material. In particular, that material, while present in the import, no longer performed the function for which it was patented – even if it did previously and may again. Moreover, since Article 9 had effected exhaustive harmonisation, Monsanto could not claim protection under national law. Similarly, in *Budějovický Budvar*[245] the Czech producer of Bud sought to prohibit the US producer of Bud from marketing its product in Austria on grounds that the designation 'bud' was reserved for the former under a bilateral agreement with Austria. However, the Court held

[237] *SABEL,* C-251/95, EU:C:1997:528, paragraph 26.
[238] C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* p. 327.
[239] At the same time this issue continues to cause much debate and litigation, and is often very fact specific. See ex. *L'Oréal & Others*, C-487/07, EU:C:2009:378; *Canon Kabushiki Kaisha*, C-39/97, EU:C:1998:442; *Klijsen Handel*, C-342/97, EU:C:1999:323 and *Marca Mode*, C-425/98, EU:C:2000:339.
[240] Directive 2004/27/EC of the European Parliament and of the Council amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, OJ L. 136, 30 April 2004, pp. 34 – 57.
[241] *Generics*, note 212.
[242] C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* p. 328.
[243] *Monsanto Technology,* C-428/08, EU:C:2010:402.
[244] Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions, OJ L. 213, 30 July 1998, pp. 13 – 21.
[245] *Budějovický Budvar*, C-478/07, EU:C:2009:521.

that the Protection of Geographical Indications Regulation[246] was exhaustive and precluded the possibility for a bilateral agreement to protect a designation of a qualified geographical indication.

2.2.1 Enforcing the Regulatory Effect

66. EU measures that harmonise IP rights also impose regulatory standards to protect the rightsholder. Under the second leg of the Exhaustion Rule, protective national measures that comply with such standards will be validated without direct review under Articles 34 – 36 TFEU. Member States must also, if necessary, modify national rules to comply with higher EU standards. In this section, we look at how the Court has enforced this regulatory effect with respect to certain aspects of the Trademark and Copyright Directives.

67. Turning first to the Trademarks Directive, this regulatory effect can be seen in the Court's interpretation of the exhaustion of rights doctrine. We noted above that Article 7 (1) of the first Trademarks Directive (and its successors) requires adherence to this doctrine under the same conditions as applied in the absence of harmonisation. As a result, a trademark holder cannot prohibit use of the trademarked good which has been put on the EU market with his consent. However, the Court has also interpreted Article 7 (1) as including a number of limitations that *protect* the trademark holder. First, it clarified in *Silhouette* that Article 7 only applied if the products had been marketed, with consent, in the EU. As a result, the exhaustion of rights doctrine would not apply when the product was marketed outside the EU and Member States could *not* provide for international exhaustion.[247] Second, the Court found in *Zino Davidoff* that consent to exhaustion could only be implied in very limited circumstances.[248] Indeed, given the far-reaching implications of extinguishing exclusive IPRs, such consent would have to unequivocally demonstrate an intention to renounce those rights. However, while a demonstration of intention would usually require an 'express statement', consent could also be inferred. The Court then listed a number of situations under which implied consent *could not* be inferred. In other words, it delimited, and restricted, the possibilities to demonstrate consent. And in doing so, the Court also restricted the possibilities for parallel importers to circulate trademarked goods. Since the directive had completely harmonised the matter, the

[246] Council Regulation (EU) No. 510/2006 on the protection of geographical indications and designations of origins for agricultural products and food, OJ L. 343, 14 December 2012, pp. 1 – 29.
[247] *Silhouette,* C-355/96, EU:C:1998:374.
[248] *Zino Davidoff & Others,* note 228.

Court did not subject its definition, which was ultimately restrictive of free trade, to an additional review under the Treaty.[249]

68. Finally, the Court has continued to maintain a balance between the free movement of trademarked goods under the exhaustion of rights doctrine and the rights of IP holders, as mandated under the Trademarks Directives. As noted in Part I (Chapter Two), Member States can, under Article 7 (2) of the directive, refuse or challenge the exhaustion of their trademark for 'legitimate reasons', especially where the condition of the goods is subsequently changed or impaired.[250] This provision recognises that the exhaustion of rights doctrine is not absolute but can be opposed by rightsholders, even if this opposition can then be challenged.[251] As such, Article 7 'seeks to strike a balance between the free movement of good within the common market and the protection of trademark rights'.[252] The appropriate balance can be found by permitting restrictions on free movement that are *necessary* to safeguard the specific subject matter and essential function of the trademark. Once the Court has established such necessity, the trade restrictive measures will not subject such action to additional review under the Treaty. This balanced approach reflects and builds on the Court's jurisprudence before the directive was adopted, and allows trademark holders to oppose the repackaging and sale of their products if a number of criteria have not been satisfied. [253]

69. The second measure we look at relates to the Court's interpretation of the Copyright Directive[254] in *Opus Supplies*.[255] This directive grants rightsholders exclusive rights over reproduction of their works, subject to exceptions under Article 5. Such exceptions include the 'private copying exception', which authorises copying 'by a natural person for private use and for ends that are neither directly nor indirectly commercial' once the rightsholder is granted 'fair compensation'. The Netherlands implemented the 'private copying exception' and obliged

[249] National law can, however, provide for a wider concept of consent in the absence of harmonisation. See C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* p. 347.
[250] Articles 7 (1) and 7 (2) under the First and Second Trademarks Directives, *op. cit*. Article 15 of the Third Trademarks Directive, *op. cit*.
[251] The Court explored the need for balance between free movement and the legitimate concerns in the absence of harmonisation in *Hoffmann-La Roche*, note 217. It confirmed that the same principles applied in the presence of the Trademarks Directive in *Bristol-Myers Squibb & Others,* note 214.
[252] Opinion in *Bristol-Myers Squibb & Others*, Joined cases C-427/93, C-429/93 and C-436/93, EU:C:1995:440, paragraph 95.
[253] For list of criteria, see C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* p. 353. See also *Ferring Lægemidler,* C-297/15, EU:C:2016:857 and *Copad,* note 228.
[254] Directive 2001/29/EC, *op. cit*.
[255] *Opus Supplies*, C-462/09, EU:C:2011:397. See also *Padawan*, C-467/08, EU:C:2010:264.

the manufacturer or importer of reproduction media to pay fair compensation. However, the German company, Opus Supplies, started selling blank media in the Netherlands without imposing a private copying levy. This practice was challenged by the Dutch collecting society, raising the question as to whether the Dutch system complied with the Copyright Directive and the free movement of goods. The Court found that it did. Specifically, while the directive did not specifiy who should pay such fair compensation, it aimed to ensure a high level of copyright protection. Member States that introduced the private copying exception therefore had to ensure effective recovery of fair compensation for harm suffered by copyright holders on its territory. While the private user had to pay such compensation, practical difficulties allowed this burden to be placed on the seller through a collective arrangement, which it could then pass on to the consumer. As a result, the Dutch rules imposing the duty of fair compensation on the manufacturer or importer of relevant media came within the limits of national discretion. As regard the potential for such rules to impact on the free movement of goods, the Court confirmed that 'it is of no bearing on that obligation on the said Member State that, in the case of distance selling arrangements such as those at issue in the main proceedings, the commercial seller who makes available reproduction equipment, devices and media to purchasers residing on the territory of that Member State, as final users, is established in another Member State'.[256]

2.2.3 The Conditional Effect

70. As with other sectors, the Court must establish the existence of an exhaustively harmonising rule before ousting Treaty-based discretion under the Exhaustion Rule. This requirement has particular resonance for the regulation of IP since the bulk of EU legislation either remains silent on matters relating to the grant, transfer and extinction of intellectual property rights[257] or exists in parallel with national IPRs. Moreover, even when harmonising legislation is in place, Member States will continue to control the specific subject-matter of the relevant IPR, to the extent that this has not been precluded by the EU rule. *Matratzen Concord* provides a good example of this dynamic.[258] Indeed, while initially appearing as a classic application of the Exhaustion Rule, this case in fact *excludes* the impugned national rule from the scope of the Trademarks Directive, yet without reviewing it by reference to Articles 34 – 36 TFEU.

[256] *Ibid*., paragraph 40.
[257] C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.* p. 328.
[258] *Matratzen Concord,* C-421/04, EU:C:2006:164.

71. At issue in *Matratzen Concord* was a Spanish decision to register Hukla's Spanish trademark, MATRATZEN, which is the German word for mattress. Specifically, the Court was asked whether Articles 34 TFEU prevented a Member State from registering a generic term as a national trademark where that term was borrowed from the language of another on grounds that it could limit imports from German-speaking Member States. The Court first established that the matter was to be considered under the Trademarks Directive, and not primary law, given that Article 3 had exhaustively harmonised the grounds to refuse or invalidate the registration of a trademark.[259] These grounds, however, did not authorise a refusal to register where generic terms were borrowed from another EU language, as claimed by the plaintiff. While refusal could be authorised if the term was devoid of distinctive character or if it described the product's character, which would have been the case for MATRATZEN in Germany, this ground did not apply for the term in Spain, given cultural, social and economic differences. As a result, Spanish registration of that term *was not precluded* under the directive. The Court then bolstered its finding by assessing whether its interpretation of the directive complied with Articles 34 – 36 TFEU.[260] It first confirmed that EU law did not affect the existence of trademark rights as recognised by national legislation. As a result, Spain retained full discretion to register trademarks at national level, once not prohibited by the directive. Referring to the AG's Opinion, the Court also confirmed that the trademark holder could not prevent the word MATRATZEN being used in other contexts such as, for example, in a catalogue written in German to refer to mattresses.[261] The Court then concluded the matter by exclusive reference to the Trademarks Directive – that is that Article 3 did not preclude a Member State from registering a term borrowed from the language of another Member State as a national trademark. In other sectors, the Court would have reviewed the Spanish action by reference to Articles 34 – 36 TFEU, given that it fell outside the scope of the directive. However, since it pertained to the grant of a trademark, and therefore its specific subject matter, the Court deferred to the Spanish decision, without such a review.

72. The Court will, however, impose a more intensive review on national measures that regulate *the exercise* of an IPR in the absence of harmonisation. This can be seen in *Van Doren*,[262] which considered the lawfulness of a German rule of evidence that required the

[259] *Ibid*., paragraphs 20 – 21.
[260] *Ibid*., paragraphs 28 – 31.
[261] *Ibid*., paragraph 31. See also Opinion in same case, EU:C:2005:720, paragraph 64.
[262] *Van Doren,* C-244/00, EU:C:2003:204.

alleged infringer of a trademark right to prove that it had been exhausted. The Court held that the measure, which pertained to national procedural rules, was consistent with Articles 5 – 7 of the Trademarks Directive. However, since it was being invoked for a reason outside the scope of the directive, the matter was also subject to review under the free movement provisions.[263]

[263] *Ibid*., paragraph 41.

3. (CERTAIN) MANDATORY REQUIREMENTS

73. One key element of *Cassis de Dijon*[264] was to reinforce the scope for national rules in the absence of harmonisation by imposing the principle of 'non-absolute' mutual recognition. Accordingly, goods lawfully produced in one Member State could enjoy EU-wide market access but subject to host country rules justified by reference to 'a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods'.[265] These 'purposes in the general interest' are generally known as 'essential' or 'mandatory requirements', which, in *Cassis de Dijon*, were found to include preventing tax evasion and unfair competition, and consumer protection. This list, however, has always been open-ended and now includes environmental protection, improving working conditions, cultural aims, road safety and protecting fundamental rights.[266] As discussed, this ruling had a profound impact on the Community's legislative programme. In particular, recognising that additional public interest goals could constitute legitimate trade barriers automatically opened up new regulatory possibilities for the EU legislator, insofar as this was necessary for the establishment and functioning of the internal market.[267]

74. It should be mentioned that there is, at least in theory, an important distinction between Article 36 derogations and mandatory requirements in the absence of harmonisation, since the latter are only available to justify indistinctly applicable national measures.[268] However, from the perspective of assessing the effects of EU legislation, this distinction is irrelevant. As a result, the fact that we have separated EU regulatory goals based on Article 36 grounds and mandatory requirements is for the purposes of presentation and does not endorse limiting mandatory requirements in this way. As with our approach to Article 36 TFEU, we focus on

[264] *Cassis de Dijon*, Case 120/78, EU:C:1979:42.
[265] *Ibid.*, paragraph 14.
[266] For a list of mandatory requirements, see European Commission, *Free Movement of Goods: Guide to the Application of Treaty Provisions governing the Free Movement of Goods,* Ares (2013) 3759436 – 18/12/2013, pp. 29 – 30.
[267] See H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, pp. 1240 – 1242 and J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *Yearbook of European Law*, vol. 4, no. 1, 1984, pp. 169 – 205, at p. 182. See also Commission Communication concerning the consequences of "Cassis de Dijon", OJ C. 256, 3 October 1980, pp. 2 – 3.
[268] At the same time, as noted by AG van Gerven, 'the conditions governing the applicability of the "Cassis de Dijon" doctrine and of Article 36 are the same (absence of harmonisation, examination of the criteria of necessity and proportionality, prohibition of arbitrary discrimination or disguised restriction on trade)'. Opinion in *Aragonesa*, Joined Cases C-190 and C-176/90, EU:C:1991:247, paragraph 14. See also discussion by S. Enchelmaier, 'Article 36 TFEU: General', *op. cit.*, pp. 216 – 220.

the impact of EU regulation in the two fields that have been the subject of most EU legislation, those being consumer protection (which for our purposes may also include unfair competition)[269] (3.1) and environmental protection (3.2).

3.1 Protecting the Consumer

75. The regulatory goal of consumer protection refers to the aim of protecting the health, safety, and economic interests of natural persons who are 'acting outside the scope of an economic activity',[270] largely by empowering them to 'make choices based on accurate information'.[271] Although recognised as a Community aim in the 1970s,[272] consumer protection was only established as an independent EU competence under the Treaty of Maastricht and is currently laid down in Article 169 (1) TFEU. The latter, however, limits legislative action to supporting, supplementing and monitoring national policies. As a result, consumer protection legislation is generally based on Article 114 TFEU, reflecting its status as a 'corollary' to achieving the internal market.[273] To this end, Article 114 (3) TFEU also mandates a high level of consumer protection. This has enabled the EU legislator to supplement judicial deregulation of national barriers to trade with 'an ever-increasing body of universally applicable positive Community legislation on consumer protection'.[274]

76. EU consumer protection rules have traditionally mirrored the negative integration regime by focusing on creating informed consumers while also facilitating choice and ensuring private autonomy.[275] However, this approach, which shifts responsibility for developing the market from the regulator to private parties, has been criticised for ignoring the vulnerability of

[269] For the overlap between the mandatory requirements of consumer protection and protecting against unfair competition see S. Enchelmaier, *ibid*.
[270] R. Mańko, 'The Notion of 'Consumer' in EU Law', *Library Briefing*, Library of the European Parliament, 2013, p. 1. Available at: www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf. Last accessed 29 September 2019.
[271] J. Valant, *Consumer Protection in the EU*, European Parliamentary Research Service, 2015, p. 3. Available at www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf. Last accessed 29 September 2019.
[272] See ex. Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ C. 92, 25 April 1975.
[273] Commission consumer policy strategy, COM (2002) 0208 final, p. 6.
[274] H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, p. 1241.
[275] S. Weatherill, *EU Consumer Law and Policy*, second edition, Elgar European Law, 2013 at Chapters two and four. See also S. Weatherill, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *Common Market Law Review*, vol. 36, no. 1, 1999, pp. 51 – 85.

many consumers in practice.[276] This criticism is particularly prevalent today with respect to the weak EU regulation of health risks associated with certain lifestyles, such as sugar intake and alcohol consumption.[277] Still, while the Court often endorses this hands-off vision, a review of its jurisprudence also shows a willingness to validate genuine national consumer protection measures[278] and to interpret certain EU rules in a consumer-friendly manner.[279] This reflects the reality that certain EU legislative measures increasingly seek to protect the consumer, by moving beyond information provision to regulating the actual terms of the bargain,[280] and requiring the Member States to raise their regulatory standards.[281] At the same time, the 'internal market' threshold to rely on Article 114 TFEU applies equally in the field of consumer protection. As noted by Weatherill, it is far from obvious that certain consumer protection measures meet this standard.[282]

77. In this section, we first look at how the Court has relied on the Exhaustion Rule to enforce the integrative and regulatory effects of certain EU consumer protection rules, including horizontal measures that regulate food, advertising and marketing, and sector-specific rules for footwear, chocolate and cosmetics. Other sectors, such as the regulation of industrial, consumer and medicinal products, as well as the labelling of tobacco products, are considered under health and safety measures. We have not assessed the case-law arising under a suite of other consumer protection measures, including the Unfair Terms Directive,[283] EU legislation relating to

[276] A. McGee & S. Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation?', *Modern Law Review*, vol. 53, no. 5, 1990, pp. 578 – 596.
[277] For recent discussion, see A. Alemanno & A. Garde (eds.), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets*, Cambridge, Cambridge University Press, 2015.
[278] S. Weatherill, *EU Consumer Law and Policy*, *op. cit.,* pp. 54 – 61 and S. Weatherill, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *op. cit.*
[279] H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*
[280] Ex. Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (the Unfair Contract Terms Directive - UCTD), OJ L. 95, 21 April 1993, pp. 29 – 34; Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, OJ L. 171, 7 July 1999, pp. 12 – 16. See S. Weatherill, EU Consumer Law and Policy, *op. cit*., Chapter Five.
[281] H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*
[282] S. Weatherill, *EU Consumer Law and Policy*, *op. cit.,* p. 118.
[283] Directive 93/13/EEC, *op. cit*.

travel[284] and financial services[285] and other sectoral measures.[286] However, it seems that the same principles generally apply to their implementation and review.[287]

78. The regulatory intensity (or impact) of this 'inconsistent patchwork' of rules has traditionally been set at the lower end – that is, with a preference for minimum harmonisation[288] and national control.[289] Yet the Court has also frequently relied on the Exhaustion Rule both to oust national regulatory discretion over consumer protection matters and validate national rules complying with the EU standard. This dynamic is bound to continue, given the recent shift to total harmonisation in this field.[290]

3.1.1 Enforcing the Integrative Effect

79. As with other sectors, the Court will not hesitate to rely on the *Tedeschi* Rule to cast aside national measures that conflict with the provisions of exhaustive consumer measures. This approach is evident from the two areas we have focused on, those being EU regulation of food labelling, and the EU's general advertising and marketing rules. We also briefly look at the pre-emptive effect of the Product Liability Directive.[291]

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[284] Ex. Council Directive 90/314/EEC on package travel, package holidays and package tours, OJ L. 158, 23 June 1990, pp. 59 – 64 (the Package Travel Directive); Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L. 33, 3 February 2009, pp. 10 – 30, (the Timeshare Directive) and Regulation (EC) No. 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ L. 46, 17 February 2004, pp. 1 – 8.

[285] Ex. Chapter II of Directive 2008/48/EC of the European Parliament and of the Council on credit agreements, OJ L. 133, 22 May 2008, pp. 66 – 92, (the Consumer Credit Directive), Directive 2002/65/EC of the European Parliament and of the Council concerning the distance marketing of consumer financial service, OJ L. 271, 9 October 2002, pp. 16 – 24, (The Distance Selling of Financial Services Directive) and Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market, OJ L. 319, 5 December 2007, pp. 1 – 36.

[286] Ex. Regulation (EU) No. 1007/2011 of the European Parliament and of the Council on textile fibre names and related labelling and marking of the fibre composition of textile product, OJ L. 272, 18 October 2011, pp. 1 – 64.

[287] On the substance of these measures, see S. Weatherill, *EU Consumer Law and Policy*.

[288] Ex. Directive 90/314/EEC, *op. cit*., Directive 93/13/EEC *(*the Unfair Contract Terms Directive), *op. cit*., and Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, OJ L. 171, 7 July 1999, pp. 12 – 16.

[289] Ex. Failure to reach agreement at EU level on protecting consumers from over indebtedness, despite Commission efforts (see COM (2002) 443), means this problem continues be addressed at national level. The same can be said for the regulation of certain lifestyle risks, such as alcohol and sugar consumption.

[290] Ex. The Directives on, respectively, consumer credit, consumer rights and timeshare (*op. cit.*) replaced the minimum harmonisation of their predecessors with maximum harmonisation. See S. Weatherill, *EU Consumer Law and Policy*, *op. cit*., Chapter 4.

[291] Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L. 210, 7 August 1985, pp. 29 – 33 (the Product Liability Directive).

80. EU regulation of labelling requirements comes in the form of general and specific rules. For example, general food labelling measures cover foodstuffs in general, while sectoral directives apply to specific foods such as chocolate. The regulatory goal of EU labelling requirements, apparent since the Community's early legislative agenda, is to create informed consumers as the least trade restrictive means of protecting their interests.[292] At the same time, labelling requirements can also constitute a barrier to trade, as is the case for certain language rules or origin markings. The first Food Labelling Directive therefore aimed to both harmonise the differences in labelling requirements for food and protect and inform consumers.[293] To this end, it prohibited statements on labels that were materially misleading. It also exhaustively listed and regulated the particulars to be mentioned on every label, including the language to be used. All food products complying with the directive's labelling requirements enjoyed market access under Article 15 (1), subject to Article 15 (2), which allowed stricter national rules for the protection of health and the consumer, and to prevent fraud. The first Food Labelling Directive was replaced in 2000[294] and again in 2011 with the Consumer Information Regulation.[295]

81. This legislation has had a clear pre-emptive – and integrative – effect on national competences. In *Piageme I* and *II*, for example, the Court invalidated national language requirements for labels that exceeded the requirements of the first Food Labelling Directive.[296] A similar negative finding was made in *SARPP*, this time with respect to a French ban on use of the word 'sugar' on labels.[297] Having established that this prohibition did not comply with the harmonised standards, the Court noted that it could only be justified under the exceptions exhaustively listed in Article 15 (2). The Court then assessed the ban on this basis, finding that it had a legitimate objective (preventing unfair competition) but was 'manifestly disproportionate' since the objective could have been achieved 'by having recourse to the

[292] *Cassis de Dijon*, note 264, paragraph 13.
[293] Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L. 33, 8 February 1979, pp. 1 – 14.
[294] Directive 2000/13/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L. 109, 6 May 2000, pp. 29 – 42.
[295] Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, OJ L. 304, 22 November 2011, pp. 18 – 63.
[296] *Piageme I*, C-369/89, EU:C:1991:256 and *Piageme II,* C-85/94, EU:C:1995:312. See also *Geffroy*, C-366/98, EU:C:2000:430.
[297] *SARPP*, C- 241/89, EU:C:1990:459.

general rules against unfair competition or by prohibiting in the labelling of artificial sweeteners only statements whose object or effect is to disparage sugar'.[298] The Court also held that the prohibition of the French rules under the First Food Labelling Directive applied to both national products *and* imports, unlike national rules prohibited under Articles 34 and 36 TFEU, which could suffer from 'reverse discrimination'.[299] An Austrian ban on food labels that mentioned health-related information suffered the same fate in *Commission v Austria* (*Food Labelling)*[300] and *Sterbenz*.[301] In both cases, Austria sought to defend its measure as protecting public health and the consumer under Article 15 (2). Austria also pointed to its prior authorisation procedure, whereby health-related information on labels could be allowed, and defended it as a stricter national standard under Article 7 (1) of the (first) Misleading Advertising Directive.[302] The Court dismissed both arguments. It first stated that a food product labelled with non-misleading health-related information must enjoy market access, subject to national measures adopted under Article 15 (2). However, the latter provision triggered the Exhaustion Rule, since it 'carried out an exhaustive harmonisation of the grounds on which the application of national rules raising obstacles to trade in foodstuffs complying with the directive may be justified'. As a result, 'any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of Articles 28 EC and 30 EC.'[303] The Food Labelling Directive therefore constituted the sole norm of reference and the Misleading Advertising Directive did not apply.[304] The Court then assessed whether the Austrian measure was proportionate by reference to the directive, and confirmed that it was not. First, the aim of public health protection could have been achieved by less restrictive means, such as accurate labelling. Second, the measure did not protect the consumer, since it prevented the free movement of products with accurate and non-misleading labelling. The Court concluded that the Austrian measures were precluded by the directive and, contrary to the request of the Commission, did not mention the Treaty. Similar findings were made against additional

[298] *Ibid*., paragraph 21.
[299] *Ibid*., paragraph 16.
[300] *Commission v Austria (Food Labelling),* C-221/00*,* EU:C:2003:44.
[301] *Sterbenz v Haug,* Joined Cases C-421/00, C-426/00 and C-16/01, EU:C:2003:46.
[302] Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L. 250, 19 September 1984, pp. 17 – 20.
[303] *Commission v Austria (Food Labelling)*, note 300, paragraph 42.
[304] *Ibid*., paragraphs 43 – 44.

national labelling requirements in *Dega,*[305] *Ardnoldus Van der Laan* (which relied on the classic approach)[306] and *Douwe Egberts*.[307]

82. The field of advertising and marketing has also been subject to exhaustive EU legislation. This is unsurprising, given the central role of such activities in developing the internal market and ensuring consumer choice by facilitating the growth of new markets.[308] Still, consumers need protection from misleading, offensive, deceitful or aggressive messages, particularly when they are part of a vulnerable category, such as minors, or when certain products such as tobacco, medicines or alcohol are concerned. In the 1980s, the Court started assessing, and sometimes authorising, national regulation of such activities under Articles 34 *et seq*, notwithstanding cross-border restrictions.[309] The EU legislature responded with a number of directives based on Article 114 TFEU (and predecessors), including the general Misleading and Comparative Advertising Directives [310]and sector-specific measures, such as the Tobacco Advertising Directives and the Medicinal Products Code (considered in Section 2.1). This section focuses on the general directive, first adopted in 1984, before being replaced in 2006.

83. The Misleading and Comparative Advertising Directive prohibits misleading advertising under a minimum harmonisation regime.[311] As noted however, this scope for higher national measures is subject to more specific EU measures such as the Food Labelling Directive[312] and the Cosmetics Directive,[313] which impose exhaustive requirements on the Member States and prevent the exercise of Treaty-based discretion in these fields.[314] Moreover, the Court has restrictively interpreted what could constitute misleading advertising. For example, in *Procureur de la Republique v X*[315] it assessed whether the practice by a Belgian

[305] *Dega*, C-83/96, EU:C:1997:414.
[306] *Arnoldus Van der Laan,* C-383/97, EU:C:1999:64.
[307] *Douwe Egberts*, C-239/02, EU:C:2004:445.
[308] Ex. *GB-INNO,* Case 362/88, EU:C:1990:102, where the Court ruled that a measure preventing information from being provided to a consumer constituted a trade obstacle under Article 34 TFEU. See also *Oosthoeck,* Case 286/81, EU:C:1982:438 and *A-Punkt,* C-441/04, EU:C:2006:141.
[309] *Ibid*.
[310] Directive 84/450/EEC, *op. cit.* and Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising, OJ L. 376, 27 December 2006, pp. 21 – 27.
[311] Article 7 of Directive 84/450/EEC and Article 8 of Directive 2006/114/EC allow more stringent national consumer protection measures once consistent with the free movement of goods.
[312] Directive 79/112/EEC, *op. cit.*
[313] Council Directive 76/768/EEC on the approximation of national laws relating to cosmetic products, OJ L. 262, 27 September 1976, pp. 169 – 200 (the Cosmetics Directive).
[314] Ex. *Linhart & Biffl,* C-99/01, EU:C:2002:618, paragraphs 20 – 21. *Commission v Austria (Food Labelling)*, note 300, paragraphs 43 – 44.
[315] *Procureur de la République v X,* C-373/90, EU:C:1992:17.

trader of advertising imported Nissan cars as 'new' and cheaper was misleading under the 1984 directive. On the one hand, the cars had already been registered and possessed fewer accessories (and were therefore cheaper) than the models sold through the French distributor. On the other hand, registration was for importation purposes only and the cars had never been driven on the road. The Court relied on the latter to conclude that the imported cars should be considered as new. As to whether the Belgian advertisement was misleading, the Court held that this would only be the case if a 'significant number of consumers' would have been deterred from purchasing the vehicles had they known, first, that the car had already been registered and second, that the cheaper price was connected to the smaller number of accessories.[316]

84. The non-exhaustive legal regime governing misleading advertising contrasts with the EU's regulatory approach to 'comparative advertising',[317] which arises when the advertisement of one good focuses on identifying a competitor, or goods/services offered by a competitor. In particular, the 2006 Misleading and Comparative Advertising Directive generally authorises such advertising under an exhaustive regime, with Article 4 explicitly listing when it shall be permitted. This approach reflects the EU's view that comparative advertising is 'a legitimate means of informing consumers of their advantages', which should be interpreted broadly 'to cover all modes of comparative advertising'.[318] Indeed, as noted in *Lidl,* the conditions for comparative advertising 'must be interpreted in the sense most favourable to permitting advertisements which objectively compare the characteristics of goods or services'.[319]

85. The exhaustive nature of the legal regime governing comparative advertising prevents Member States from restricting the practice, although they can exclude certain goods, services or professional activities from its remit. Many cases arising under the directive have therefore sought clarification on what constitutes lawful comparative advertising, with the Court tending to favour the practice (and pre-empt national rules) once consumer benefits flowing from

[316] *Ibid.*, paragraphs 15 – 16. Having said this, the Court has also recognised the minimum nature of the EU standard and allowed stricter national protections to protect consumers from deceitful advertising practices. See ex. *Karner,* C-71/02, EU:C:2004:181, paragraph 34.
[317] Comparative advertising was incorporated into the first Misleading Advertising Directive in 1997 by Amending Directive 97/55/EC of the European Parliament and of the Council amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ L. 290, 23 October 1997, pp. 18 – 22, following the Court's finding in *GB-INNO,* note 308, that restrictions on comparative advertising violated Article 34 TFEU.
[318] Recital 8 of Directive 2006/14/EC, *op. cit*.
[319] *Lidl v Vierzon,* C-159/09, EU:C:2010:696, paragraph 21 and 68. See also *L'Oréal & Others,* note 239, paragraph 68 – 69.

increased competition are perceived as outweighing the risks of confusion.[320] In other cases, the Court has explored the meaning of 'misleading'[321] or established the dividing line between comparative and misleading advertising.[322] The latter was considered in *Pippig v Hartlauer*,[323] which concerned the lawfulness of an advertisement that compared the prices of the defendant's spectacles with those of the plaintiff. Pippig claimed that the comparison was misleading and violated the directive. In particular, it argued that the directive instituted minimum harmonisation with respect to the *misleading* element of the advertisement, which allowed Member States to adopt stricter standards. Austria agreed that it should be able to adopt stricter national rules in such circumstances. Hartlauer responded that all elements of the comparison had been harmonised under a permissive regime. The Court agreed and, implicitly activating the *Tedeschi* Rule, dismissed the possibility for Member States to go beyond the terms of the directive as far as comparative advertising was concerned. In particular, it held that 'Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be lawful'. As a result, 'the lawfulness of comparative advertising throughout the Community is to be assessed solely in the light of the criteria laid down by the Community legislature. Therefore, stricter national provisions on protection against misleading advertising cannot be applied to comparative advertising as regards the form and content of the comparison'.[324] Having resolved this preliminary point, the Court assessed the extent to which price comparisons could be prohibited under the directive, and found that the practice was generally allowed, subject to some overarching requirements.

86. A second relevant EU measure relating to advertising and marketing is the Unfair Commercial Practices Directive (UCPD).[325] Adopted in 2005, this measure is based on the familiar dual aim of integrating the internal market and ensuring a high level of consumer protection. Its scope, although limited to business-to-consumer commercial practices, has been broadly interpreted by the Court[326] but must give way to more sector-specific directives in the event of conflict, and is without prejudice to EU or national health and safety rules. As regards

[320] Ex. *Toshiba*, C-112/99, EU:C:2001:566; *Siemens,* C-59/05*,* EU:C:2006:147; *De Landtsheer Emmanuel,* C-381/05 EU:C:2007:230 and *Hutchison 3G,* C-533/06, EU:C:2008:339.
[321] Ex. *Lidl v Vierzon,* note 319 and *Procureur de la République v X*, note 315.
[322] Ex. *Posteshop,* C-52/13, EU:C:2014:150.
[323] *Pippig,* C-44/01, EU:C:2003:205.
[324] *Ibid*., paragraph 44. See also *Lidl v Vierzon,* note 319, paragraph 22.
[325] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ L. 149, 11 June 2005, pp. 22 – 39, (UCPD).
[326] Ex. *Mediaprint,* C-540/08, EU:C:2010:660, which found that prohibitions on practices that serve aims in addition to consumer protection, such as safeguarding press pluralism, fell within the scope of the UCPD.

its pre-emptive effect, the UCPD not only exhaustively regulates the field. It also completely harmonises the definition of what constitutes an unfair commercial practice, which is prohibited under Article 5 (1). Moreover, Articles 5 (2) – (5) lay down detailed rules as to what exactly would constitute an 'unfair' practice. This includes practices that are not exercised with professional diligence, that materially distort economic behaviour and that are misleading or aggressive. These two latter terms are defined in more detail in Articles 6 – 9 of the directive. Article 5 (5) also refers to Annex 1, which sets out a blacklist of commercial practices that will automatically considered as unfair. The benchmark used by the directive to identify what is considered 'unfair' is the 'average consumer', although Article 5 (3) grants leeway to Member States to offer a higher level of protection for more vulnerable groups of consumers, such as children. Member States have, as a result, very limited regulatory room for manoeuvre as regards matters falling within the scope of the UCPD, subject to exceptions discussed in section 3.1.3 below. This is confirmed in Article 4, which, in line with the Commission's current policy preference for 'complete harmonisation', states: 'Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.' This market access clause was disputed by Denmark and Sweden, which voted against the proposal. However, the drive for legal certainty via exhaustive regulation carried the day,[327] meaning that Member States can no longer adopt more restrictive rules, even where they aim to provide greater consumer protection. In *Plus Warenhandelsgesellschaft*, for example, the Court found that Member States could not institute a blanket ban on commercial practices that made consumer participation in a prize competition or lottery conditional on the purchase of goods or the use of services.[328] A similar finding was made in *VTB-VAB* in relation to a general national prohibition on combined offers made by a vendor to a consumer.[329] This absence of ambiguity as regards the directive's exhaustive character, and the fact that it institutes total harmonisation, means that most disputes arising thereunder concern either questions of scope or issues of pure interpretation. In the latter, parties accept the UCPD as the sole normative basis, but dispute the meaning of one of its provisions.[330]

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[327] S. Weatherill, *EU Consumer Law and Policy*, *op. cit.,* p. 242.

[328] *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12. See in particular paragraph 41, where the Court states 'Directive 2005/29 fully harmonises at the Community level the rules relating to unfair business-to-consumer commercial practices. Accordingly, as Article 4 thereof expressly provides, Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection'. See also *Wamo*, C-288/10, EU:C:2011:443, paragraph 33; *Commission v Belgium*, C-421/12, EU:C:2014:2064 and *Europamur*, C-295/16, EU:C:2017:782, paragraph 39.

[329] *VTB-VAB & Galatea,* Joined Cases C-261/07 & C-299/07, EU:C:2009:244, paragraph 52.

[330] As discussed in Part III (Chapter Two), the dividing line between interpretation of legislative provisions and legislation-based discretion is not always obvious.

It is in this context that private actors often rely on the directive as a shield against more protective national rules.[331]

87. Another EU act highlighted as having a strong pre-emptive effect is the Product Liability Directive.[332] The main thrust of this directive is to harmonise national laws with respect to defective products by instituting a default regime of strict liability. Although the Product Liability Directive was adopted under Article 114 TFEU with the aim of progressing market integration, the cross-border connection of many cases arising thereunder is often limited or indirect. Still, it is worth mentioning that the Court clarified the directive's status as instituting a complete system of harmonisation, which prevents Member States from maintaining a general system of product liability in parallel.[333] The Court reached this conclusion, notwithstanding Article 13, which states that the directive 'shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability existing at the moment when this Directive is notified'. However, from the Court's perspective, Article 13 referred to systems of liability based on grounds not covered by the Product Liability Directive, such as fault.[334]

88. Labelling and other requirements have also been laid down in sector-specific directives, which generally take precedence over horizontal EU rules.[335] One example is the Cosmetics Directive (now recast under the Cosmetics Product Regulation)[336] which imposed obligatory labelling requirements for cosmetic products under Article 6 (1), accompanied by market access and exclusivity clauses. In line with its interpretation of the general Food Labelling Directives, the Court relied on the Exhaustion Rule to establish when national implementing measures went beyond the Cosmetics Directive's requirements, as in *Parfümerie-Fabriek*,[337] and *Commission v Italy (Cosmetics)*.[338] However, the directive also granted Member States a degree of

[331] *Ibid*. See also *Telekommunikacja Polska*, C-522/08, EU:C:2010:135 and *Europamur*, note 328. For discussion, see J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', *Common Market Law Review*, 2015, vol. 52, no. 3, pp. 721 – 752.
[332] Directive 85/374/EEC, *op. cit.*
[333] *María Victoria González Sánchez*, C-183/00, EU:C:2002:255; *Commission v France (Product Safety)*, C-52/00, EU:C:2002:252 and *Commission v Greece (Product Safety)*, C-154/00, EU:C:2002:254.
[334] See *Centre hospitalier universitaire de Besançon*, C-495/10, EU:C:2011:869.
[335] Ex. *Linhart & Biffl,* note 314, paragraphs 20 – 21. This is often explicitly specified. Ex. Article 8 (2) of Directive 2006/114/EC, *op. cit*., and Article 3 (2) of Directive 2011/83/EU of the European Parliament and of the Council on Consumer Rights, OJ L. 304, 22 November 2011, pp. 64 – 88.
[336] Regulation (EC) No. 1223/2009 of the European Parliament and of the Council on cosmetic products, OJ L. 342, 22 December 2009, pp. 59 – 209.
[337] *Parfümerie-Fabrik*, C-150/88, EU:C:1989:594.
[338] *Commission v Italy (Cosmetics)*, C-365/00, EU:C:2002:152.

discretion under Article 6 (2) to protect consumers against misleading statements,[339] and under Articles 7 (2) and 7 (3) to impose language and information disclosure requirements. We discussed the former in detail in Part I (Chapter Two), as the Court relied on it to strike down national attempts to determine what was 'necessary' to prevent 'misleading the consumer'. In particular, the Court confirmed that this restrictive interpretation of Article 6 (2) took precedence over the minimum rules in the Misleading Advertising Directive, and invalidated German[340] and Austrian[341] measures on this basis.

89. National measures based on Article 7 (3) of the Cosmetics Directive often met a similar fate. As noted, this provision authorised Member States to require 'for purposes of prompt and appropriate medical treatment … that adequate and sufficient information regarding substances contained in cosmetic products is made available to the competent authority'. However, as confirmed in infringement proceedings against France and Greece, this possibility was only allowed if the information related to the *substance* of the cosmetics product for the purposes of *medical treatment*. [342] Anything outside these stipulations would be sanctioned, as would additional obligations to retain a permanent file for inspection. The Court summed up this position in *Commission v France (Cosmetics)*, where it stated that 'the Directive has provided exhaustively for the harmonization of national rules on the packaging and labelling of cosmetic products so that a Member State cannot make the movement of cosmetic products subject to conditions other than those laid down by the Directive.'[343]

90. The Court has been equally intolerant of Member States attempts to impose additional national labelling requirements on footwear and chocolate in the presence of relevant exhaustive EU rules. In *Commission v Italy (Pure Chocolate)*, for example, the Court, having established that the (second) Chocolate Directive[344] instituted 'full harmonisation of sales names for cocoa and chocolate products', struck down an Italian rule allowing for the adjective 'pure' to be added to the sales name of chocolate without vegetable fats other than butter.[345] In *UNIC*, a similar negative finding was made with respect to an Italian measure prohibiting the

[339] Or Article 6 (3) after an amendment in 1988.
[340] Ex. *Clinique,* C-315/92, EU:C:1993:823 and *Estée Lauder*, C-220/98, EU:C:2000:8.
[341] *Linhart & Biffl,* note 314 and *Unilever,* C-77/97, EU:C:1999:30.
[342] *Commission v Greece (Cosmetics),* C-29/90, EU:C:1992:131 and *Commission v France (Cosmetics)*, C-246/91, EU:C:1993:174.
[343] *Commission v Franc*e *(Cosmetics)*, paragraph 7.
[344] Directive 2000/36/EC of the European Parliament and of the Council relating to cocoa and chocolate products intended for human consumption, OJ. L 197, 3 August 2000, p. 19 – 25.
[345] *Commission v Italy (Pure Chocolate)*, C-47/09, EU:C:2010:714.

marketing of leather components of shoes in free circulation that did not indicate their country of origin.[346] Following its finding that the Footwear Labelling Directive[347] had brought about exhaustive harmonisation at EU level, the Court assessed the Italian rule by exclusive reference to that directive, and found it to be unlawful.

3.1.2 Enforcing the Regulatory Effect

91. As noted, national rules will be saved, without review by reference to Articles 34 – 36 TFEU, if they correctly implement the harmonised requirements. In such cases, the Court will presume that a national rule complying with secondary legislation automatically complies with the Treaty. The Court's conclusion in *Bellamy*[348] was based on this logic. Here, the national court queried the legality of a national rule directly transposing Article 2(1)(a)(iii) of the first Food Labelling Directive.[349] In line with that provision, Belgium had prohibited branded food products from implying that they possessed particular qualities when all similar products also had such qualities. This prevented Ms. Bellamy from presenting milk as containing no additives or preservatives. She claimed in response that the Belgian rule violated Article 34 TFEU. The Commission argued not, submitting that, since the national rule was based on the Food Labelling Directive, it could not be so precluded.[350] The Court agreed, stating that 'A national legislative provision which correctly transposes a Community rule harmonising the national rules on consumer protection against misleading practices by means of specifically-defined measures does not constitute an obstacle to free movement contrary to Article 28 EC'.[351] Similar findings can be observed in *Teekanne,*[352] *Lidl Italia,*[353] *Goerres*[354] and *Müller,*[355] where the Court enforced the regulatory effect of the first and second Food Labelling Directives and validated, where appropriate, the impugned national rule.

[346] *UNIC*, C-95/14, EU:C:2015:492.
[347] Directive 94/11/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer, OJ L. 100, 19 April 1994, pp. 37 – 41.
[348] *Bellamy*, C-123/00, EU:C:2001:214.
[349] Directive 79/112/EEC, *op. cit*.
[350] *Bellamy*, paragraph 17.
[351] *Ibid*., paragraph 21.
[352] *Teekanne*, C-195/14, EU:C:2015:361.
[353] *Lidl Italia*, C-315/05, EU:C:2006:736.
[354] *Goerres,* C-385/96, EU:C:1998:356.
[355] *Müller*, C-229/01, EU:C:2003:153. See also *Breitsamer & Ulrich*, C-113/15, EU:C:2016:718.

92. The Court has also adopted a protective interpretation of other food-related EU legislation by enforcing their regulatory effects, where appropriate. For example, in *Berger*,[356] the Court validated a German warning that game meat products were 'unfit for human consumption' and unsafe within the meaning of the 2002 Foodcode, [357] even though the products did not pose any risk to consumer health. The plaintiff had challenged these statements as being disproportionate and referred to the considerable loss it suffered as a result. However, the German authority responded that it was authorised to issue such a public alert under the Foodcode. The Court agreed and confirmed that the public statements were legal under Articles 10, 14 and 17(2) even though the food in question did not harm public health.[358] In reaching this conclusion, the Court made no mention of the plaintiff's right to free movement but referred exclusively to the protection of consumer interests, laid down in Article 5 (1) as an objective of food law.[359] Since the German measure was simply implementing an EU rule, it benefited from the presumption of constitutionality enjoyed by the latter and was not subjected to a further review. This protective approach to food regulation can also be seen in the interpretation of Regulation 1924/2006 on nutrition and health claims[360] where the Court dismissed arguments based on Articles 11, 15 and 16 of the Charter seeking to undermine high standards laid down thereunder, as implemented by Member States.[361]

93. Similarly, the Court has frequently interpreted EU measures such as the UCPD and Cosmetics Directive, hitherto discussed in relation to their pre-emptive and integrative effects, in a manner that protects the consumer. As regards the UCPD, this approach can be seen in *Loterie-Nationale*, where the Court broadly defined what could constitute a prohibited 'pyramid promotional scheme'.[362] Similarly, in *Nemzeti Fogyasztóvédelmi Hatóság*, the Court held that communication to a single consumer of erroneous information must be classified as a 'misleading commercial practice', without it being necessary to further determine whether such a practice contravened the requirements of professional diligence.[363] *Trento Sviluppo* classified a commercial practice as 'misleading' on the sole ground that it contained false information or

[356] *Berger,* C-636/11, EU:C:2013:227.
[357] Regulation (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L. 31, 1 February 2002, pp. 1 – 24.
[358] *Roby Profumi,* C-257/06, EU:C:2008:35, paragraph 36.
[359] *Ibid*., paragraph 35.
[360] Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods, OJ L. 404, 30 December 2006, pp. 9 – 25.
[361] Ex. *Deutsches Weintor*, C-544/10, EU:C:2012:526 and *Neptune Distribution*, C-157/14, EU:C:2015:823.
[362] *Loterie Nationale*, C-667/15, EU:C:2016:958.
[363] *Nemzeti Fogyasztóvédelmi Hatóság*, C-388/13, EU:C:2015:225.

was likely to deceive, regardless of whether the practice was likely to cause the consumer to take a transactional decision that he would not have taken otherwise.[364]

94. By the same token, the Cosmetics Directive has provided a basis for the Court to promote consumer protection. In *Roby Profumi*,[365] for example, it found that an Italian measure, which required information on cosmetic products to be made available to the competent authorities, was not precluded. The defendant argued that this obligation, which covered the name and address of the manufacturer and the substances contained in the product, hindered the free movement of goods. However, the Court confirmed that the measure complied with the Article 7 (3) of the Cosmetics Directive, as it ensured the availability of necessary information in the event of medical difficulties and was proportionate to the objective of protecting human health. In *Schwarzkopf*, the Court found that Germany had correctly relied upon the Cosmetics Directive to restrict a commercial practice adopted to facilitate the free movement of cosmetics.[366] Specifically, the defendant (Schwarzkopf), wishing to market its cosmetics in nine different languages, had provided information about the product on an accompanying leaflet– and not on its package and container as required under Article 6 (1) of the directive. It defended such action by relying on Article 6 (1)(d), which authorised a derogation from certain harmonised labelling requirements in the event of 'practical impossibility'. The Court, however, held that traders could not invoke 'impossibility' purely for commercial convenience. Having reached this conclusion, it then insisted that the directive's information disclosure and language requirements, while constituting an obstacle to trade, were justified to protect public health. Germany could therefore implement the directive's labelling requirement to challenge Schwarzkopf, without being subject to a further Treaty review. While this could not make inclusion of multiple languages excessively difficult, that it prevented providing information in nine languages was not disproportionate. This protective approach to the regulation of cosmetics is maintained under the Cosmetic Directive's replacement – the 2009 Cosmetics Regulation.[367] For example, the Court found in *Fédération des entreprises de la beauté* and *European Confederation for Cosmetics Ingredients* that Member States could, respectively, establish the disciplines and level of qualification of persons required to determine the safety

[364] *Trento Sviluppo & Others,* C-281/12, EU:C:2013:859.
[365] *Roby Profumi,* note 358.
[366] *Schwarzkopf*, C-169/99, EU:C:2001:439.
[367] Regulation (EC) No. 1223/2009, *op. cit.*

of cosmetics products, and prohibit cosmetics containing ingredients tested on animals outside the EU.[368]

95. Turning back to *Schwarzkopf*, this case provides an example of the dual analysis approach to the Exhaustion Rule, where the Court assessed whether the directive complied with the free movement provisions to confirm the lawfulness of the impugned national measure. A similar approach can be seen in *Diageo*,[369] although here, since the relevant legislative provision was found to contravene the free movement of goods, the national measures that had correctly implemented the directive could no longer persist. In other words, the presumption of constitutionality generally enjoyed by secondary measures was rebutted, with consequences for any national measure adopted thereunder. The case considered whether the Pre-packaged Liquids Directive[370] allowed the alcoholic product, 'Baileys Minis', to be marketed in Germany in pre-packages with a nominal value of 0.071 litres, on the basis that the product had been lawfully marketed in Ireland and in the UK. According to Article 5 (1) of the directive, products satisfying the legislative requirements as regards nominal values could enjoy market access, while Article 5 (3)(b) prohibited such market access for pre-packages containing certain liquids with different nominal values. However, the directive also provided for an exception from this latter prohibition with respect to the volume of 0.071 litres, although the scope of this exception was unclear under different linguistic versions. The Court interpreted the derogation as authorising free movement only for those products of 0.071 litres that were originally marketed in Ireland or the UK. However, the Court then found that this provision could hinder intra-Community trade by making trade in such products more difficult or onerous. Since this hindrance could not be justified, the Court concluded that the second paragraph of Article 5 (3)(b), read in conjunction with Article 5 (3)(d), was invalid.

96. A final point to mention is that certain EU measures can impose a strong regulatory effect, even when they institute minimum harmonisation, and even when this goes beyond the Member States' desired degree of consumer protection. Such an effect could be illustrated with Court's protective and restrictive interpretation of both the Unfair Contract Terms

[368] See, respectively, *Fédération des entreprises de la beauté*, C-13/17, EU:C:2018:246 and *European Confederation for Cosmetics Ingredients*, C-592/14, EU:C:2016:703.
[369] *Diageo Deutschland,* C-457/05, EU:C:2007:576.
[370] Council Directive 75/106/EEC on the approximation of the laws of the Member States relating to the making-up by volume of certain prepackaged liquid, OJ L. 42, 15 February 1975, pp. 1 – 13.

Directive (UCTD)[371] and the first Distance Selling Directive.[372] While the directives allow more stringent national rules to protect the consumer, respectively, from unfair contract terms and when contracting with remote sellers, the Court has relied exclusively on these directives to enforce a protective interpretation insofar as higher national standards have *not* been adopted. In other words, exhaustive EU legislation, and the regulatory standards imposed thereunder, pre-empt Member States from adopting less protective national rules, (even in the absence of any obvious cross-border element).

97. As regards the UCTD, and as discussed in Part III, the Court has adopted an increasingly pro-consumer interpretation of what could constitute an unfair contract term, while at the same time restricting the ability of national courts to waver from this vision.[373] A similar stance was taken with respect to the Distance Selling Directive. For example, in *Content Services*,[374] the Court held that provision of information to the consumer via a hyperlink was not sufficient to meet the directive's information disclosure requirements.[375] In *Messner,*[376] the Member State was prohibited from providing, as a general rule, that consumers who exercised their right of withdrawal would have to compensate the seller for use of that good (although room was left for the provision of fair compensation to sellers under civil law principles, once the right of withdrawal was not adversely effected). Finally, in *Heinrich Heine*[377] the Court confirmed that the directive precluded national rules that allowed sellers under distance contracts to charge the consumer with the cost of delivery in the event of consumer withdrawal from the contract. The Court has taken a similar protective stance with respect to the consumer when interpreting certain provisions of the Doorstep Selling Directive[378] and the Package Travel Directive,[379] both of which also institute minimum harmonisation. For example, in *Leitner*, it interpreted the potentially broad term 'damages', as referred to in Article 5 (2) of the latter directive, as

[371] Council Directive 93/13/EEC, *op. cit.*
[372] Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, OJ L. 144, 4 June 1997, pp. 19 – 27.
[373] *Pénzügy*, C-137/08, EU:C:2010:659 and *Aziz*, C-415/155, EU:C:2013:164. For discussion see H.-W. Micklitz and N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *Common Market Law Review*, vol. 51, no. 3, 2014, pp. 771 – 808.
[374] *Content Services,* C-49/11, EU:C:2012:419.
[375] Although in *Majdoub*, C-322/14, EU:C:2015:334, the Court confirmed that consumer acceptance of the terms and conditions of a distance electronic sale via 'click wrapping', where the agreement opened in a new window and could be printed and saved, constituted a 'durable medium' of information provision and was not precluded.
[376] *Messner*, C-489/07, EU:C:2009:502.
[377] *Heinrich Heine*, C-511/08, EU:C:2010:189.
[378] Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ L. 372, 31 December 1985, pp. 31 – 33. See *Heininger*, C-481/99, EU:C:2001:684 and *Schulte*, C-350/03, EU:C:2005:637.
[379]Directive 90/314/EEC, *op. cit*.

extending to 'compensation for non-material damage arising from the loss of enjoyment of the holiday'.[380] The Distance and Doorstep Selling Directives have now been repealed by the 2011 Consumer Rights Directive,[381] which codifies the Court judgements in *Messner* and *Heinrich Heine*, and which has replaced their minimum harmonisation status with one of exhaustion. As a result, Member States can no longer adopt more stringent national measures, unless in accordance with the EU measure.[382]

3.1.3 The Conditional Effect

98. As with other sectors, if an EU consumer protection measure does not harmonise the field, or if the national matter falls outside its scope, the Treaty provisions will continue to apply as norms of reference to assess more stringent national rules.

99. Many EU consumer protection measures fall into the first category by instituting minimum rules.[383] Two examples were the first Distance Selling Directive,[384] and the first Doorstep Selling Directive,[385] although, as just mentioned, both have now been replaced with an exhaustive framework under the Consumer Rights Directive.[386] The former originally set minimum rules to protect the consumer in contracts with sellers who are physically remote. These included mandatory information disclosure requirements and a seven-day 'cooling off period' for consumers to withdraw from the contract. Article 14 laid down the scope for national discretion, stating: 'Member States may introduce or maintain, in the area covered by this directive, more stringent provisions compatible with the [EC] Treaty, to ensure a higher level of consumer protection.' By citing the Treaty as the norm of reference and providing general national discretion to adopt stricter measures, Article 14 indicated that the regulatory scope of the directive was not exhaustive and that the degree of harmonisation was minimum. This was first confirmed in *Doc Morris*, which considered the lawfulness of a German ban on importing

[380] *Leitner*, C-168/00, EU:C:2002:163 paragraphs 22 – 24. See also *Club Tour*, C-400/00, EU:C:2002:272.
[381] Directive 2011/83/EU, *op. cit*. Under Article 14, the scope for sellers to impose costs on consumers who exercise their withdrawal rights has been limited. See S. Weatherill, *EU Consumer Law and Policy*, *op. cit*., p 135.
[382] However, this has not prevented the Court from interpreting such measures in a consumer-friendly manner. See S. Weatherill, *The Internal Market as a Legal Concept*, Oxford University Press, 2017, pp. 160 – 162; H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, and H-W. Micklitz and N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*.
[383] *Supra*, note 288.
[384] Directive 97/7/EC, *op. cit.*
[385] Directive 85/577/EEC, *op. cit.*
[386] Directive 2011/83/EU, *op. cit*.

authorised medicinal products by mail order, on grounds that they could only be sold in pharmacies. In particular, the Court observed that national measures based thereunder had to have 'due regard for the Treaty, as is expressly stated in that provision.'[387] As a result, Article 14 'does not obviate the need to ascertain whether the national prohibition at issue in the main proceedings is compatible with Articles 28 EC to 30 EC'.[388] The Court then carried out a Treaty review of the German measure, which it found to be precluded. A similar stance was taken in *Gybrechts*,[389] which concerned the legality of a Belgian rule prohibiting a supplier from requiring payment of a good before expiry of the withdrawal period. Having noted that the rule came within the scope of the directive, the Court stated the latter was not exhaustive but expressly allowed more stringent national measures under Article 14 (1), once compliant with the Treaty.[390] Following a review of the national measure by reference to the Treaty's provisions on the free movement of goods, the Court concluded that it was not precluded by Article 35 TFEU, even if suppliers must be allowed to request the consumer's credit card details during the withdrawal time period. The Court also authorised stricter national rules adopted under the Doorstep Selling Directive on this basis. In particular, Article 8 of the directive allowed Member States to adopt more favourable consumer protection measures to protect the consumer. This led the Court to conclude in *Buet* that a French ban on the doorstep sales of certain educational material, while going beyond the directive, did not fall foul of Article 34 TFEU, given the need to protect consumers.[391] An Austrian ban on the doorstep sales of jewellery was confirmed on the same grounds.[392]

100. As with other sectors, matters falling outside the scope of exhaustive EU consumer protection rules will also be subject to a similar Treaty-based assessment, and the Exhaustion Rule will not apply. The Court's assessment in *SARPP* is emblematic of its approach to such questions in this field.[393] As noted earlier, the Court assessed – and excluded – a French ban on use of the term 'sugar' on labels for food by exclusive reference to the first Food Labelling Directive. However, it also found that the provisions of the ban relating to advertisements did not come within the scope of the directive. As a result, the latter were subject to a separate

[387] *Doc Morris*, note 139.
[388] *Ibid*., paragraph 65.
[389] *Gysbrechts,* C-205/07, EU:C:2008:730. See also *Doc Morris*, note 139.
[390] *Ibid*., paragraph 34.
[391] *Buet,* Case 382/87, EU:C:1989:198.
[392] *A-Punkt*, note 308.
[393] *SARPP*, note 297.

assessment by reference to Articles 34 and 36 TFEU.[394]A further example of this conditional effect can be seen in the Chocolate Directive saga, which preceded the judgment in *Commission v Italy (Pure Chocolate)*, discussed above. The first Chocolate Directive,[395] adopted in 1973, defined chocolate as not containing vegetable fats and allowed Member States to exclude vegetable fats from national recipes. However, the directive also explicitly allowed Ireland, Denmark and the UK to add such vegetable fats to chocolate, as was their tradition. The question was whether such products could move freely throughout the EU and be marketed as 'chocolate' in countries that prohibited vegetable fats from national recipes. Italy and Spain argued not, and banned the sale of 'vegetable fat chocolate' under the name 'chocolate'. Commission infringement proceedings ensued against both Member States,[396] which tried, in their defence to rely on the Exhaustion Rule to justify their national bans. In particular, Italy claimed that Article 34 TFEU did not apply because the directive had exhaustively harmonised both the definition and marketing of chocolate, and that the system of free movement under the name 'chocolate' was reserved for cocoa and chocolate products without vegetable fats.'[397] Member States that prohibited the use of vegetable fats other than cocoa butter could therefore prohibit the marketing of such products as 'chocolate'. Siding with the Commission, the Court dismissed this argument. It first held that the matter had not been 'regulated definitively' by the Chocolate Directive.[398] In particular, Article 14 (2) gave Member States full discretion to authorise or prohibit the addition of vegetable fats other than cocoa butter. As a result, the directive 'did not seek to establish a fully harmonised system as regards the use of those other vegetable fats under which common rules completely replace existing national rules in the field'.[399] Since the matter fell outside the scope of the directive, the Italian prohibition was examined and ultimately prohibited under Articles 34 and 36 TFEU. This meant that chocolate that had been manufactured under national rules specifically authorised by the Chocolate Directive could enjoy market access, even if this resulted in reverse discrimination. The first Chocolate Directive has since been replaced by the second Chocolate Directive, which requires Member States to recognise that chocolate containing up to 5% of vegetable fat other than cocoa butter can be called 'chocolate'.

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[394] *Ibid*., paragraph 15. See also *Douwe Egberts*, note 307.
[395] Council Directive 73/241/EEC on the approximation of the laws of the Member States relating to cocoa and chocolate products intended for human consumption, OJ L. 228, 16 August 1973, pp. 23 – 35.
[396] *Commission v Italy (Chocolate),* C-14/00, EU:C:2003:22 and *Commission v Spain (Chocolate),* C-12/00, EU:C:2003:21.
[397] *Commission v Italy (Chocolate), ibid.,* paragraph 46.
[398] *Ibid*., paragraph 49.
[399] *Ibid*., paragraph 58.

101. Similarly, in *Ker-Optika*, the Court considered whether Member States could, in the presence of the Electronic Commerce Directive[400] restrict the sale of contact lenses to shops specialising in the sale of medical devices, thus preventing Internet sales. Taking a nuanced approach to the question, the Court concluded that the selling of contact lenses via the Internet came within the scope of the directive, but that the rules relating to the conditions of sale did not. As a result, national rules that regulated the latter were assessed – and invalidated – by reference to Articles 34 – 36 TFEU.[401] A further interesting case is *Ruwet*.[402] Here, Belgium required cider bottles to comply with EU standards on nominal values for pre-packaged liquids laid down in the Annex to the Pre-Packaged Liquids Directive,[403] even though these standards were only obligatory for wine, spirits and liqueur. In contravention of the Belgian rules, Stassen sold 0.33l bottles of cider intended for consumers, which was followed by a request from Ruwet to cease such marketing. In reviewing the Belgian measure, the Court noted that the directive was one of 'partial harmonisation', where Member States could, for certain liquids such as cider, accept nominal values that differed from those indicated in the Annex. The fact that Belgium had made a Community range of values mandatory for the latter liquids could not justify depriving prepackages with values authorised in other Member States from the right to free movement under Article 34 TFEU. The Belgian rules were therefore found to constitute an unlawful trade barrier. To find otherwise would be 'tantamount to authorising a Member State to partition their markets in regard to products not covered by the Community rules, contrary to the objective of free movement', as it would apply a 'ban on the marketing of prepackages that are not the subject of harmonisation'.[404]

102. Finally, with respect to the UCPD, parties wishing to avoid its pre-emptive effect must show that the matter falls outside its scope, or within an excepted field that, although within the scope of the directive, is not subject to the market access clause. An example of the former is *RLvS*, which found that the UCPD could not be relied upon against newspaper publishers.[405] As a result, Member States could require such publishers to identify any publication in their

[400] Directive 2000/31/EC, *op. cit*. was adopted to establish the free movement of the information society and ensure consumer confidence and legal certainty. Much of the resulting case-law concerns the free movement of services and establishment as well as procedural issues such establishing jurisdiction and service provider liability.
[401] *Ker-Optika*, C-108/09, EU:C:2010:725.
[402] *Ruwet,* C-3/99, EU:C:2000:560.
[403] Directive 75/106/EEC, *op. cit.*
[404] *Ruwet,* note 402, paragraph 47.
[405] Ex. *RLvS*, C-391/12, EU:C:2013:669.

periodicals for which they received remuneration by use of the term 'advertisement', unless evident that the publication was indeed an advertisement. As regards the latter, such excepted fields are listed in the directive and include commercial practices relating to financial services and immovable property. The Court confirmed in *Citroën Belux* that such matters could be subjected to more stringent national rules, once compliant with the Treaty.[406]

[406] *Citroën Belux*, C-265/12, EU:C:2013:498. Specifically, the Court found that a Belgian prohibition on combined offers to consumers, where at least one of the components was a financial service, was authorised by both the UCPD and under Article 56 TFEU. See also *Vanderborght*, note 142.

3.2 Protecting the Environment

103. EU Environmental legislation has a vast reach and often overlaps with other regulatory goals, such as the regulation of dangerous substances (considered as a health and safety measure in section 2.1) and animal protection measures (assessed under the CAP). This cross- cutting nature is reflected in various legal bases laid down in the Treaty. The EU's main competence to adopt measures to protect the environment is under Environment Title XX (Articles 191 – 193 TFEU). The objectives, which are laid down in Article 191 TFEU, include protecting human health and the quality of the environment, prudent use of natural resources and contributing towards resolving global environmental problems. Article 191(2) TFEU specifies that EU environmental measures must also pursue a 'high level of protection' and 'shall be based on' the precautionary principle, the prevention principle (preventive action should be taken), the source principle (rectifying environmental damage at source) and the polluter pays principle, while Article 191 (4) TFEU requires international co-operation. As regards the decision-making process, Article 192 TFEU provides for EU environmental rules to be adopted by the ordinary legislative procedure and can include harmonisation. Environmental protection goals are reinforced by Article 114 (3) TFEU and under the mainstreaming provisions under Articles 7 and 11 TFEU. References to protecting the environment also appear with respect to the EU's external policy under Article 21 TEU, its energy policy under Article 194 (2) TFEU and in relation to CAP and animal welfare policy under Article 13 TFEU.

104. These legal bases confirm that environmental protection and sustainable development enjoy a 'prominent place' as EU objectives, as explicitly mentioned in the Preamble to the TEU and under Article 3 TEU.[407] Yet such goals are also subject to limitations inherent to the internal market, which seeks to balance regulatory goals with market integration. First, as with consumer protection, the EU's environmental policy is scattered throughout various sectoral regimes that are subject to national derogations, variances in national implementing rules and international commitments. Second, while environmental protection forms part of different policies, it is also subject to them and must be balanced with potentially conflicting aims – such as free movement, pursuit of a common commercial policy, development or increasing agricultural productivity and efficiency. This is particularly prevalent in relation to environmental standards, which, having a more substantive connection to the internal market,

[407] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, Fourth Edition, Groningen, Europa Law Publishing, 2012, p. 11.

tend to rely on Article 114 TFEU to adopt what are often – but not always - exhaustive rules.[408] At the same time, the EU legislature has wide scope to rebalance the potential 'market integration' bias of Article 114 TFEU in favour of the environment. As noted, Article 192 TFEU allows harmonising measures specifically to protect the environment, and thus outside the framework of Article 114 TFEU, which, in terms of competence, brings this policy closer to the CAP than consumer and health protection. Moreover, as discussed in Part II, Member States can maintain or introduce more stringent protective measures under Article 193 TFEU once compatible with the Treaties and notified to the Commission. This reflects the reality that many (but not all) EU environmental measures adopted under Article 192 TFEU institute minimum harmonisation - particularly those with limited impact on the internal market, such as water and air quality, and habitat protection.

105. As with other sectors, the Court's approach to review is influenced by whether the national environmental measure directly implements an exhaustive EU standard, or whether it is based on legislative and/or Treaty-based authority to deviate. In the latter scenario, the Court must assess whether such authority was exercised in a proportionate manner, a review that can vary greatly in terms of intensity.[409] Indeed, while the Court will limit economic rights in the name of environmental protection, EU and national environmental measures must also respect the economic freedoms.[410] It will, to this end, rely on the Exhaustion Rule to oust national environmental rules going beyond what has been authorised.

3.2.1 Enforcing the Integrative Effect

106. Much EU legislation adopted in the field of environmental protection, while pre-empting national action, has limited connection to market integration. Prior to adoption of the SEA, such measures often relied on ex. Article 235 EEC.[411] However, they can now be based

[408] For list of EU environmental measures that have been adopted under Article 114 and its predecessors see J. Jans & H. Vedder, *ibid.,* p. 76.
[409] Ex. in *Dusseldorp,* C-203/96, EU:C:1998:31, the Court took a restrictive and ultimately negative view of the Dutch national measure adopted in the presence of an exhaustive EU measure, in contrast to *EU Wood Trading*, C-277/02, EU:C:2004:810, where the Court was much more permissive.
[410] See J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* Chapter Six and p. 261, and N. de Sadeleer, *EU Environmental Law and the Internal Market*, Oxford University Press, 2014, pp. 229 – 233.
[411] Ex. Council Directive 76/160/EEC concerning the quality of bathing water, OJ L 31, 5 February 1976, pp. 1 – 7 and Council Directive 80/778/EEC relating to the quality of water intended for human consumption, OJ L. 229, 30 August 1980, pp. 11 – 29, relied on both ex. Articles 235 and 100 EEC as legal bases. Council Directive 79/409/EEC on the conservation of wild birds, OJ L. 103, 25 April 1979, pp. 1 – 18, relied exclusively on ex. Article 235 EEC. For discussion, see D. Wyatt, 'The Community Competence to Regulate the Internal Market',

on Article 192 TFEU.[412] Given the free movement focus of our research, this section only explores the pre-emptive effect of environmental legislation that has had a specific market integration and cross-border connection. One area falling under this category is the regulation of waste.

107. Waste regulation occupies an important place in the EU environmental *acquis*, with key legislative measures including Directive 2008/89 (the Waste Framework Directive)[413] and a number of directives covering specific types and methods of disposing of waste, such as packaging waste and the shipment of waste.[414] It is thus unsurprising that these EU rules have generated pre-emptive effects on national regulatory competences. For example, as discussed in Part I (Chapter Two), the Waste Oils Directive,[415] which was one of the earliest Community environmental measures, led not only to the seminal *ADBHU* decision, but also to the invalidation, in *Inter Huiles*[416] and *Rhônes Alpes*[417] of national environmental measures that sought to limit the free movement of waste oil based on an unlawful interpretation of that directive. In reaching these decisions, the Court confirmed that Member States could not rely on secondary measures to avoid obligations under Articles 34 and 35 TFEU, and that secondary measures had to comply, and be interpreted consistently, with the Treaty. In the same vein, the Court found, in *Vanacker & Lesage*, that a national zone system preventing non-national undertakings from becoming approved collectors of waste oil was incompatible with the directive.[418] Waste oil is now regulated under the Waste Framework Directive.[419]

108. The Court has also confirmed that national environmental measures cannot go beyond what is authorised under EU rules, even if such measures might have been possible in the absence of harmonisation. Such was the Court's interpretation of national action taken within the framework of EU rules on the shipment of waste. In *Commission v Belgium* (*Walloon*

University of Oxford, Faculty of Law, *Legal Studies Research Paper Series*, Working Paper No. 9/2007, pp. 3 – 4.

[412] A large part of the EU legislative *acquis* on the conservation of nature would fall under this category. See J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit., pp.* 506 – 519.

[413] Directive 2008/98/EC of the European Parliament and of the Council on waste, OJ L. 312, 22 November 2008, pp. 3 – 30.

[414] See J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* Chapter Eight, section 17, pp. 473 – 502 and N. de Sadeleer, *EU Environmental Law and the Internal Market*, *op. cit.*

[415] Directive 75/439/EEC, *op. cit.*

[416] *Inter Huiles,* Case 172/82*,* EU:C:1983:69.

[417] *Rhône-Alpes Huiles*, Case 295/82, EU:C:1984:48.

[418] *Vanacker & Lesage*, C-37/92, EU:C:1993:836.

[419] Directive 2008/98/EC, *op. cit.*

Waste),[420] for example, the Court precluded a Walloon measure that prohibited the storing, tipping or dumping of waste in that region insofar as such waste was regulated at EU level. This was because the Shipment of Waste Directive[421] had 'introduced a comprehensive system' as regards the shipment of hazardous waste, which included a procedure for national authorities to object to and prohibit particular shipments of hazardous waste and left 'no scope for Member States to prohibit such shipments generally.'[422] Member States were, as a result, precluded from legislating to implement the mandatory requirement of environmental protection with regards to hazardous waste.

109. *Walloon Waste* triggered a review of how shipment of waste was regulated in the EU, leading to the adoption of the first Waste Shipment Regulation (the WSR)[423] and a series of important cases on the relationship between EU and national rules. As outlined in Part I, the Court found in *DaimlerChrysler* that Germany could rely on Article 4 (3)(a)(i) WSR to ban shipments of waste for disposal to another Member State.[424] However, having established this, the Court proceeded to invalidate two specific elements of the German Decree for exceeding other provisions of the WSR. In the first of these elements, the German measure had required countries of destination to comply with its environmental standards before receiving waste shipments. The German *Land* justified this measure by arguing that anything short of the export ban, which was allowed under Article 4 (3)(a)(i), had also to be authorised. In other words, a partial prohibition that derogated from the ban, such as its conditional exception, enjoyed a presumption of constitutionality.[425] The Court did not accept this argument. Instead, it emphasised that Article 4 (3) only allowed a prohibition on waste exports (general or partial) if this constituted a proportionate implementation of the principles of proximity, recovery and self-sufficiency.[426] The Court then reviewed the German measure on this basis and found it to

[420] *Commission v Belgium (Walloon Waste),* C-2/90, EU:C:1992:310.
[421] Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ L. 326, 13 December 1984, pp. 31 – 41.
[422] *Commission v Belgium (Walloon Waste),* note 420, paragraph 20.
[423] Council Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L. 030, 06 February 1993 pp. 1 – 28. The first WSR was replaced by Regulation (EC) No. 1013/2006 of the European Parliament and Council on shipments of waste, OJ L. 190, 12 July 2006, pp. 1 – 98, with Article 11 more or less reproducing Article 4 (3)(a)(i), although with deadlines / time limits.
[424] *DaimlerChrysler,* C-324/99, EU:C:2001:682.
[425] *Ibid.,* paragraph 54.
[426] *Ibid.,* paragraph 56.

be disproportionate and precluded under Article 4 (3).[427] The second contested element of the Decree was a notification procedure that Germany had imposed in addition to the procedure laid down under the WSR. Recalling that the EU framework had exhaustively regulated the matter, the Court concluded that competence to establish such a national notification procedure was pre-empted and therefore invalid. In reaching this conclusion, the Court confirmed that the WSR, while ousting application of the Treaty's free movement provisions as norms of reference, did not allow Member States to unilaterally regulate this field. Instead, they remained bound – and limited – by the EU's regulatory framework, which either pre-empted national action or subjected its exercise to a proportionality review.

110. A third relevant case in the field of waste regulation is *Commission v Denmark (Waste Packaging)*,[428] which challenged Danish rules requiring certain drinks to be sold in reusable packaging and forbidding their importation in metal containers. Relevant to this assessment was Directive 94/62 on packaging and packaging of waste (the Waste Packaging Directive),[429] which harmonises national measures on the management of packaging to both ensure the functioning of the market and protect the environment.[430] In challenging the Danish measures, the Commission argued that the Packaging Directive had established 'full harmonisation of the domestic rules on packaging', thereby ousting national competence to adopt more stringent rules.[431] Given the market access clause in Article 18, packaging that complied with its essential requirements under Article 9 enjoyed free movement. The Commission also maintained that the Danish measure constituted a disproportionate infringement of the free movement of goods. Defending its measure, Denmark disputed that the Waste Packaging Directive instituted exhaustive harmonisation, given that the essential requirements set out in its Annex were 'so broad, vague and discretionary that they need to be specified'.[432] Denmark therefore argued that it retained discretion to adopt its impugned measures, which could be justified on grounds of environmental protection. This case was struck out as Denmark accepted to bring its legislation into line with the directive and so the Court never issued a judgement. However,

[427] *Ibid.*, paragraph 65. This finding implicitly reflects the Court's discomfort with the notion that national rules could have extra-territorial effect, as seen previously in *Hedley Lomas* (note 24) and *CIWF* (note 33), even if it does not deny the possibility in principle. For discussion, see Part II (Chapter Two), points 182.
[428] *Commission v Denmark (Waste Packaging),* C-246/99, EU:C:2002:477.
[429] European Parliament and Council Directive 94/62/EC on packaging and packaging waste, OJ L. 365, 31 December 1994, pp. 10 – 23.
[430] For some, inexplicable reason, ex. Article 130s EEC (now Article 193 TFEU) was not also used as a legal basis. See J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 485.
[431] Opinion in *Commission v Denmark (Waste Packaging),* C-246/99, EU:C:2001:44, paragraph 14.
[432] *Ibid*., paragraph 16.

Denmark was most likely influenced by the robust opinion of AG Colomer, who agreed that the management of packaging and packaging waste had been completely harmonised under the Packaging Directive. The AG had also opined that the measures could not in any event be justified on environmental protection grounds.

111. Animal welfare is another field in which EU environmental measures have been enacted with pre-emptive effect, although many have a limited cross-border impact.[433] Those that do often fall within the framework of the CAP, as discussed in section 1 above. One interesting case in this field is *Van den Burg*.[434] It concerned an interpretation of the Wild Birds Directive,[435] which set out rules on the conservation of all species of birds occurring naturally in the wild, with special provisions for endangered and migratory birds. The defendant relied on the directive to defend the presence of a dead red grouse on his premises. While the marketing of this bird was prohibited under Dutch law, Van den Burg argued that it had been lawfully shot in the UK, in accordance with the directive. In particular, since the directive did not list the red grouse bird as an endangered or migratory species, the UK could (and did) authorise its hunting and sale under certain conditions. The national court, considering that the Dutch rule prohibited a lawfully shot bird from being imported, classified that prohibition as an MEEQR. The Court was asked whether the prohibition could nonetheless be justified under Article 36 TFEU. This question prompted a classic approach to review, whereby the Court first assessed the measure under the Treaty's free movement rules, and classified it as a MEEQR, before triggering the *Tedeschi* Rule to exclude application, and thereby the interpretation, of Article 36 TFEU. This was based on a finding that the directive had regulated the field exhaustively,[436] which seemed curious given that Article 14 allowed Member States to 'introduce stricter protective measures than those provided for under this directive'. However, the Court interpreted Article 14 as including a territoriality clause, whereby national regulation of species that were neither migratory nor endangered, such as the red grouse, could only have effects on that territory. Since there was no red grouse in the Netherlands, its measure would only have an impact outside its territory. It was therefore an unjustifiable trade barrier. While

[433] Ex. Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7 – 50, (the Habitats Directive).
[434] *Van den Burg,* C-169/89, EU:C:1990:227.
[435] Council Directive 79/409/EEC on the conservation of wild birds, OJ L. 103, 25 April 1979, pp. 1 – 18. This directive was the first Community environmental protection measure. It has now been replaced by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L. 20, 26 January 2010, pp. 7 – 25.
[436] *Van den Burg*, note 434, paragraphs 8 and 9.

the judgement did refer to Article 36 TFEU in its operative part, this was only to reinforce the Court findings and no interpretation of that provision was actually given.

112. The final sector we consider in this section relates to EU regulation of GMOs. Of particular relevance is Directive 2001/18 on the deliberate release into the environment of GMOs (the Deliberate Release Directive), which was adopted under ex. Article 95 EC, with the aim of harmonising relevant national measures and protecting human health and the environment.[437] This legal basis confirms that EU regulation of GMOs is not only concerned with reducing risks to the environment and to humans,[438] but also seeks to promote research, development and commerce, as part of the internal market.[439] The Deliberate Release Directive lays down detailed procedures for the authorisation of GMO seed varieties. Once authorisation is granted, these seeds must be included in a common catalogue and enjoy free movement throughout the EU, in accordance with Directive 2002/53 on the common catalogue of agricultural plant seeds.[440] This latter directive was adopted as a CAP measure under ex. Article 37 EC, although it also mentions human health and environmental protection as aims, and limits restrictions or prohibitions to authorised safeguard measures.

113. Given the anxiety over GMOs in certain Member States, several attempts have been made to derogate from the directive's provisions, either by invoking the safeguard clause[441] or by relying on the Treaty-based derogations under Article 114 (4) or (5) TFEU.[442] Poland went further however, in seeking to rely on its own national discretion to ban imports of GMO seeds on the basis of ethical or religious considerations. In particular, it prohibited the free movement of GMO seed varieties and excluded them from the national catalogue of varieties. The Commission launched infringement proceedings against the Polish measures, invoking the *Tedeschi* Rule to argue that the GMO directives harmonised the field, thereby ousting Article

[437] Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms, OJ L. 106, 17 April 2001, pp. 1 – 39.
[438] In this regard, see Directive 2009/41/EC of the European Parliament and of the Council on the contained use of genetically modified micro-organisms, OJ L. 125, 21 May 2009, pp. 75 – 97, which was adopted under ex Article 175 EC.
[439] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 468.
[440] Council Directive 2002/53/EC on the common catalogue of varieties of agricultural plant species, OJ L. 193, 20 July 2002, pp. 1 – 11.
[441] Ex. *Greenpeace,* C-6/99, EU:C:2000:148 and *Monsanto & Others,* C-58/10, EU:C:2011:553.
[442] In 2003, the Commission rejected an application by Austria to derogate from Directive 2001/18/EC under Article 114 (5). Austria then unsuccessfully appealed against this Decision. See *Land Oberösterreich & Austria v Commission (GMOs)*, Joined Cases T-366/03 and T-235/04, EU:T:2005:347 and *Land Oberösterreich & Austria v Commission (GMOs)*, Joined Cases C-439/05 P and C-454/05 P, EU:C:2007:510.

36 as a justification for any digressions, such as a general ban.[443] Poland responded that the Deliberate Release Directive had not harmonised ethical considerations. As a result, its impugned measures were not automatically excluded but were to be examined in light of Articles 34 – 36 TFEU. The Court acknowledged that Member States continued to have discretion for matters not harmonised by EU secondary rules. However, Poland had not discharged the burden of proving that its national provisions were in fact adopted to pursue religious and ethical objectives. It had simply referred to general statements and presumptions as regards the fears and concerns of Polish society, without backing this up with any concrete evidence. Moreover, and in line with its approach to similar claims made in *CIWF*, the Court doubted that the ethical and religious issues raised were in fact separate to the justifications relating to protection of human health and the environment, which had been harmonised by the directive. Having dismissed the possibility for Poland to raise justifications outside the scope of EU secondary rules, the Court assessed the Polish ban in line with the Exhaustion Rule and found in favour of the Commission. The Court took a similar dim view of Italy's attempt to subject the cultivation of certain GMOs to a national authorisation procedure, in addition to the EU authorisation already obtained under the directive, finding that national competence to adopt such measures had been pre-empted.[444]

3.2.2 Enforcing the Regulatory Effect

114. We have observed time and again that national measures correctly implementing secondary legislation will benefit from the same presumption of constitutionality as is enjoyed by the latter and, under the Exhaustion Rule, will not be reviewed by reference to the Treaty's free movement provisions. In the context of environmental protection, such secondary measures often establish prior authorisation and/or other systems, such as monitoring, registration and negative/positive lists, to control the availability and use of certain substances, as well as the adoption of practices that might endanger the environment – such as the use, shipment and dumping of certain dangerous and hazardous materials, and the management of waste.[445]

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[443] *Commission v Poland (GMOs),* note 108.
[444] *Pioneer Hi Bred Italia*, C-36/11, EU:C:2012:534. See also *Bablok*, C-442/09, EU:C:2011:541 and, more recently, *Fidenato*, C-111/16, EU:C:2017:676.
[445] Ex. Council Directive 91/414/EEC concerning the placing of plant protection products on the market, OJ L. 230, 19 August 1991, pp. 1–32; Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market, OJ L. 123, 24 April 1998, pp. 1 – 63; Directive 2006/66/EC of the European Parliament and of the Council on batteries and accumulators and waste batteries and accumulators, OJ L. 266, 26 September 2006, pp. 1 – 14; Regulation 1907/2006 (REACH), *op. cit.,* the Waste Shipment Regulation, *op. cit.,* the Deliberate Release Directive, *op. cit.* etc.

115. Disputes before the Court sometimes query whether the Member State respected the limits imposed by the regulatory framework, often by reference to the free movement principles. While in many cases, the Court strikes down the national measure as having gone beyond the relevant secondary measure (subsection 3.2.1), in other cases the national measure is confirmed as correctly implementing the EU obligation. This latter conclusion was reached in *ADBHU*[446] for example, which questioned the validity of the French system for collecting and disposing of waste oils, as well as the Waste Oils Directive itself, on which the national system had been based. Taking a dual analysis approach, and as noted in Part I, the Court agreed that Articles 4 and 5 of the directive restricted trade and competition, since they authorised Member States to establish disposal zones and require permits for such disposal. However, in light of the dual objectives of the directive, such measures were both proportionate and non-discriminatory. Having validated the directive, it followed that the French rules adopted on this basis were also lawful.[447] Similarly, in *DaimlerChrysler*, also discussed in Part I, the Court held that a German export ban on the shipment of waste for incineration had been correctly based on the exhaustive WSR. As a result, it did not need to be reviewed under the Treaty's free movement principles but was instead presumed valid.

116. The WSR was also relied upon to confirm the validity of another German environmental measure in *EU Wood Trading*. As mentioned in Part I, the company Wood Trading wished to ship wood waste for recovery into chipboard panels from Germany to Italy, and in accordance with the requirements of the WSR, notified its intention to the country of dispatch, Germany, and the country of destination, Italy. Relying on its powers to object to such shipments under Article 7(4) WSR, Germany refused to authorise the shipment on grounds that recovery in Italy, where standards were lower, would endanger human health and harm the environment. In other words, it raised a 'low standards objection' to the shipment. This was subsequently challenged by Wood Trading on the basis that it, first, contravened the principle of mutual trust among Member States and second constituted an obstacle to the free movement of goods, insofar as it went beyond the exhaustive provisions of the WSR. In assessing the matter, the Court turned to Article 7(4) WSR, noting that the exhaustive grounds upon which Member States could raise such objections to shipments of waste for recovery included objections 'in accordance the Waste Directive,[448] and in particular Article 7 thereof'. This latter directive instituted minimum

[446] *ADBHU,* Case 240/83, EU:C:1985:59.
[447] *Ibid*., paragraph. 29.
[448] Council Directive 75/442/EEC on waste, OJ L. 194, 25 July 1975, pp. 39 – 41/ 47 – 49.

harmonisation and under Article 4, allowed Member States to adopt 'necessary measures' to ensure that waste was recovered in a way that protected both human health and the environment. Article 7 then required Member States to take 'necessary measures' to ensure that waste was handled by an appropriate public or private body. The Court affirmed that the conditions for waste recovery had *not* been harmonised at EU level. Member States therefore had a 'margin of discretion in assessing the need for such measures',[449] which could lead to different standards throughout the Union. Considering in particular the Community's aim of promoting a high level of environmental protection, it was 'evident' that a Member State could rely on its own higher standards to lodge an objection,[450] even if this resulted in different national assessments of risk.[451] The Court then applied a very light proportionality test to assess the legality of the national measure, emphasising that Member States had discretion on the matter and could institute different systems of protection. It deferred to the national court to make this appraisal.

117. In reaching its conclusion, the Court made no reference to Articles 34 – 36 TFEU, despite the claims by EU Wood Trading, but relied exclusively on the WSR as its normative framework of reference. Although not mentioned explicitly, this appears to be an activation of the Exhaustion Rule. Indeed, AG Léger implied as much in his opinion, closely followed by the Court.[452] Considering the environmental focus of the WSR, as confirmed in *European Parliament v Council (Waste Shipment)*,[453] the fact that Articles 34 – 36 TFEU did not apply as direct norms of reference gave the judgement a fundamentally different emphasis than a standard Treaty review of a potential national obstacle to trade. Far from finding that the low standards objection was an obstacle to be justified, the Court first confirmed that Member States could rely on their higher standards to further the aims of the WSR and Waste Directive. It was only after having established this right that the Court stated that waste for recovery must be able to move freely and that any opposition must be proportionate.

[449] *EU Wood Trading*, note 409, paragraph 45.
[450] *Ibid*., paragraph 47.
[451] *Ibid*., paragraph 48.
[452] Opinion in *EU Wood Trading*, C-277/02, EU:C:2004:547, paragraph 14. The Court's earlier rulings in *European Parliament v Council (Waste Shipment)*, C-187/93, EU:C:1994:265 and *DaimlerChrysler*, where it confirmed that the WSR instituted exhaustive regulation and triggered the Exhaustion Rule, also played a role (note 424).
[453] *European Parliament v Council (Waste Shipment), ibid*. As discussed in Part I (Chapter Two), point 229, the Court confirmed that the WSR was correctly based on ex. Article 130s, since its essential function was to ensure environmental protection, notwithstanding the impact on the free movement of goods.

118. A final example of reliance on the Exhaustion Rule to enforce the regulatory effect of an EU measure can be seen in *Belgische Petroleum Unie*.[454] This case assessed Belgium's regulation of the biofuels sector by reference to relevant EU rules. It should be noted by way of background that the impact of biofuels on the environment is complex. On the one hand, they are less damaging than conventional fuels (diesel and petrol) as they only release the carbon dioxide that is used by the plants to produce them. On the other hand, they can damage biodiversity or land with high carbon stock. The relevant EU regulatory framework reflects this dilemma, by encouraging the use of biofuel in Directives 2003/30 and 2009/28 (the Promotions Directives)[455] and Directive 2009/30 (the Biofuels Directive),[456] while also linking such use to sustainability criteria. As regards use of conventional fossil fuels, Directive 98/70 (the Fuels Directive)[457] sets criteria to ensure the quality of diesel and petrol placed on the market. It was on the basis of this framework that Belgian rules, which imposed a 'blending obligation' on petrol companies via a 'biofuels quota', were challenged. This obligation required registered petrol companies that sold petrol or diesel products to also sell a particular quantity of biofuels in the same calendar year, amounting to at least 4% vol/vol of the quantity of petrol/diesel products sold. The biofuels to be released were bioethanol and fatty acid methyl ether (FAME). The national court queried whether this obligation complied with Articles 3 – 5 of the Fuels Directive and free movement rules.

119. The Court opened by stating the Exhaustion Rule,[458] and proceeded to assess the question exclusively by reference to relevant secondary law. It noted first that Article 4 (1) of the Fuels Directive, read with Annex II, set the maximum limit for FAME content of diesel fuel at 7%. As a result, a national biofuels quota set at a lower level (*in casu* 4%) was not precluded. At the same time, the Belgian rule placed an additional condition on fuels that met the minimum requirements of the Fuels Directive. This prompted the question as to whether such a move could be invalid under Article 5, which states: 'No Member State may prohibit, restrict or

[454] *Belgische Petroleum Unie*, C-26/11, EU:C:2013:44.
[455] Directive 2003/30/EC of the European Parliament and of the Council on the promotion of the use of biofuels or other renewable fuels for transport, OJ L. 123, 17 May 2003, pp. 42 – 46 and Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, OJ L. 140, 5 June 2009, pp. 16 – 62.
[456] Directive 2009/30/EC of the European Parliament and of the Council amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels, OJ L. 140, 5 June 2009, pp. 88 – 113.
[457] Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels, OJ L. 350, 28 December 1998, pp. 58 – 68.
[458] *Belgische Petroleum Unie*, note 454, paragraph 27.

prevent the placing on the market of fuels which comply with the requirements of the Directive'. Since the biofuels quota was a fuel specification, which was subject to harmonised rules under the directive, it was deemed by the Court[459] and AG[460] to potentially limit the sale of compliant fuels, in conflict with Article 5. To assess whether the quota was nonetheless allowed, the Court looked at the wider EU legislative framework for the EU's fuel economy, noting that it formed 'a comprehensive package of measures aimed at promoting the production and use of renewable energies'. In particular, the 2003 Promotion Directive left Member States with a 'freedom of choice' as to how biofuels should be promoted, while the 2009 Promotion Directive included a mandatory 10% minimum target for biofuels to be achieved by all Member States by 2020. In this context, the Belgian rule, adopted to achieve the 10% target and in compliance with the maximum limits set by the Fuels Directive, could not be considered as contrary to EU law.

3.2.3 The Conditional Effect

120. As with other sectors, Member States retain residual discretion under the Treaty to protect the environment insofar as there is no relevant exhaustive EU secondary rule governing that particular matter. Such cases are frequent in this field, given the emphasis on minimum harmonisation, and the possibility to invoke Article 193 TFEU to adopt more stringent environmental standards, if that EU rule was adopted under Article 192 TFEU.

121. Articles 5 and 7 of the Waste Packaging Directive provide good examples of EU rules that are relevant to the Member States without being exhaustive, as the Court interpreted them to authorise – and even require national action, but without exhaustively regulating the field.[461] As a result, national implementation of these provisions, while based on EU secondary law, was subject to a review by reference to the Treaty's free movement 'ceiling'. We discussed in Part I how the Court reached this conclusion in relation to Article 5 in *Commission v Germany (Waste Packaging)*[462] and *Radlberger.*[463] In these cases, Germany claimed that Article 5, which allowed Member States to 'encourage reuse systems of packaging, which can be reused in an environmentally sound manner, in conformity with the Treaty', harmonised the field and 'excluded an assessment in light of the Treaty provisions relating to the free movement of

[459] *Ibid*., paragraph 36.
[460] Opinion in *Belgische Petroleum Unie*, C-26/11, EU:C:2012:480, paragraph 52.
[461] See also legislation at issue in *Aher-Waggon,* C-389/96, EU:C:1998:357, in *Commission v Belgium (Birds in Captivity),* C-100/08, EU:C:2009:537 and in *György Balázs*, C-251/14, EU:C:2015:687.
[462] *Commission v Germany (Waste Packaging),* C-463/01, EU:C:2004:797.
[463] *Radlberger*, C-309/02, EU:C:2004:799.

goods' of national measures adopted thereunder. However, the Court disagreed. It first noted that Article 5 did no more than encourage Member States to adopt environmentally friendly systems of packaging, in contrast to essential requirements, which had, as confirmed in *Commission v Denmark (Waste Packaging)*, instituted exhaustive harmonisation. Moreover, Article 5 simply allowed the Member States to encourage reuse, 'in conformity with the Treaty'. As a result, the German measure was assessed under Articles 34 – 36 TFEU, where the Court found that it constituted an obstacle to trade.[464]As regards justification, the Court found the German rule to be partly disproportionate, given the absence of a sufficient transitional period to enable producers to adapt to the new system.

122. The Court took a similar approach to interpreting Article 7 of the Waste Packaging Directive, which provides that Member States 'shall take the necessary measures' to set up a system for the return and reuse/recovery of packaging waste from the consumer, in conformity with the Treaty. In *Valev Visnapuu,* the Court assessed, *inter alia*, whether Article 7 exhaustively regulated the possibility for Member States to adopt such return schemes.[465] At issue was a Finnish scheme that excepted the packer or importer of beverages from paying an excise duty if a return system had been put in place. When Mr. Vispanuu was prosecuted for importing alcohol to Finland, without paying the duty or establishing a return scheme, he challenged the Finnish scheme by reference to the directive, as well as Articles 110 and/or 34 TFEU. The Court first established that the matter was not the subject of 'exhaustive harmonisation at EU level'. To reach this conclusion it noted that the directive aimed both to protect the environment and ensure the functioning of the market. The Court then referred to the fact that Article 5 of the same directive had been found not to institute exhaustive harmonisation, on the basis that any action taken thereunder had to be 'in conformity with the Treaty'. Pointing to a similar reference to the Treaty in Article 7, the Court concluded that it, like Article 5, 'does not bring about an exhaustive harmonisation, but rather refers to the relevant provisions of the Treaty'.[466] The Court then proceeded to assess – and validate the Finnish scheme by reference to the directive, as well as Articles 110, 34 and 36 TFEU, subject to compliance with the proportionality principle, which was to be determined by the national court.

[464] *Commission v Germany (Waste Packaging),* paragraph 53 – 69 and *Radlberger*, paragraphs 60 – 73.
[465] *Valev Visnapuu*, C-198/14, EU:C:2015:751.
[466] *Ibid*., paragraph 46.

123. Treaty-based discretion to adopt national environmental protection measures also persists to regulate matters outside the regulatory scope of EU legislation. As with any exercise of such discretion, the Court will review resulting national rules by reference to the principle of proportionality. An example can be seen in the *Walloon Waste* case,[467] discussed earlier, where the Court condemned the Walloon region for prohibiting the dumping of waste that fell within the scope of Waste Shipment Directive.[468] However, insofar as the Walloon measure related to waste not covered by this directive, it could be justified by reference to the mandatory requirement of environmental protection.[469] Similarly, in *Balsamo,* the Court held that while the Waste Directive[470] did not prohibit the sale or use of plastic bags, nor did it prevent Member States from imposing such prohibitions in order to protect the environment. In other words, Member States, and in this case, the Municipality of Balsamo, retained discretion to regulate this matter. While the plaintiffs argued that the absolute prohibition on plastic was incompatible with Article 34 TFEU, the Court declined to answer this point, having not been asked to do so by the national court.[471] A further illustration of national regulatory leeway in the absence of harmonisation, discussed in section 2.1.2, was the Court's acknowledgement that Member States could regulate elements of the dangerous substances sector that fell outside the scope of exhaustive EU rules.

124. Finally, as discussed in Part I (Chapter Two), Article 193 TFEU allows Member States to adopt higher national standards in the presence of exhaustive EU rules based on Article 192 TFEU. Although certain commentators dispute that this should be the case, the possibility to do so was implicitly confirmed in *Dusseldorp*[472] and explicitly in a series of subsequent cases.[473] As with Article 36 derogations, reliance on Article 193 TFEU is an option for the Member States, not an obligation and will be interpreted and reviewed strictly by the Court.

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[467] *Commission v Belgium (Walloon Waste),* Case C-2/90, EU:C:1992:310.
[468] Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ L. 326, 13 December 1984, pp. 31 – 41.
[469] The Court essentially allowed Belgian to rely on environmental protection to justify a discriminatory measure, which traditionally can only justify non-discriminatory measures. The Court got around this limitation by holding that the Walloon measures were not in fact discriminatory, given the special nature of the subject matter, waste, and the requirements of proximity and self-sufficiency in this regard.
[470] Directive 75/442/EEC, *op. cit*.
[471] *Balsamo*, Case 380/87, EU:C:1989:318.
[472] *Dusseldorp*, C-203/96, EU:C:1998:316.
[473] *Fornasar,* C-318/98, EU:C:2000:337. See also *Dimos Agiou Nikolaou*, C-82/09, EU:C:2010:220, paragraph 24 and the Opinion in *EU Wood Trading*, note 452, paragraph 69.

CONCLUSION OF CHAPTER ONE

125. Chapter One aimed to present at least some of the vast jurisprudence that stems from judicial reliance on, or exclusion of, the Exhaustion Rule to ensure the effectiveness of EU secondary law. In this regard, the Rule's main function has been to establish which normative framework of assessment will apply to resolve a particular dispute. As has been well documented, EU legislation that is exhaustive will constitute the sole framework of reference for the Court to either invalidate or authorise impugned national measures that fall within its scope of application. If not, and insofar as there is a cross-border element to the dispute, the Treaty's free movement provisions will continue to apply, again either to strike down or allow the national measure. The jurisprudence that has resulted from these decisions is wide-ranging, far-reaching and multifaceted, covering multiple sectors and spanning almost five decades. From its radical 'conceptualist-federalist' approach to interpreting early CAP measures, the Court has become more pragmatic and nuanced over years, as trust with the national level has grown and EU measures have become more varied, complex and even collaborative.[474] As a result, the Court does not presume pre-emption of national regulatory competences but interprets the relevant EU measure to establish its scope, character and effects.

126. Our study thus reflects not only the (evolving) EU legislative programme,[475] but also the Court's role in resolving the tensions inherent to the task of regulating the internal market, between integration and regulation, on the one hand, and the persistence or the pre-emption of residual national competence, on the other. While the EU legislator seeks to reconcile integration and regulatory goals, the Court, when resolving a particular dispute, may need to favour one goal over another. Thus, the pendulum of its judgments swings from pre-empting national trade barriers to authorising EU compliant national regulation, and from imposing the EU standard under the Exhaustion Rule, to determining that it does not apply in a given case.

127. From one perspective, this case-law confirms our conclusion in Part I, which is that the Exhaustion Rule provides an appropriate framework within which the Court can consider, and where necessary, enforce one or more provisions of an EU regulation, while respecting residual

[474] Ex. the regulation of dangerous substances under Regulation 1907/2006 (REACH), *op. cit*. For discussion, see J. Scott, 'REACH – Combining Harmonisation and Dynamism in the Regulation of Chemicals' in J. Scott, (ed.) *Environmental Protection: European Law and Governance*, Oxford, Oxford University Press, 2009, pp. 56 – 91.
[475] For an analysis of this evolution, see R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, Oxford, Oxford University Press, 2009.

national competences and the Treaty. Indeed, enforcing such EU rules is only legitimate to the extent that the Court reflects the legislative reconciliation - or balance – in a constitutional manner, which, for our purposes, means in line with the free movement of goods. However, further analysis of the case-law reveals a number of difficulties, including, *in extremis,* the possibility for (potentially) unlawful trade barriers to escape review. The question explored in Chapter Two is whether, and the extent to which the Exhaustion Rule plays a role in this regard.

128. Part I (Chapter Two) highlighted the Court's initial reluctance to rely on the Exhaustion Rule to resolve certain regulatory disputes. Whether out of inadvertence, respect for sequence of questions asked or concern over dis-applying a fundamental freedom, the Court's review of national measures in the presence of harmonisation was inconsistent throughout the 1990s, as it wavered between relying directly or indirectly on Articles 34 – 35 TFEU, and ignoring them completely. While largely inconsequential to the result achieved, the Court's varied approach, as manifested in different methods of analysis, triggered legal uncertainty, increased litigation and, in some cases, a threat to the principle of institutional balance. In response, and in the interests of judicial economy, the Court abandoned the mixed and classic approaches to review in favour of a generally applicable Exhaustion Rule. What emerged was a framework that allowed the Court to enforce the legislator's intention, without undermining free movement or its judicial role more generally.

129. This relatively harmonious picture is illustrated in many of the judgements just assessed, where the Exhaustion Rule was applied (or invoked, without success) to resolve regulatory disputes. The Rule's main function in these cases was to determine the normative framework of reference, which, once confirmed, allowed the Court to either strike down the offending national measure (integrative effect), or presume that the national measure, which complied with the exhaustive EU standard, also complied with Articles 34 – 35 TFEU (regulatory effect). In other cases, the Rule was found not to apply (conditional effect), leaving the matter to be determined by reference to Articles 34 – 36 TFEU. These different results, far from indicating incoherence and subjectivity, reveal the Court to be generally responsive to the legislator's intention, while maintaining boundary control to ensure balance and respect for the hierarchy of norms. On further analysis of some cases, however, reliance on the Exhaustion Rule could appear to question this achievement, by allowing potentially unlawful trade barriers to escape review, or, contrarily, by undermining legitimate regulatory standards. This leads us to consider whether suspension of Articles 34 – 35 TTFEU could ultimately threaten the principles of institutional balance and/or legality, thereby legitimating, at least in part, the Court's (and Commission's) initial suspicion of the Exhaustion Rule.

130. It is against this backdrop that this Chapter assesses three categories of the Court's 'Exhaustion Rule' case-law to explore how the displacement of (or reliance on) Articles 34 –

36 TFEU could impact its approach to review. In the first category, discussed in section one, we look at the varied nature of this jurisprudence and conclude that it represents, in general, a reasonable interpretation of the legislator's intention, expressed through EU secondary rules. We then turn, in section two, to a number of 'inconsistent' cases which appear to deviate from this conclusion, for example by adopting an alternate interpretation of the same words in different legislative acts, or by departing from the common understanding of the Exhaustion Rule. We note, however, that these decisions can often be explained, and justified, by reference to the Court's interpretative discretion, which can include taking other external factors into consideration. Yet other such rulings could appear to go too far. In section three, we analyse this latter category, where reliance on the Exhaustion Rule appeared to promote an inappropriate liberal bias, or, alternatively, allow a trade barrier to escape necessary review by reference to the free movement of goods.

1. REFLECTING THE VARIED LEGISLATIVE *ACQUIS*

131. The Exhaustion Rule requires the Court to rely exclusively on exhaustive EU legislation to resolve regulatory disputes in the field of free moving goods. As discussed in Part I, this disapplication of primary law arises because the EU measure is presumed to pursue and reconcile (or balance) the dual aims of market integration and regulation in a manner that respects the free movement of goods. Within these parameters, the EU legislator enjoys broad discretion to set appropriate standards and determine the relationship between such standards and national regulatory options. This renders the legislative *acquis* wide-ranging, varied and, often, ambiguous - given its need to accommodate various goals and interests, and considering, more generally, the internal market's unsettled nature. Regulatory disputes can ensue, with parties sometimes relying on the dual character of the Rule to selectively support a particular aim,[476] which may, or may not, be justified. The Court, in its response, must assess the national measure by reference to the EU legislation, which it interprets and enforces over three potential steps. As outlined in Part I (Chapter Two), and as will be elaborated further in Part III (Chapter Two), the Court relies on the first two steps to establish whether the Rule applies to pre-empt national Treaty-based discretion. To this end, it must determine whether the matter comes within the *regulatory scope* of an EU measure that has an *exhaustive regulatory character*. The

[476] Ex. In *ATRAL*, note 115, the applicant challenged a Belgian measure, on grounds that the relevant essential requirements had been harmonised, and that the 'additional' Belgian measure could not be justified. By contrast, Germany, in *Doc Morris*, defended part of its national measure on grounds that it complied with the EU standard. *Doc Morris,* note 139, paragraph 49.

third step requires the Court to carry out what was referred to in Part I as a 'pre-emption analysis' – that is, assess the national measure by reference to the exhaustive regulatory framework.[477] This latter step can be unnecessary in the presence of field pre-emption (total harmonisation) since relevant national measures are often automatically invalidated – or authorised. However, if the EU measure institutes one of the 'softer' pre-emption types, such as rule or obstacle pre-emption – or if its pre-emptive effect has to be established – the Court may need to interpret specific legislative provisions to resolve the dispute.

132. Considering the varied nature of secondary legislation, the judicial response necessarily oscillates between pre-empting national trade barriers and authorising EU compliant national regulation, and from imposing the EU standard under the Exhaustion Rule, to deciding that the Rule did not apply. This may lead the Court to favour one goal at the expense of the other - for example, the regulatory effect of the EU measure over an integrative effect[478] (or *vice versa*);[479] the regulatory and integrative goals at the expense of national autonomy;[480] or national autonomy at the expense of further EU competence.[481] However, far from signalling judicial incoherence or subjectivity, we consider this approach to ultimately tally with the conclusion reached in Part I, which is that the Exhaustion Rule, in principle, grants space to the Court to determine the legislator's intention when triggering (or dis-applying) the Rule (1.1), and interpreting the exhaustive EU measure (1.2), while ensuring respect for the Treaty (1.3). The Court also retains discretion to recognise and manage difference, which feeds into the 'inherently messy' nature of its case-law.[482]

[477] See Part I (Chapter One), section 1.2.3 (Assessing the Pre-emptive Effects of EU Legislation).
[478] In *Doc Morris*, the Court, by finding that a national prohibition on Internet sales of prescription medicines correctly implemented the EU standard, authorised a restriction on the free movement of such medicines (note 139).
[479] Ex. In *ATRAL*, note 115, the Court invoked *Tedeschi* to pre-empt Belgium's national approval system for alarms, thereby enforcing the integrative effect of the relevant directives at the expense of national regulatory standards.
[480] In *Messner*, note 376, the Court required the Member State to raise its level of regulatory protection, thereby pre-empting it from adopting lower standards. See also *Content Services*, note 374.
[481] In such cases, the Court considers the Rule not to apply (conditional effect), which might support the (national) regulatory goal at expense of market integration (*Van Bennekom*, note 186), or facilitate free movement (ex. *Commission v Italy (Chocolate)*, note 396).
[482] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, Oxford, Oxford University Press, 2013, p. 10.

1.1 Triggering the Exhaustion Rule

133. The Court's first step, when reviewing a national measure in the presence of potentially relevant EU legislation, is to determine its normative framework of reference by assessing whether or not the Exhaustion Rule applies. A positive response will generally imply a gain for EU competences at the expense of the national, as Member States are pre-empted from unilaterally regulating under Treaty-based discretion. As discussed in Part I, such pre-emption of national competences is necessary to ensure the integrative agenda of the internal market. Yet is also feeds concerns that national autonomy, and regulatory diversity more generally, could be undermined, with adverse effects on the division of competences and wider regulatory agenda.

134. The EU's response to this concern has been to accept that EU product rules can depart from the traditional ideal of total harmonisation and field pre-emption, for example, via less intensive regulatory options, such as minimum and optional rules, or by only partially harmonising – or not harmonising – the field.[483] The existence of such options can then prompt disputes over whether or not the Exhaustion Rule applies in a given case. An early example arose in *Van Bennekom*,[484] which challenged a Dutch prior authorisation procedure for vitamin preparations on grounds that such preparations did not necessarily constitute medicinal products under the Medicinal Products Directive.[485] According to the accused, the directive, by harmonising the rules for the marketing and use of medicines, barred the Netherlands from justifying its national procedure under Article 36.[486] The Commission, however, claimed that *Tedeschi* could not apply since the directive did not cover vitamins. A similar debate took place in *Gintec*,[487] which assessed whether EU rules for advertising medicines, laid down the Medicinal Products Code,[488] were 'exhaustive, with no leeway at all for the national legislature', or whether they instituted 'a minimum programme, leaving the Member States free to adopt other rules and tighter restrictions'.[489]

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[483] Contrast the EU's focus on self-regulation to regulate the marketing of certain foods, beverages and alcohol with its interventionist approach regarding tobacco advertising. For discussion, see A. Garde & M. Friant-Perrot, 'The Regulation of Marketing Practices for Tobacco, Alcohol Beverages and Foods High in Fat, Sugar and Salt – a Highly Fragmented Landscape', in A. Alemanno & A. Garde (eds.), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets'*, Cambridge, Cambridge University Press, 2014, pp. 68 – 93.
[484] *Van Bennekom*, note 186.
[485] Directive 65/65/EEC, *op. cit*.
[486] *Van Bennekom*, note 186, p. 3890, paragraphs 5 – 6.
[487] *Gintec*, note 138.
[488] Directive 2001/83/EC, *op. cit.*
[489] Opinion in *Gintec*, C-374/05, EU:C:2007:93, paragraph 22.

135. Such arguments, which are repeated in a many of the cases discussed in Chapter One, prevent the Court from presuming that the mere presence of EU legislation triggers the Exhaustion Rule. Indeed, to do so would revert back to the conceptualist-federalist ideology of the 1960s and 1970s.[490] Instead, and as discussed in Part I, the Court must assess whether the EU legislation is relevant and exhaustive – that is, that the matter comes within the regulatory scope of an EU measure that exhaustively regulates the field. It does this by looking at various factors, such as the wording of the EU legislation, as well as its objectives, context and general scheme.[491] In *Van Bennekom*, for example, the Court referred to the directive's preamble, objectives and wording to conclude that it had not fully harmonised the field, and that Member States retained national competence to regulate vitamin preparation substances that fell outside its scope.[492] A similar conclusion was reached in the cases discussed in Chapter One under 'conditional effect', where the Exhaustion Rule was found not to apply, because the relevant measure was not exhaustive,[493] and/or because it did not cover the matter at issue,[494] sometimes in contrast to Commission submissions.[495] In *Gintec*, the Court followed an equally nuanced approach to reach the opposite conclusion, that is, that the exhaustive nature of the Medicinal Products Code precluded Germany from prohibiting certain advertisements for medicines.[496]

136. This case-by-case evaluation can contribute to case-law coherence by prompting the Court to justify decisions to trigger the Rule, which could otherwise be interpreted as erroneously privileging one particular goal at the expense of the other.[497] In *DaimlerChrysler*, for example, the Court (and AG) gave a detailed explanation as to why Article 4 (2)(b) of the first Waste Shipment Regulation (WSR)[498] triggered the Rule, even though the provision also allowed Member States to object to shipments of waste 'in accordance with the Treaty'.[499] In

[490] See Part I (Chapter One), points 40 – 41.
[491] Part I (Chapter Two), points 205 – 217. See also J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit*., p. 112.
[492] *Van Bennekom*, note 186, p. 3891. See also *Delattre,* note 137 and *Commission v Austria (food supplements)*, note 189.
[493] Ex. *Denkavit Futtermittel,* note 10; *Grunert*, note 185; *Commission v Italy (Chocolate),* note 396; *Commission v Spain (Chocolate),* note 396 and *Commission v Germany (Waste Packaging)*, note 462.
[494] Ex. *Denkavit v Minister for Food*, *Agriculture & Forestry of North-Rhine-Westphalia*, note 79; *Commission v Germany (Garlic Capsules)*, note 137; *Nicholas Schrieber*, note 203; *SARPP*, note 297 and *RLvS*, C-391/12, note 405.
[495] Ex. *Prantl*, note 91 and *Toolex,* note 201.
[496] *Gintec*, note 138, paragraphs 17 – 33.
[497] On the importance of case-law coherence, see N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, *op. cit*.
[498] Regulation (EEC) No. 259/93*, op. cit*.
[499] *DaimlerChrysler*, note 424. See also Opinion in *DaimlerChrysler,* C-324/99, EU:C:2001:459.

doing so, they explicitly justified departing from the traditional understanding that such a Treaty reference would imply minimum harmonisation, with more stringent national measures reviewed by reference to primary law.[500] Specifically, and as outlined in Part I (Chapter Two), the Court took great care to assess and confirm that the WSR's objection procedure ensured compliance with Articles 34 – 35 TFEU, without needing to directly refer to the latter.[501] Reliance on the Exhaustion Rule did not, therefore, privilege the regulatory function of the WSR to the detriment of integration, but enabled respect for both concerns.[502]

137. In some cases, the parties accept that the EU measure has harmonised, or 'pre-empted' the field but dispute that the impugned national measure comes within its regulatory scope. In such cases, a finding that the EU measure does cover the matter in question will automatically oust or authorise the national rule. In *Delhaize Frères*, for example, the Court was asked to confirm whether or not a Belgian measure fell within the scope of the relevant directives. By responding affirmatively, the Court immediately resolved the matter, since the national court had implicitly accepted that Article 36 TFEU could not be relied upon to justify any measure covered by the EU rule.[503] Similarly, in *Antroposana*, the only point at issue was whether anthroposophic medicines came under Medicinal Product Code's definition of medicinal product 'by presentation'. Confirming that this was so disposed of the dispute, since those medicines could only be authorised in accordance with the harmonised authorisation procedure, and not via a fast-track national procedure.[504] In other cases, however, the Court, having triggered the Exhaustion Rule, must engage in a pre-emption analysis to assess whether the Member State has gone beyond, or remained within, what is authorised by the exhaustive EU legislative framework. In such cases, the question shifts from *whether* the Member State is pre-

[500] Ex in *Doc Morris*, the Court held that Article 14 (1) of the Distance Selling Directive did not 'obviate the need to ascertain whether the national prohibition at issue in the main proceedings is compatible with Articles 28 EC to 30 EC', since it authorised more stringent national measures with 'due regard to the Treaty'. (*Doc Morris*, note 139, paragraph 65). A similar finding was made in relation to Article 5 of Directive 94/62/EC, *op. cit*., (the Waste Packaging Directive), which mentioned the need for any additional national measures to be 'in conformity with the Treaty' and Article 26 of the Award of Public Contracts Directive allowed for special conditions 'provided that these are compatible with Community law' (Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L. 134, 30 April 2004, pp. 114 – 240).

[501] *DaimlerChrysler*, note 424.

[502] This can also be seen by Germany's unsuccessful attempt to rely on *DaimlerChrysler* to argue that Article 5 of the Waste Packaging Directive, *op. cit.*, also triggered the Exhaustion Rule. As with Article 4(2)(b) WSR, Article 5 had granted national regulatory to encourage reuse systems of packaging 'in conformity with the Treaty'. However, the Court explicitly distinguished its objective, content and nature from the WSR, before confirming that former constituted a grant of Treaty-based discretion. The German measure was, as a result, assessed under Articles 34 – 36 TFEU. See *Commission v Germany (Waste Packaging)*, note 462.

[503] *Delhaize Frères*, note 26. See also *Denkavit v Land-Nordrhein-Westfalen*, note 42 and *Van den Burg*, note 434.

[504] *Antroposana & Others*, note 161. See also *DaimlerChrysler,* note 424, question one.

empted to *the extent of* this pre-emptive effect. It can be seen in *Gintec*, for example, where the Court, having identified that the EU measure was exhaustive, relied exclusively on the latter to assess what exactly Germany could, and could not, do within its exhaustive regulatory framework.[505]

1.2 Applying the Exhaustion Rule

138. Strategic reliance on the Exhaustion Rule, by regulators and free movers alike, highlight its key role in resolving disputes. Still, it is the content of the EU legislation that ultimately determines the outcome – as evidenced when the Court specifically interprets the exhaustive EU measure to determine the lawfulness of the national rule. Mirroring its general approach to triggering the Rule, the Court, by and large, carries out this interpretative function in a manner that pays due respect to the legislator's intention. That its jurisprudence wavers between enforcing the various effects of EU legislation does not undermine this achievement, but rather reflects the varied content and pre-emptive effects of different EU measures, as well as the dual function of each legislative act. Indeed, based on the latter, the same piece of legislation can both preclude and authorise the impugned national measures, depending on the facts at issue. For example, while the Court interpreted the Cosmetics Directive as ousting protective national measures in *Clinique*, *Estée Lauder* and *Linhart*, (integrative effect),[506] it considered the same directive to authorise the national rule in *Roby Profumi* and *Schwarzkopf* (regulatory effect).[507] A similar varied approach can be observed with the Court's application of the Food Labelling and Waste Oil Directives, and the Waste Shipment Regulation, with national measures being struck down in *SARPP*, *Commission v Austria (Food Labelling)* and *Sterbenz*;[508] *Inter Huiles* and *Vanacker*;[509] and *DaimlerChyrsler* (questions one and two)[510] to enforce an integrative effect, while being upheld in *Bellamy*, *Lidl Italia* and *Müller*; [511] *ADBHU*; [512] and *DaimlerChrysler* (question one) to enforce its regulatory effect.

[505] *Gintec*, note 138. See also *DaimlerChrysler*, note 424, questions two and three.
[506] For references, see Chapter One, section 3.1.1.
[507] For references, see Chapter One, section 3.1.2
[508] For references, see Chapter One, section 3.1.1.
[509] For references, see Chapter One, section 3.2.1.
[510] *DaimlerChrysler*, note 424.
[511] For references, see Chapter One, section 3.1.2.
[512] *ADBHU*, note 446.

139. This concern with respecting the intention of the legislator can be specifically illustrated by exploring the Court's approach to one of the trickiest issues raised in the presence of harmonisation, that being, the extent to which secondary legislation can require – or authorise – a national measure to prevent the free movement of an import that has been lawfully manufactured in another Member State. This issue, while generally associated with minimum harmonisation, can also be relevant to exhaustive EU measures. For example, the latter might authorise a national derogation from the harmonised standard, without allowing the relevant product to enjoy free movement throughout the EU.[513] An illustration of this possibility, discussed in Chapter One, can be seen under the 2001 Tobacco Sales Directive,[514] which allowed Sweden to derogate from the generalised EU ban on the sale of tobacco for oral use, without allowing such tobacco to then move freely throughout the internal market.[515] Alternatively, exhaustive EU legislation, while ousting application of Articles 34 – 36 TFEU, could grant Member States a degree of regulatory discretion to prevent the free movement of goods that otherwise comply with the harmonised rule – as under Article 6 (2) of the Cosmetics Directive and Article 15 (2) of the first Food Labelling Directive, also discussed in Chapter One. A final example of an EU-authorised trade barrier emerges when EU legislation explicitly excludes the obligation of mutual recognition by requiring the importing Member State to subject a product to a national authorisation procedure before being marketed and sold on its territory, even if that product was lawfully sold in another Member State. Such a system is imposed, for example, on the sale of medicinal products under the Medicinal Products Code[516] and on plant protection products under the Plant Protection Directive.[517]

140. These practices can be justified by reference to the EU legislator's freedom to reconcile the goals of integration and regulation, in whatever manner it deems necessary. At the same time, the exercise of this freedom cannot result in a disproportionate incompatibility with the free movement of goods. As such, the question often posed to the Court is whether – and the extent to which – it can rely on the Exhaustion Rule in such cases to defend a national measure that could otherwise be subject to scrutiny under Articles 34 – 35 TFEU. To answer it, the Court may need to assess one or both of the following interlinked questions. First – can the product

[513] Ex. Article 11 (2) of Directive 91/629/EEC, *op. cit*.
[514] Directive 2001/37/EC*, op. cit.*
[515] See Part I (Chapter One), point 49.
[516] Directive 2004/27/EC, *op. cit.*
[517] Directive 91/414/EEC concerning the placing of plant protection products on the market, OJ L. 230, 19 August 1991, pp. 1 – 32.

lawfully manufactured or authorised in accordance with such deviation enjoy free movement throughout the Union? Second, can a Member State rely on an EU obligation – or authorisation – to restrict the free movement of goods that comply with that harmonised standard? Considering the case-law presented in Chapter One, the Court's approach might initially appear to be rather inconsistent.

141. In some cases, judicial reliance on the Exhaustion Rule ultimately hindered a lawfully produced good from enjoying free movement. Thus, in *Swedish Match*,[518] the Court interpreted the (exhaustive) directive as preventing Swedish *snus* from circulating freely outside Sweden, while finding, in *Doc Morris*,[519] that the Medicinal Products Code restricted the free movement of prescription medicines marketed in the Member State of export. A similar conclusion was reached in *Escalier & Bonnarel* with respect to the free movement of pesticides covered by the Plant Protection Directive.[520] In the Cosmetics and Food Labelling cases, the Court confirmed that Member States could, in principle, rely on an EU legislative provision to prevent the free movement of cosmetic products lawfully labelled and circulated in other Member States, even if many of the specific national measures were ultimately found to be disproportionate. In other cases, however, the Court's interpretation of the (exhaustive) EU measure confirmed that the goods could enjoy unhindered market access. In *Diageo*, for example, while the Pre-packaged Liquids Directive restricted the marketing of pre-packaged bottles with a volume of 0.071 litres to Ireland and the UK, the Court considered that such products should enjoy free movement throughout the EU.[521] It reached a similar conclusion in *Commission v Poland (Right-Hand Steering)* [522] with respect to cars with right-hand steering equipment. In the same vein, *Gallaher*[523] and *CIWF*[524] both found that higher national standards, while lawfully imposed on domestic production, could not restrict the free movement of products that complied with the lower EU legislative standard. Finally, in *Commission v Italy (Chocolate)*, the Court rejected Italy's attempt to rely on the Exhaustion Rule to prevent the free movement of chocolate manufactured in the UK, Ireland and Denmark using certain vegetable fats. Instead, it

[518] *Swedish Match*, note 168.
[519] *Doc Morris*, note 139.
[520] *Escalier & Bonnarel*, note 60. See also *Harpegnies*, C-400/96, EU:C:1998:414.
[521] *Diageo*, note 369.
[522] *Commission v Poland (Right-Hand Steering)*, note 129.
[523] *Gallaher*, note 173.
[524] *CIWF*, note 33.

considered that such chocolate fell outside the scope of the Chocolate Directive.[525] As a result, the Italian prohibition was examined and prohibited under Articles 34 and 36 TFEU.

142. Looking solely at these divergent findings could imply an inconsistent and intuitive judicial approach to determining where the balance lies between free trade and public interest protection, and between national and EU competences. In reality however, the conclusion in each case generally corresponded to the EU legislator's position on the matter, unless, as in *Diageo*, it considered this position to violate the free movement of goods. In *Swedish Match*, for instance, the Tobacco Sales Directive, while allowing Sweden to derogate from the ban on oral tobacco, did not include a market access clause for such products. As a result, Swedish *snus*, while lawfully manufactured in Sweden, could not be imported to the UK. Indeed, the Court could only have found otherwise had it first invalidated the directive itself, given that Article 8 had banned the sale of oral tobacco. Instead, by confirming that the directive, and in particular, Article 8, complied *inter alia* with Articles 34 – 35 TFEU, it automatically assured the lawfulness of the UK ban, which was based on that provision. Similarly, by confirming that prescription medicines could only be sold following *national* market authorisation, the Court was simply enforcing Articles 6 – 39 of the Medicinal Products Code, which require all medicinal products to obtain market authorisation from the relevant national authorities, according to the harmonised authorisation procedure, before being marketed on the territory of that Member State. The same system had been set up under the Plant Protection Directive, which, under Article 3 (1) 'and notwithstanding the rules of the EC Treaty relating to the free movement of goods' precluded plant protection product from being 'placed on the market and used in a Member State unless a prior marketing authorisation has been issued by the competent authority of that State in accordance with the Directive'.[526] The pre-emptive, and integrative, effect of the Steering Equipment Directive,[527] which the Court enforced in *Commission v Poland (Right-Hand Steering)*, was also rooted in an explicit legislative intention. Specifically, following the accession of Ireland and the UK to the EEC, Article 2(a) was incorporated to the directive to prevent any refusal of registration 'on grounds relating to (the) steering equipment)' once the vehicle satisfies other requirements. This expressed a specific legislative intention to allow left-hand drive vehicles to enjoy free movement, even if it incurred 'a certain risk

[525] Directive 73/241/EEC, *op. cit.*
[526] *Escalier & Bonnarel*, note 60, paragraph 24. See also *Harpegnies*, note 520, paragraph 26.
[527] Directive 70/311/EEC, *op. cit.*

connected with road traffic'.[528] Similarly, the Court in *Gallaher* and *CIWF* relied on explicit territorial restrictions on higher national standards in the relevant directives to conclude that they could not be imposed on imports.[529] In *Commission v Italy (Chocolate)*, the Court found that the use of certain vegetable fats in chocolate had not been 'regulated definitively' by the Chocolate Directive since Article 14 (2) granted Member States full discretion over the matter. As a result, Member States could rely on Articles 34 – 35 TFEU to ensure market access for chocolate manufactured according to national recipes. This finding may have been reinforced by the fact that the new 'second' Chocolate Directive, in force on the date of proceedings, provided that all Member States must recognise that chocolate containing up to 5% of vegetable fat other than cocoa mutter can be called 'chocolate'.[530]

143. These cases confirm that the Court is, in general, more concerned with enforcing the legislator's intention than promoting a subjective or arbitrary view on how to balance the varied interests at stake in the regulation of goods. The resulting deference is, however, subject to compliance with primary law, and for our purposes, the free movement of goods.

1.3 Respecting the Free Movement of Goods

144. We have emphasised throughout this research that the Exhaustion Rule should pose no barrier to the legislator's duty to respect the free movement of goods. Indeed, its compatibility with the hierarchy of norms has been a necessary pre-condition for the Rule's transformation into a systematic tool to guide the Court when resolving regulatory disputes. This compatibility can be seen in the case study just discussed, where the Court, while reflecting the legislative balance between different interests, also ensured that this balance did not facilitate an *unlawful* barrier to trade. For example, while acknowledging that Article 6 (2) of the Cosmetics Directive and Article 15 (1) of the first Food Labelling Directive granted a degree of national regulatory discretion *vis-à-vis* lawfully manufactured imports, it also subjected resulting measures to a strict proportionality test. In *Diageo*, it went even further, by striking down the provision in the Pre-packaged Liquids Directive that restricted the free movement of pre-packaged bottles with a volume of 0.071. In doing so, the Court emphasised that the presumption of constitutionality enjoyed by secondary measures, and generally protected under the Exhaustion Rule, would be

[528] *Commission v Poland (Right-Hand Steering)*, note 130, paragraphs 39 – 42.
[529] See, respectively, Directive 89/622/EEC, *op. cit.* and Directive 91/629/EEC, *op. cit.*
[530] Directive 2000/36/EC*, op. cit.*

rebutted where necessary. In other words, the Rule would not provide cover for the regulator to reinstate potential barriers to trade at EU level.

145. That said, the fact that the Exhaustion Rule ousts direct application of Articles 34 – 36 TFEU could imply an ambiguity in the relationship between primary and secondary law, which could pave the way for a strategic interpretation of EU legislation. Such cases betray an understanding, amongst certain parties, that the impugned national rule will be reviewed differently, depending on the norm of reference. Specifically, a free mover (often a trader and/or Commission), such as ATRAL or Van Bennekom,[531] seeks to invoke the Exhaustion Rule to oust Treaty-based discretion and restrict the scope for national action. Yet he argues *against* the Rule's application to avoid an exacting EU regulatory standard[532] or to subject a national rule to scrutiny under Articles 34 – 35 TFEU.[533] The inverse is true for the Member State/regulator.[534] In many cases, it argues against the Rule in order to maintain Treaty-based discretion to go beyond (or avoid[535]) the common provision. Thus, in *ATRAL* and *Van Bennekom*, the Member State responded to the free mover's claims by insisting that the Exhaustion Rule did not apply, and that its measure was justified under Article 36 / mandatory requirement, successfully in the former, but without success in the latter.[536] Yet in other cases, it sees the Rule as a means to avoid the Treaty as a norm of reference. For example, the Member State invoked the Rule in *Doc Morris* (successfully) and *Commission v Italy (Chocolate)* (without success) to defend its national measure as complying with the legislative standard, thus freeing it from review by reference to Articles 34 – 35 TFEU.[537]

146. This strategic reliance on the Exhaustion Rule stands to reason under the *Tedeschi* leg, which prevents Member States from relying on Treaty-based discretion to adopt national measures that deviate from the EU standard. It is more contentious *per se* with respect to the

[531] See *ATRAL*, note 115, paragraph 35 and *Van Bennekom*, note 186, p. 3890.
[532] See the position taken by Antroposana in *Antroposana & Others*, note 161, paragraph 29.
[533] See the position taken by DaimlerChrysler in *DaimlerChrysler*, note 424, paragraph 24.
[534] Private parties wishing to rely on national measures can also take this stance.
[535] See the stance taken by Austria, France and Finland in *Leitner*, note 380, paragraph 16.
[536] Ex. *Atral*, note 115, paragraph 36 and *Van Bennekom*, note 186, p. 3891. See also positions of Italy in *Commission v Italy (Sealed Heaters),* note 117, paragraphs 50 – 53; Poland in *Commission v Poland (Right-Hand Steering)*, note 130, paragraph 31; The Netherlands in *Wulro*, note 47, paragraph 10 and Germany in *Commission v Germany (Pyrotechnic Articles)*, note 117, paragraph 24. See also Member States' positions in the numerous cases on implementation of Article 6 (2) of the Cosmetics Directive (Directive 76/768/EEC, *op. cit.*), discussed *supra*, point 89 and in Part I (Chapter Two), points 182 – 183.
[537] *Doc Morris*, note 139 and *Commission v Italy (Chocolate)*, note 396. See also positions of the Netherlands in *Antroposana & Others*, note 161, of France in *ADBHU,* note 446, pp. 544 – 545 and of Germany in *Commission v Germany (Waste Packaging)*, note 462.

second leg, since EU secondary rules must, like national measures, comply with primary law. Still, as discussed in Part I, harmonising rules can legitimately alter the relationship between national law and the fundamental freedoms. First, national measures that comply with a harmonised standard no longer constitute a barrier to trade since the same standard is applied by all Member States; Second, given the ambiguity of the internal market, it is entirely appropriate that the Court would view with deference the balance set by the EU legislator between free movement and a particular public interest goal. In such circumstances, EU public interest rules, which represent EU-wide interests, can enjoy a robustness in the face of free movement rights, which is denied to unilateral national measures.[538] At the same time, and as mentioned, such deference cannot facilitate a *de facto* normative inversion between primary and secondary law. And as discussed in Part I, the Court generally avoids this risk by blocking national attempts to shirk free movement obligations,[539] 'defusing' the validity issue via consistent interpretation and, where necessary, reviewing the EU rule. This obligation can, as in *DaimlerChrysler*, contribute to case-law coherence by requiring the Court to explain why it interprets certain ambiguous legislative provisions in a certain way.[540]

147. Reflecting our conclusion in Part I, the Exhaustion Rule thus emerges as a constitutional compass for the Court to assess and resolve regulatory disputes, and distribute power, in the presence of secondary legislation. This observation must, however, be reconciled with certain difficulties regarding the Exhaustion Rule jurisprudence, which indicate that it could sometimes misguide the Court and lead it to stray from its mandate.

2. AN INCONSISTENT JUDICIAL APPROACH?

148. One initial goal of this research was to explore the reasons for, and consequences of, the Court's *ad hoc* reliance on the Exhaustion Rule, where it would sometimes rely exclusively on an exhaustive EU measure to assess the lawfulness of a national rule, while in other cases refer simultaneously to Articles 34 – 36 TFEU. As Part I explained, such inconsistencies, while a feature of the Court's early jurisprudence, have today given way to a more systematic reliance on the Exhaustion Rule. In this context, most case-law variations, whether to trigger the Rule or enforce different legislative provisions, are based on legitimate interpretations of ambiguous

[538] For discussion, see Part I (Chapter One), point 117. See also M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution,* Oxford-Portland Oregon, Hart Publishing, 1998, pp. 72 – 78.
[539] See ex. case-law discussed in Part II (Chapter One) under 'integrative effect'.
[540] *DaimlerChrysler*, note 424. See also *Inter Huiles*, *Commission v Council (Lomé Convention)* and *Bristol-Meyers Squibb*, discussed in Part I (Chapter One), points 94 – 95.

EU legal provisions. Yet in some cases, the Court can appear to deviate from this harmonious picture, in a way that cannot be readily explained by reference to the underlying EU measure, thus indicating an inconsistent – and incoherent - approach. This could happen, for example, if the Court triggered the Rule, notwithstanding the apparent existence of Treaty-based discretion and even though the same wording led to an Articles 34 – 36 assessment in another case. It could also arise when the Court interprets the (exhaustive) EU measure so as to enforce a particular effect, at the expense of another, without justification.

149. Before assessing such incidents in more detail, it should be mentioned that the Court's assessment of certain national measures may, at least in principle, remain unaffected by the application, or not, of the Exhaustion Rule. As a result, the fact that the Court takes an inconsistent approach to triggering the Exhaustion Rule may be inconsequential. This is particularly so when that national measure stems from an act of discretion, since such acts should always be reviewed, whether by reference to Articles 34 – 36 TFEU, in the absence of harmonisation, or an exhaustive legislative framework, under the Exhaustion Rule.[541] Thus, the Court can authorise that national rule, either by reference to the Treaty as in *Aher-Waggon*,[542]or by relying on the Exhaustion Rule as in *Danske Svineproducenter I*.[543] It may, equally, decide to strike down the national measure, again, whether by reference to the exhaustive EU legislation, as in *Linhart & Biffl*,[544] or Articles 34 – 36 TFEU, as in *Commission v Germany (Garlic Capsules)*.[545] In these cases, the fact that the Court relied on primary or secondary law as its norm of reference did not necessarily influence its conclusion.

150. In other cases, however, the Exhaustion Rule could have a decisive impact, for example by preventing Member States from justifying a unilateral trade rule (integrative effect) or by confirming the lawfulness of a national measure that correctly implements an EU standard, without reference to Articles 34 – 35 TFEU (regulatory effect). And it is this impact, or its potential, that often drives disputing parties to strategically invoke, or discard, the Rule, as discussed. The Court may also, in the presence of exhaustive rules, decide, without any adequate explanation, to review an impugned national measure with more or less intensity. In

[541] See ex. *Denkavit Futtermittel*, note 10, where the Court and AG both validated a German rule, even though the former classified it (wrongly, in the author's view) as an act of Treaty-based discretion, while the AG deemed it to constitute an act of legislation-based discretion and thus reviewable by reference to the directive.
[542] *Aher-Waggon*, note 461.
[543] *Danske Svineproducenter I*, note 63.
[544] *Linhart & Biffl*, note 314.
[545] *Commission v Germany (Garlic Capsules)*, note 137.

such cases, an inconsistent approach might not only cause legal uncertainty. It could also indicate arbitrary or unjustifiable judicial interpretation. These latter risks will be assessed by reference to specific case-law in section three and Part III of the research. First, however, this section outlines instances of apparently inconsistent or deviant case-law (2.1) and assesses whether and when such cases can be explained and justified (2.2).

2.1 Some 'Inconsistent' Court Judgements

151. Inconsistencies between cases mostly arise in the context of triggering the Rule, when the Court assesses the regulatory scope and/or character of potentially relevant EU legislation to determine whether to oust or directly apply Articles 34 – 36 TFEU (2.1.1). They are less obvious when the Court reviews the national measure by reference to the exhaustive legislative framework. Since decisions at this stage often turn on specific questions of interpretation, the main differential between cases is the Court's intensity of review, which is influenced, *inter alia*, by whether the national measure directly implements an EU legislative obligation or stems from an act of national discretion (2.1.2).

2.1.1 Triggering the Exhaustion Rule

152. As outlined in Part I (Chapter Two), the Court will only trigger the Exhaustion Rule if the matter at issue comes within the regulatory scope of an exhaustive EU measure. As also noted, the Court generally takes the same contextual and teleological approach to assessing both conditions, which often overlap in practice.

153. As regards the question of regulatory scope, the Court's approach can vary, depending on whether the EU legislation is presumed to cover the matter, or whether the Court specifically assesses that this is in fact the case. Indeed, as Weatherill observes, 'technical questions of interpretation carry significant constitutional consequence'. [546] A comparison between *Commission v Germany (Garlic Capsules)*[547] and *Antroposana & Others*[548] clearly illustrates this point. Specifically, and as discussed in Chapter One, both cases required the Court to assess the scope of the Medicinal Products Code to determine whether the substance at issue was to be subjected to the Code's strict authorisation procedure. In the former case, the Court

[546] S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', in P. Oliver, (ed.), *Oliver on Free Movement of Goods in the European Union*, *op. cit.,* pp. 427 – 486, at p. 485.
[547] *Commission v Germany (Garlic Capsules)*, note 137.
[548] *Antroposana & Others*, note 161.

considered the matter in detail, devoting over 30 paragraphs to establishing that garlic capsules did not come within the scope of the Medicinal Products Code.[549] As a result Germany's requirement to subject this product to a market authorisation was assessed – and struck down – under primary law. By contrast, no such assessment took place in *Antroposana*, with the Court simply presuming that anthroposophic medicines came within the scope of the Code. In doing so, it automatically validated the Dutch rule subjecting such medicines to the Code's obligatory authorisation procedure.

154. As for the question of regulatory character – that is, whether or not the EU measure institutes an exhaustive regulatory framework – a key issue is to determine whether a grant of discretion should be classified as 'Treaty-based', with national measures reviewed under Articles 34 – 35 TFEU, or 'legislation-based', which would trigger the Exhaustion Rule. As previously discussed, the Court generally responds to this question in a balanced and coherent manner, by grounding any decision in the wording of the EU legislation, as well as its objectives, context and general scheme – and by specifically justifying divergent case-law.[550] There are, however, some cases where its assessment appears inconsistent with previous case-law, without any concrete or convincing justification. Four examples are cited.

155. The first of these is *Van den Burg*,[551] where the Court read a territorial limitation into Article 14 of the Wild Birds Directive,[552] even though that provision, on its plain wording, simply allowed Member States to 'introduce stricter protective measures than those provided for under this directive'.[553] In doing so, it departed from its usual approach, which accepts that under general minimum harmonisation clauses, Member States can adopt higher regulatory standards with no such domestic restriction (i.e. Treaty-based discretion),[554] unless such a restriction is specifically laid down thereunder.[555] Article 14 thus transformed into a grant of legislation-based discretion, with national measures adopted thereunder reviewed by reference to the directive. Since this now included a territorial limitation, Member States could only rely on Article 14 to regulate species of birds on its territory, and were, under the *Tedeschi* Rule,

[549] *Commission v Germany (Garlic Capsules)*, note 137, paragraphs 43 – 78.
[550] See *DaimlerChrysler*, note 424, discussed at point 136.
[551] *Van den Burg,* note 434.
[552] Directive 79/409/EEC*, op. cit.*
[553] *Van den Burg*, note 434, paragraphs 8 and 9.
[554] Ex. *Buet,* note 391 and *A-Punkt*, note 308.
[555] Ex. Article 11(2) of Directive 91/629/EEC, *op. cit*., as interpreted in *CIWF*, note 33.

pre-empted from going beyond under Article 36 TFEU. As a result, the Dutch ban on importing 'red grouse' was found to be an unlawful and unjustifiable MEEQR.

156. A second example of an inconsistency in classification is illustrated by comparing the Court's interpretation of Article 7 of the Waste Packaging Directive,[556] with its approach to Article 6(2) of the Cosmetics Directive.[557] Both provisions required Member States to take 'necessary measures', in the former, to establish systems for the return/reuse of packaging, and in the latter, to prevent misleading statements on the labels of cosmetics products that had been lawfully marketed elsewhere. The Court, however, deemed in *Valev Visnapuu* that Article 7 granted *Treaty-based* discretion,[558] unlike its earlier finding that Article 6 (2) of the Cosmetic Directive constituted a grant of *legislation-based* discretion.[559] As a result, the Finnish measure in *Valev*, which was partially adopted under Article 7 of the Waste Packaging Directive, was assessed – and validated – by reference to Articles 110, 34 and 36 TFEU, while national measures adopted under Article 6 (2) of the Cosmetics Directive were reviewed, and generally struck down, under Exhaustion Rule. In reaching its decision in *Valev Visnapuu*, the Court noted the Waste Packaging Directive's dual environmental and integrative aim, before recalling that it had, in *Commission v Germany (Waste Packaging)*, classified Article 5 of the same directive as also granting Treaty-based discretion. Of particular relevance was the fact that Article 7, like Article 5 of the Waste Packaging Directive, specifically referred to the need for discretionary national measures to be 'in conformity with the Treaty'.[560] Yet, as discussed above in relation to *DaimlerChrysler*, this reference to the Treaty need not have been decisive in classifying Article 7 as a grant of Treaty-based discretion.[561] What is more, Article 5 merely allowed Member States to 'encourage reuse systems of packaging', in contrast to Article 7, which, as with Article 6 (2) of the Cosmetics Directive, *obliged* Member States to take the necessary national measures. Finally, the Court had previously found other provisions of the Waste Packaging Directive to trigger the Exhaustion Rule, thus confirming that the directive could house different degrees of harmonisation.[562] Against this backdrop, a more consistent

[556] Directive 94/62/EC, *op. cit.*
[557] Directive 76/768/EEC, *op. cit.*
[558] *Valev Visnapuu*, note 465, paragraphs 40 – 48.
[559] See Part III (Chapter One), point 31.
[560] *Valev Visnapuu*, 465, paragraphs 43 – 44. See also Opinion in *Valev Visnapuu*, C-198/94, EU:C:2015:463, paragraphs 68 – 75.
[561] *DaimlerChrysler*, note 424.
[562] Specifically, while the Waste Packaging Directive, *op. cit*., was found to completely harmonise rules on the essential requirements for waste packaging, it only instituted minimum rules for the establishment of environmentally-friendly waste packaging systems. See *Commission v Denmark (Waste Packaging),* note 428 and *Commission v Germany (Waste Packaging)*, note 462.

approach may have been to classify Article 7 as granting legislation-based discretion, and review the Finnish tax in line with the Exhaustion Rule.

157. A similar distinction can be observed by comparing *Aher-Waggon*[563] and *Danske Svineproducenter I*,[564] this time with interpreting the words 'at least'. In the former case, the Court classified Article 3 (1) of the Noise Emissions in Aircrafts Directive[565] as laying down minimum requirements under Treaty-based discretion since it required Member States to set noise limits that were *at least* equal to the applicable standards. Member States could, as a result, impose stricter national limits on imports, subject to compliance with the Treaty. However, in *Danske Svineproducenter I*, the Court considered as legislation-based discretion the leeway retained by Member States under the Animal Transport Directive,[566] with respect to the height of transport compartments. This was so, even though Article 3(1)(aa) required space allowances for animals to comply 'at least' with the figures laid down in the Annex. National measures that activated this discretion were, as a result, reviewed by reference to directive's objective, and the principle of proportionality, with no direct reference to the Treaty – thus – in line with the Exhaustion Rule.

158. A final case to consider is *EU Wood Trading*.[567] As we saw in Chapter One, this case challenged a German decision, which, relying on Article 7(4)(a) of the Waste Shipment Regulation (WSR), objected to shipments of waste to Italy for recovery, on grounds that lower Italian standards of recovery would endanger human health and the environment. The Court was asked whether authorities in the state of dispatch (Germany) could object to waste 'shipments' on grounds relating to recovery in the destination (Italy), and, if so, whether its non-harmonised 'higher' recovery standards could serve as the point of reference for such objections. By responding affirmatively to each question, the Court cast Article 7 (4) as a grant of legislation-based discretion and assessed the German objection, which impacted on the free movement of waste, by exclusive reference to the WSR. To this end, it subjected the German measure to a very light proportionality test – akin to the review of EU legislation. Specifically, while confirming that higher national recovery standards should be based on relevant scientific

[563] *Aher-Waggon*, note 461.
[564] *Danske Svineproducenter I*, note 63.
[565] Council Directive 83/206/EEC amending Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft, OJ L. 117, 4 May 1983, pp. 15 – 17.
[566] Directive 91/628/EEC*, op. cit.*
[567] *EU Wood Trading*, note 409.

considerations, the Court also insisted that a mere difference would not mean disproportion, and deferred to the national court for the final decision.

159. The Court's conclusion certainly contributes to a robust environmental and health protection regime, in line with the WSR's aims. In particular, by allowing Germany's standards of recovery to form the basis of its objection to waste shipments, the Court gave scope for these higher national standards to prevail throughout the EU. At the same time, the Court's reliance on the Exhaustion Rule to achieve this laudable result is not necessarily convincing, since the German standards, and the objection based thereunder – seem to have stemmed, not from legislation-based discretion, but from *Treaty*-based discretion. In particular, while Article 7 (4) WSR authorised Member States to object to shipments of waste, Article 7 (4)(a), which had been relied upon *in casu*, specified that any such objections were to be in accordance with Article 7 of the *Waste Directive*.[568] This latter provision, read with Article 4 of the Waste Directive, authorised national waste management system in accordance with Member States' appreciation of what constituted an environmental or health risk, subject to compliance with the Treaty. The resulting minimum harmonisation regime enabled different standards of waste management, including waste recovery, to coexist in the EU. It was in this context that a regulatory disparity between Germany and Italy's standards for recovery emerged, causing Germany to raise a low standards objection within the framework of the WSR. As such, while the (exhaustive) WSR authorised Germany to raise a low-standards objection on grounds relating to recovery in Italy, the fact that the German and Italian standards differed in the first place, causing a barrier to free movement, was due to action taken under a minimum harmonisation regime. Indeed, the Court stated as much by observing that national waste recovery standards may 'differ substantially from one State to another'[569] and that such divergence was 'inherent in the system established by the (WSR)'.[570]

160. Following this analysis, it seems that Article 7 (4)(a), which formed the basis of Germany's objection, did not fulfil the conditions to trigger the Exhaustion Rule. Specifically, it did not oust national Treaty-based discretion, since to do so would have prevented Germany from setting its higher standards in the first place. Nor could those national standards, which had been adopted unilaterally outside the WSR framework, enjoy a presumption of

[568] Directive 75/442/EEC, *op cit*.
[569] *EU Wood Trading*, note 409, paragraph 46.
[570] *Ibid.*, paragraph 48.

constitutionality. We would argue, therefore, that Germany's reliance on Article 7 (4)(a), which invoked such standards, constituted an act of Treaty-based discretion, and should have been reviewed under Articles 34 – 36 TFEU. Such a ruling would not have undermined the otherwise exhaustive character of the WSR, given that different degrees of harmonisation can coexist in the same legislative act.[571] The Court, however, did not take this approach, but instead decided to review (and ask the national court to review) the German measure exclusively by reference to the WSR, without any reference to the Treaty. In doing so, it appeared to shield national action taken under a minimum harmonisation directive from a Treaty review, on grounds that such action furthered an aim of an exhaustive 'framework' regulation.

161. We will return to this latter point in section three below, which explores whether reliance on the Exhaustion Rule could pose a risk to the free movement of goods. For now, suffice it to note that the judicial decision to trigger (or dis-apply) the Rule, while potentially impacting on the outcome of a case, does not always appear to be consistent. The question that follows is whether such apparent inconsistencies stem from the exercise of legitimate judicial discretion, or indicate a Court at the limits of its mandate. Before responding to this question, we first look at the Court's approach to review after the Rule has been triggered, that is, where it interprets the exhaustive legislative provision to assess the national rule – and determine the extent and consequences of its pre-emptive effect.

2.1.2 Assessing the National Rule

162. We noted earlier that in some cases, such as *Delhaize Frères* and *Van den Burg*, the only question for the Court is to establish whether or not the Exhaustion Rule applies. Such cases are generally associated with total harmonisation, which, by pre-empting the field, invalidates all 'additional' national measures coming within its regulatory scope, without having to assess the existence, or not, of a regulatory conflict. In other cases, the Court must interpret the EU measure and assess whether the national measure complies with or exceeds what is authorised thereunder. Its approach to this latter question is often influenced by whether the Member State must directly implement the EU standard, or whether it retains some national discretion.

[571] *Supra*, note 562.

163. Direct implementation is closely connected to the concept of 'rule pre-emption', discussed in Part I (Chapter One), which precludes Member State from regulating to the extent that this would directly conflict with a specific provision of the pre-empting EU measure. As such, the Court's interpretation of that provision, which is often linked to triggering the Exhaustion Rule, will automatically determine the lawfulness of a national measure – whether to validate it, as in *Doc Morris*, [572] or strike it down, as in *ATRAL*.[573] If the Court's approach varies, this can indicate an EU legislative ambiguity, which can be interpreted in a manner that is more or less favourable to the regulatory goal. This can be seen, for example, by comparing its restrictive interpretation of the term 'misleading advertising' in *Procureur de la Republique v X*,[574] which seemed to accept a degree of consumer confusion to facilitate free trade, with its more protective interpretation of 'damages' in *Leitner* as including a right to compensation for certain non-material damage.[575] Similar variations in the Court's assessment can be observed throughout the case-law surveyed in Chapter One.

164. A more complex picture emerges when the EU measure grants a degree of legislation-based discretion, since the Court must, in addition to interpreting the EU measure, determine whether the national act complies with the EU regulatory framework, often by reference to the proportionality test. In doing so, it engages in a sort of 'obstacle pre-emption' analysis, which, as discussed in Part I, precludes national action to the extent that this runs contrary to the objectives of the EU legislation. As also discussed, this review is often akin to an Article 34 – 36 assessment, which, as evidenced with certain consumer protection measures, might lead the Court to privilege the integrative effect of the EU rule and require adoption of the national measure that is least restrictive of trade.[576] In other cases, the Court's review of the national measure is more hands off, mirroring the proportionality assessment applied to secondary measures, and allowing scope for regulation that is not necessarily the least restrictive of trade. In such cases, the regulatory effect has more room to prevail, as in *ADBHU*, *Danske Svineproducenter I* and *EU Wood Trading*.

165. The Court's assessment in these cases can prompt judicial, academic and inter-institutional disagreement, which, in itself, reveals the subjective nature of balancing – or

[572] *Doc Morris*, note 139, paragraphs 52 – 54.
[573] *ATRAL*, note 115, paragraphs 47 – 53.
[574] *Procureur de la République v X*, note 315.
[575] *Leitner*, note 380.
[576] Part I (Chapter One), points 101 – 102.

reconciling – regulatory and integration goals. It is therefore appropriate, in this context, for the Court to defer to the legislator as being better placed to determine such matters, in line with the principle of pre-emption and presumption of constitutionality that underlie the Exhaustion Rule. And indeed, the previous section concluded that jurisprudential variations generally reflect legitimate differences between the content and objectives of EU measures at issue. However, the Court's approach to, and intensity of, review can also play a decisive role in its decision, particularly when faced with legislative ambiguities or a potential threat to primary law.

2.2 Explaining the Court's Approach

166. The Court, when interpreting EU law, must protect and further the Treaty's objectives and values. It has, to this end, various methods of interpretation at its disposal, including 'textualism, contextual interpretation and teleological interpretation'. [577] The first method, 'textualism', '(explains) what a normative text conveys by looking at the usual meaning of the words contained therein'.[578] Reflecting the principle of legal certainty, it helps the Court to align with the legislature's intention and avoid the accusations of overreach associated with Treaty interpretations. Yet, it is insufficient in the face of ambiguity, all the more given the Treaty's different linguistic versions and open-textured nature.[579] A Court that remains overly deferential to the legislative text or system could also allow the regulator to reinstate trade barriers through secondary law. As a result, and as outlined throughout the research, the Court often relies on the contextual and teleological approaches to both trigger the Exhaustion Rule[580] and interpret specific legislative provisions.[581] In doing so, it can ensure compliance with the fundamental freedoms, while also respecting the specificities of the case, in line with its judicial function. Still, the further the Court moves from textualism, the higher the risk of an inconsistent and legally uncertain jurisprudence. Reliance on the teleological approach could also allow an active Court to favour integration over diversity, or free movement over regulatory protection, in a manner that undermines institutional balance. Indeed, it is in this

[577] K. Lenaerts & J. A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *Columbia Journal of European Law*, vol. 20, no. 2, 2013 – 2014, pp. 3 – 61 at p. 1. This list, which the authors consider to constitute the 'classic methods of interpretation', is based on the judgement in *CILFIT*, Case 283/81, EU:C:1982:335.
[578] *Ibid.*, pp. 8 – 9.
[579] *Ibid.*, pp. 10 – 16.
[580] See General Introduction, point 49 and Part I (Chapter One), point 6.
[581] See the Court's interpretation of Article 5(1) of the first Food Labelling Directive (Directive 79/112/EEC, *op. cit.*), discussed in Part I (Chapter One), points 97 – 99. See also the Court's interpretative approach in *Belgische Petroleum Unie*, note 454.

context that reliance on the Exhaustion Rule could conceal what is in fact a judicial choice, behind the pretext of enforcing the legislator's intention. Given the Court's role as final arbiter of EU law, such an intrusive judicial approach can be a legitimate, and even necessary, means of ensuring balance. Yet such choices must be reasoned, justified and transparent. A frequent critique of the Court's interpretation of secondary legislation is not that it prioritises one interest over another, but 'rather because the values attached to those competing interests (are) concealed in an over-simplified judgement'.[582] We return to this point in Part III. For now, we focus on the elements that could legitimately influence the Court's interpretation of secondary legislation when triggering the Exhaustion Rule and assessing national measures thereunder. Section three then assesses when such reliance on the Rule could potentially undermine legitimate regulatory standards or allow national trade barriers to escape review.

2.2.1 The Regulatory Goal Pursued

167. The EU legislator often relies on Article 114 TFEU to achieve public policy goals. Indeed, it is often pushed to do so by the limited nature of certain sector-specific legal bases, which preclude harmonisation.[583] In this context, the Exhaustion Rule will most often be triggered by such Article 114 directives, with the Court sometimes relying on this legal basis to reinforce a finding of exhaustive regulation.[584] And yet the Exhaustion Rule is not *confined* to Article 114 TFEU. Rather, it can be activated by directives, and regulations, adopted under legal bases such as Article 192 TFEU (environmental protection)[585] and as part of the CAP.[586] By the same token, reliance on Article 114 TFEU, while indicative of exhaustive harmonisation, will not, on its own, *automatically* trigger the Exhaustion Rule.[587] To the contrary, directives based thereunder can sometimes institute minimum harmonisation, with scope for more stringent national rules. Moreover, the fact that directive is based on Article 114 TFEU says nothing about its substance, and whether a more, or less, protective (EU) standard should prevail.

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[582] S. Weatherill, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *op. cit.*, pp. 56 – 57. A similar critique has been made of the Court's jurisprudence relating to the rights of (inactive) EU citizens and postal workers. See Part I (Chapter One), point 58.
[583] See Article 169 (4) TFEU (consumer protection) and Article 168 (5) TFEU (public health).
[584] Ex. *Cindu Chemicals & Others*, note 152, paragraphs 41 – 43 and *Gintec,* note 138, paragraph 19.
[585] Ex. Directive 91/628/EEC, *op. cit*.
[586] Ex. Regulation (EEC) No. 259/93, *op. cit*.
[587] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, Chapter 15.

168. A related factor to influence the Court's 'Exhaustion Rule' jurisprudence could be the *nature* of the regulatory goal, whether or not pursued in an Article 114 directive. Indeed, looking specifically at the 'inconsistent' case-law samples discussed, it seems that the Court could be more likely to trigger the Exhaustion Rule and/or favour the integration goal when interpreting certain consumer protection or CAP legislation, while being more accepting of high and/or diverse regulatory standards when interpreting environmental protection, health protection and IP measures. For example, it triggered the Rule to favour an integrative effect in much of the case-law interpreting the Cosmetics and Food Labelling Directives, as well as the interpretation of consumer-related concepts such as 'misleading advertising'. In *Danske Svineproducenter I*, it also accepted to trigger the Exhaustion Rule, notwithstanding the reference to the term 'at least' in the relevant directive. In contrast, the Court appeared more ready to favour the regulatory goal when considering environmental or IP protection measures, either by casting a grant of discretion as Treaty-based and justified / justifiable under Article 36 TFEU, as in *Valev Visnapuu* and *Aher Waggon*, or as legislation-based and free from direct scrutiny under Articles 34 – 35 TFEU, as in *ADBHU*, *EU Wood Trading* and *Opus Supplies*.

169. Given the small sample of cases surveyed, the fact that sectors often overlap[588] and the evolution of regulatory concerns over time,[589] it would be inappropriate to conclude that the Court is more or less sympathetic to a particular goal when interpreting EU legislation. What is more, our case-law review specifically highlights that the regulation/integration dynamic may be as likely to change between measures in the same sector and even within the same measure,[590] as between sectors. Indeed, in all of the sectors discussed, the Court relied on the Exhaustion Rule to favour both an integrative or regulatory effect. This stands to reason given the dual function of internal market measures, the fact that such measures can pursue a regulatory goal as a decisive objective,[591] and the need for sector-specific EU rules to comply with the economic freedoms.[592] Still, the very possibility that some such inconsistencies could be explained by reference to the sector at issue requires us to at least consider whether this factor *could* justify the Court's differentiated approach, at least in some cases.

[588] See Introduction to Part II (Chapter One), point 5.
[589] This is particularly the case with EU consumer protection measures. See *infra*, point 179.
[590] *Supra*, point 138.
[591] Opinion in *Germany v European Council and Parliament*, C-376/98, EU:C:2000:324, paragraph 66.
[592] In *DaimlerChrysler*, for example, the Court's response to questions two and three supported the integrative effect of the WSR at the expense of stricter national rules. See *DaimlerChrysler*, note 424.

170. The sector covered by a legislative measure is clearly linked to its objective (which is linked to the legal basis), and thus the intention of the legislator. Yet this, on its own, does not always explain why the Court might differentiate *between* sectors in considering the public interest being pursued. For this, we first explore whether the broader legal regime could reflect a particular understanding as to how that sector should be regulated. This exercise could explain why the Court, when faced with a legislative ambiguity, might be more likely to trigger the Exhaustion Rule and/or favour the integration goal in the presence of consumer protection or CAP legislation, while its interpretation of environmental protection, health protection and IP measures appears more tolerant of the regulatory goal and, where necessary, regulatory diversity.

171. In the case of CAP measures, for example, the relevant rule is often part of a wider common organisation of the market, which values integration, free movement and uniformity over regulatory diversity and welfare protection. [593] The Court may, as a result, be more likely to trigger the *Tedeschi* Rule to pursue an integrative goal, over Treaty-based discretion and regulatory diversity. Dougan makes this point in his analysis of *CIWF* and *Hedley Lomas*, where he states that 'where minimum harmonisation occurs within a common organisation of the market, the Community legislature must implicitly have conceived of its potential impact in the least economically disruptive terms possible and to have viewed the attainment of the relevant welfare imperatives as a goal entrusted primarily to the Community rather than the Member States'.[594]

172. A similar approach can be detected in the context of *certain* consumer protection rules. Indeed, while such measures have traditionally included a minimum harmonisation clause, this has not been the case with the harmonisation of specific products, such as food, shoes and cosmetics, and practices, such as labelling, as well as directives adopted under the new approach to harmonisation. Such measures can, as such, trigger the Exhaustion Rule. As noted in Chapter One, consumer protection measures are usually adopted in tandem with market integration goals under Article 114 TFEU and often contain a market access clause. This is because Article 169 TFEU, while recognising the need to ensure a high level of consumer protection, provides limited scope for EU regulation in practice. In terms of content, consumer protection measures,

[593] M. Dougan 'Minimum Harmonisation and the Internal Market', *Common Market Law Review*, vol. 37, no. 4, 2000, pp. 853-885 at pp. 875 – 878.
[594] *Ibid.*

adopted under Article 114 TFEU, have traditionally focused on creating informed, autonomous consumers, while also facilitating choice. In this context, 'labelling' is considered as the least trade restrictive means of protecting the consumer, while the 'average consumer', is considered to be reasonably well informed and circumspect.[595] This legislative approach reflects that of the Court, which noted in *Cassis de Dijon* that 'it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products'.[596] It could also explain the Court's readiness to invalidate national measures for exceeding the harmonised standards in the Cosmetics and Food Labelling Directives, as well as its faith in the average consumer, when interpreting notions such as 'misleading statements', 'misleading advertising' and 'comparative advertising', discussed in Chapter One. In many such cases, the Court seemed more concerned with protecting business opportunities and facilitating consumer choice, than protecting the consumer or reducing confusion.[597]

173. The more welfare oriented, perspective detected in some environmental or IP measures may, again, reflect the status of these goals in the Treaty. As regards the former, the EU enjoys, under the Environment Title XX, a more comprehensive self-standing competence to act than with consumer protection, including the possibility to adopt harmonising measures under Article 192 TFEU. Thus, while such measures must comply with the Treaty, including free movement, they are not subservient – or subject to the need – to achieve this latter goal.[598] Moreover, by accepting to adopt more stringent national measures, even in the presence of exhaustive EU rules, Article 193 TFEU expresses a tolerance – and even a desire – for a degree of regulatory diversity in this field.[599] Indeed, as Jans & Vedder note, EU environmental measures increasingly exclude any explicit reference to a minimum harmonisation clause on this basis.[600] Together with Article 114(3) TFEU, various mainstreaming provisions and other crosscutting provisions, this Title ensures that environmental protection (and sustainable development) enjoys a 'prominent place' as an EU objective, as reflected in the TEU Preamble

[595] *Springenheide & Tusky*, C-210/96, EU:C:1998:369, paragraph 37 and, more recently, *Queso Manchego*, C-614/17, EU:C:2019:344. The conception of the average consumer has, however, evolved, particularly as certain consumer protection directives, such as Council Directive 93/13/EC, *op. cit.*, impose a more protective standard than what persists in the absence of harmonisation. See V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights' Directive', *European Review of Private Law*, vol. 1, 2011, pp. 25 – 42.
[596] *Cassis de Dijon*, note 264, paragraph 13.
[597] For discussion, see S. Weatherill, *EU Consumer Law and Policy*, *op. cit.*, Chapter 3.
[598] Ex. *European Parliament v Council (Waste Shipment)*, note 452.
[599] See Part I (Chapter Two), points 256 – 260.
[600] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.*, p. 110.

and under Article 3 TEU.[601] This prominence is not just for EU measures adopted under Article 192 TFEU, but can also influence the interpretation of Article 114 Directives. For example, it may have played a role in the Court's decision to classify Article 7 of the Waste Packaging Directive as granting of Treaty-based discretion, in contrast to its interpretation of Article 6(2) of the Cosmetics Directive.

174. As for IP protection, we noted in Chapter One that secondary legislation in this field can, as with other sectors, trigger the Exhaustion Rule. Still, the volume of such legislation remains limited, with national law continuing to dominate the sector.[602] This dynamic could be influenced by 345 TFEU, which explicitly prevents the Treaties from prejudicing the rules in Member States governing the system of property ownership. Indeed, while EU legislation in this field is expanding, it largely focuses on codifying the Court's jurisprudence and remains, in general, protective of IPRs.[603] Considering this background, it is perhaps unsurprising that the Court is often 'wary of interfering with property rights more than is necessary'.[604] This approach can be seen, for example, through its intolerance of any possible confusion between trademarks,[605] in contrast to its dismissal of such concerns in cases such as *Clinique*[606] and *Procureur de la Republique v X*.[607] It may also explain the Court's deferential judgement in *Opus Supplies*, discussed in detail section 3.2 below.

175. Finally, the Court is also, generally, accepting of health protection measures, as it defers to the EU legislative standard – and national measures adopted thereunder - once the former complies with the conditions to invoke Article 114 TFEU.[608] In this context, the Court fully accepts that the legislator may take a precautionary approach,[609] and that it can adapt standards,

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[601] *Ibid.*, p. 11.
[602] See Part II (Chapter One), section 2.2 (Protecting Intellectual Property Rights).
[603] *Ibid*.
[604] C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* p. 328.
[605] Ex. *Terrapin v Terranova,* note 212; *Hag II,* note 212 and *Deutsche Renault*, note 236.
[606] *Clinique*, note 340. For discussion, see C. Stothers, 'Article 36 TFEU: Intellectual Property', *op. cit.,* p. 329.
[607] *Procureur de la République v X*, note 315.
[608] This approach is evident in the case-law assessing the EU's tobacco regime. Ex. *Gallaher*, note 173; *Philip Morris*, note 174; *Germany v European Council & Parliament*, C-380/03, EU:C:2006:772 (*Tobacco Advertising II*); *BAT*, C-491/01, EU:C:2002:741; *Swedish Match*, note 168; *Arnold André*, note 168 and *Poland v Parliament and Council (Flavoured Tobacco)*, C-358/14, EU:C:2016:323. In this context, many commentators consider *Tobacco Advertising I* as exceptional. See ex. S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 173 – 175 and D. Wyatt, 'The Community Competence to Regulate the Internal Market', *op. cit.*
[609] *Alliance for Natural Health*, Joined Cases 154/04 & 155/04, EU:C:2005:449, paragraph 68 & case-law cited. This approach is further supported by the 'precautionary principle', which can justify action to prevent damage, despite the absence of a causal link on the basis of scientific evidence. While the Treaty only mentions this principle in relation to the environment, the Commission considers its scope to be wider in practice. Specifically, the principle may be applicable 'where preliminary objective scientific evaluation, indicates that there are

not only in line with scientific progress, but also considering political and social developments.[610]

176. In sum, therefore, the sectoral context and/or legal basis of an EU measure will not always influence, or determine, the Court's interpretative approach, when deciding to trigger the Exhaustion Rule or assess whether to privilege a regulatory or integrative goal. However, it could provide a clue as to why the Court takes an apparently inconsistent approach to these questions in different cases. At the same time, both the approach to protecting various public interest goals and the relationship between the Member States and the EU can evolve over time, which can alter the sectoral comparison just outlined.

2.2.2 The Question of Time

177. As discussed in Part I (Chapter Two), the question of time can impact on the Court's assessment of whether the EU measure in question is relevant to the dispute. However, time will also influence the scope and import of a particular public interest goal, which can, in turn, feed into the Court's interpretative approach. In this regard, an evolution in the understanding of, and necessity to, protect such goals can be observed, for example, with the regulation of lifestyle risks,[611] animal welfare,[612] food supplements[613] and certain consumer protection matters.[614] Where these trends translate into EU policy, reliance on the Exhaustion Rule to pursue market integration might, in fact, imply a higher level of protection, as it ousts national measures that seek to lower the exhaustive EU regulatory standard.[615] Reflecting Schütze's thesis that the EU and its Member States increasingly 'work together as complementary parts in a shared legal sphere',[616] both levels of government are also more likely to take the same line

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reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community'. See Commission Communication on the Precautionary Principle, COM (2000), 1 final at p. 2. See also *Gowan*, C-77/09, EU:C:2010:803, paragraph 76.

[610] *BAT*, note 608, paragraph 80.

[611] For discussion of this relatively recent concern, see various contributions in A. Alemanno & A. Garde (eds.), *Regulating Lifestyle Risks*, *op. cit.*

[612] Compare, for example, the Court's ruling, and underlying legislative emphasis, in *Danske Svineproducenter I*, note 63 with its earlier approach in *Wulro*, note 47 and *Commission v Germany (Animal Feed)*, note 40.

[613] Ex. Directive 2002/46/EC (The Food Supplements Directive*, op. cit.*) was adopted following several successful cases against national regulation on vitamins in food, including *Commission* v *Denmark (Food Supplements)*, note 197 and *Commission* v *France (Food Supplements)*, note 196. The Court then confirmed the validity of the directive in *Alliance for Natural Health & Others*, note 609.

[614] *Infra*, point 179 and citations.

[615] See *supra*, note 719 for references.

[616] R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* p. 346.

in defending the EU regulatory standard and implementing national measure, against a challenge brought by a trader or other private actor.[617] Such trends can be observed in the regulation of the CAP and consumer protection.

178. The case-law review in Chapter One outlines how Member States, in the early CAP years, frequently sought to justify national agricultural rules by questioning the adequacy of the Community regulatory standard and/or the capacity of such rules to pre-empt national competence.[618] Such disputes highlight the distrust that existed with respect to Community intervention at the time. This was articulated in *Commission v Germany (Animal Feed)*, where Germany (unsuccessfully) questioned the validity of *Tedeschi* itself by arguing that Community law encroaching on national sovereignty should be interpreted proportionately to minimise intervention even in the presence of exhaustively harmonising rules.[619] However, the Court, in dismissing such arguments, invoked the pre-emption principle to favour the Community rule over the national, regardless of the standard set thereunder. Where the Court found that national regulatory competence persisted, notwithstanding the presence of certain Community rules, this was often because harmonisation was in its first stages[620] or silent on the matter,[621] or because the Commission had not (yet) taken the necessary action[622] – and not because of an explicit, positive Community decision to leave certain matters to the Member State. Such regulatory clashes between national and EU law, including the free movement of goods, still arise today.[623] Yet Member States seem less likely to overtly extend or go beyond clear EU legislative obligations, or to explicitly challenge their pre-emptive effect. Indeed, a cursory search on the CURIA database of judgments delivered between 2008 and 2019 in the field of agriculture indicates that more recent disputes tend to focus on clarifying the interpretation of EU measures, for example governing the single payment scheme,[624] geographical indications[625] and European Agricultural Guidance and Guarantee Fund,[626] as opposed to challenging national attempts to unilaterally regulate the field. It also appears increasingly common for the national regulator to

[617] See notes 627 and 639.
[618] See R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* pp. 230 – 237.
[619] *Commission v Germany (Animal Feed)*, note 40, paragraph 9, point (a).
[620] Ex. *Van Bennekom*, note 186.
[621] Ex. *Amsterdam Bulb*, note 18.
[622] Ex. *Prantl*, note 91; *Hahn*, note 95 and *Forest & Others*, note 88.
[623] Ex. *Mac*, C-108/13, EU:C:2014:2346, *Danske Svineproducenter II*, note 51, *Marc Janssens & Others*, Joined Cases C-42/10, C-45/10 & C-57/10, EU:C:2011:253 and *Ulf Hammarsten*, note 49. See also *Queisser Pharma*, C-282/15, EU:C:2017:26 and *Kødbranchens Fællesråd*, C-112/15, EU:C:2016:185.
[624] Ex. *Jan Theodorus Arts*, C-227/16, EU:C:2017:842.
[625] Ex. *Viiniverla Oy*, C-75/15, EU:C:2016:35.
[626] Ex. *ZS 'Ezernieki'*, C-273/19, EU:C:2016:364.

defend the EU standard against the trader,[627] who often (and with limited success) attacks that standard as violating general principles of EU law and/or fundamental rights.[628] This evolution not only indicates that Member States are more accepting of the pre-emptive effects of exhaustive CAP rules. It also highlights a more nuanced EU regulatory approach, where secondary rules take an increasingly protective stance,[629] while also explicitly moving to a more collaborate regulatory regime.[630] The Court can, in such cases, rely on the Exhaustion Rule to validate protective national measures either as directly implementing the protective EU measure,[631] or as constituting the lawful exercise of legislation-based discretion.[632]

179. Similar trends can be seen in the context of consumer protection. On the one hand, the Court accepts that national courts, when considering the position of the 'average consumer', can take into account social, cultural and linguistic features.[633] On the other, the EU's early focus on ensuring private autonomy has increasingly given way to a more protective legislative approach, which goes beyond information provision to regulating the actual terms of the bargain and requiring the Member States to raise their regulatory standards.[634] Indeed, Micklitz & Reich specifically highlight this trend in the Court's interpretation of the Unfair Contract Terms Directive.[635] It is also reflected by AG Tizzano, who suggests that an ambiguous term

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[627] Ex. *Gowan,* note 609; *Pesce & Others*, Joined Cases C-78-79/16, EU:C:2016:428; *Doux*, C-141/15, EU:C:2017:188; *Lidl*, C-134/15, EU:C:2016:498; *Saint Louis Sucre*, C-96/15, EU:C:2016:450; *SFIR,* C-187/12, EU:C:2013:737; *Herbert Schaible,* C-101/12, EU:C:2013:661 and *Argo Kalda Mardi talu*, C-435/17, EU:C:2018:637.

[628] *Ibid*. Although in some cases the trader seeks to rely on EU agricultural rules to promote a more protective regime than that suggested by the national regulator. See *Œuvre d'assistance aux bêtes d'abattoirs*, C-497/17, EU:C:2019:137.

[629] *Ibid*. See also EU rules on transporting animals, as interpreted in *Masterrind*, C-469/14, EU:C:2016:609; *Zuchtvieh-Export*, C-424/13, EU:C:2015:259 and *Danske Svineproducenter I & II*, notes 63 and 51.

[630] Schütze considers, for example, that the shift from price to producer support since the MacSharry reforms has triggered a more cooperate form of federalism. See R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.,* pp. 230 – 237. Cooperation can also be seen in the degree to which EU CAP rules, and related food legislation, grant legislation-based discretion to the Member States. For citations, see *infra*, note 632.

[631] Ex. *Lidl*, C-134/15, EU:C:2016:498.

[632] Ex. *Danske Svineproducenter I & II*, notes 63 and 51; *Pontini*, note 63 and *Cypra*, C-402/13, EU:C:2014:2333. See also *Fidenato & Others*, C-111/16, EU:C:2017:676, which found that while the Commission was not obliged to adopt emergency measures to protect food safety in response to a Member State request under Article 53 of Regulation (EC) No. 178/2002 (the Foodcode), *op. cit.*, Member States could maintain such protective measures at national level under Article 54, once the Commission was informed and had not made a decision to the contrary.

[633] See ex. *Wind Tre*, Joined Cases C-54/17 and C-55/17, EU:C:2018:710, paragraph 51 and *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 22.

[634] See Part II (Chapter One), points 96 – 97. See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 160 – 162. This approach, which is accepted by the Court, reflects the fact that 'the protection of consumers — who are in a weaker position in relation to sellers or suppliers, inasmuch as they must be deemed to be less informed, economically weaker and legally less experienced than the opposite party — is enshrined in Article 169 TFEU and Article 38 of the Charter of Fundamental Rights of the European Union'. See *Slewo*, C-681/17, EU:C:2019:255, paragraph 32 and cases cited thereunder.

[635] H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*.

or concept in a consumer protection measure must be 'interpreted in the manner most favourable to the person whom they are intended to protect, namely the consumer'.[636] Some commentators have, in this context, observed a widening gap between the Court's 'trade-oriented and liberal' review of national consumer protection measures and its 'consumer-friendly' interpretation of secondary rules, where 'even the most nonchalant consumer can claim protection'.[637] This 'double-headed approach' both amplifies the 'regulatory and interventionist potential' of the latter and increases potential restrictions on trade.[638] In this context, as with the CAP, the EU and national regulator often jointly defend protective EU standards against traders and other private parties.[639]

180. Finally, time can play a role when it comes to the specificity of the Court's rulings, which, in response to an increasing number of references, progressively replace general or uncertain interpretations with concrete standards.[640] While not bearing directly or explicitly on triggering the Exhaustion Rule, we will see in Part III that such increased specificity may, in practice, leave less regulatory discretion to the Member States.[641] This evolution can be observed in the Court's interpretation of the Unfair Contract Terms Directive (UCTD),[642] which has almost eliminated the scope for national discretion to determine what could constitute an unfair term.[643] It could also help explain the Court's robust application of the Rule to assess national measures adopted under Article 7 of the Trademarks Directive, when compared to its initial hesitancy in considering Article 6 (2) of the Cosmetics Directive.[644] As discussed in Part I (Chapter Two), the Court had, in the absence of harmonisation, extensively considered the questions asked to it in relation to the Trademarks Directive (that being, the exhaustion of IP rights), and could, as a result, rely on the Exhaustion Rule to consistently interpret that directive by reference to this earlier jurisprudence. In contrast, its interpretation of the Cosmetics Directive related to the more novel and uncertain notion of 'misleading advertising' and was

[636] *Leitner*, note 380, paragraph 26.
[637] V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights' Directive', *op. cit*., pp. 29 – 30. See ex. *Centro Móvil*, C-168/05, EU:C:2006:675. See also Ex. *Content Services*, note 374; *Messner*, note 376; *Heinrich Heine*, note 377; *Heininger*, note 378; *Schulte*, note 378; *Leitner*, note 380 and *Club Tour*, note 380.
[638] H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, p. 1282.
[639] Ex. *Deutsches Weintor*, note 361 and *Neptune Distribution*, note 361.
[640] T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction', *International Journal of Constitutional Law*, 2011, vol. 9, no. 3 – 4, pp. 751 – 752.
[641] *Ibid*. See also Part III (Chapter Two).
[642] Directive 93/13/EEC, *op. cit*.
[643] H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*.
[644] For discussion, see Part I (Chapter Two), point 226.

less amenable to the dis-application of primary law. In this latter context, the Court was more inclined to rely directly on Article 34 TFEU, notwithstanding the exhaustive nature of the directive.

2.2.3 Other Influencing Factors

181. In addition to the regulatory goal pursued by EU legislation, as adjusted over time, other factors that could influence the Court's interpretation of secondary legislation include the category of the EU legal act,[645] the political context,[646] the decision-making procedure followed by the EU legislator,[647] the question(s) asked to the Court, whether this question has arrived by way of a Commission infringement or preliminary reference procedure[648] and the structure of the Court.[649] As noted in Part I (Chapter Two), such factors might help to steer the Court's decision to trigger, or not, the Rule and interpret specific legislative provisions, yet without any one being determinative.[650]

182. A further influencing factor relates to a key advantage of the pre-emption principle. As discussed in Part I (Chapter One), this principle directs the Court to resolve regulatory conflicts by analysing national law in light of EU secondary law.[651] In doing so, the Court can avoid the, potentially, more far-reaching and long-lasting effects of unnecessary or controversial Treaty interpretations. *Van den Burg* could be read in this light. Considering our analysis of how the

[645] Ex. In arguing that Article 5 of the Waste Packaging Directive triggered the Exhaustion Rule, Germany referred to the Court's finding in *DaimlerChrysler* in relation to Article 4 (3)(a)i WSR However, in disagreeing with Germany, AG Colomer distinguished the WSR by, *inter alia*, pointing out it concerned a regulation, which was, by definition, more specific than a directive and directly applicable in its entirety. See Opinion in *Commission v Germany (Waste Packaging)*, C-463/01, EU:C:2004:290, paragraph 37.

[646] Ex. The Court's decision to interpret Article 5 (1) of the first Food Labelling Directive in line with *Cassis de Dijon* was probably reinforced by the fact that the latter decision had been embraced by the Community political class. For discussion, see Part I (Chapter One), point 99.

[647] In distinguishing the Court's consumer-oriented approach in *Berger*, note 356 with its free movement emphasis in *A.G.M-COS.MET*, note 118, Purnhagen notes, *inter alia*, that the directive at issue in the latter, being adopted under the new approach to harmonisation, aimed to harmonise safety requirements and facilitate free trade. He then contrasts this with the Foodcode, at issue in *Berger*, which was adopted under ex. Articles 37, 95, 133 and 152 (4)(b) EC and had a more social justice and protective focus. See K. Purnhagen, 'Beyond Threats to Health: May consumers' Interests in Safety Trump Fundamental Freedoms in Information on Foodstuffs? Reflections on Berger v Freistaat Bayern', *European Law Review*, vol. 38, no. 5, 2013, pp. 711 – 719.

[648] This latter factor may have influenced the Court's different assessment of the regulatory scope of the Medicinal Products Code in *Commission v Germany (Garlic Capsules)* and *Antroposana*, discussed *supra*, point 153.

[649] For an analysis of how the 'unorthodox structure, jurisdiction and formations' of the Court can impact on the coherence of its case-law, see N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., pp. 54 – 62. See also L. Woods, 'Consistency in the Chambers of the ECJ: A Case Study on the Free Movement of Goods', *Civil Justice Quarterly*, vol. 31, no. 1, 2012, pp. 339 – 367 at pp. 360 – 362 and M. Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?, *Cambridge Yearbook of European Legal Studies*, vol. 10, 2008, pp. 1 – 34 at pp. 28 – 29.

[650] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit*., p. 112.

[651] See Part I (Chapter One), section 1 (The Pre-emption Principle).

EU approaches environmental protection in subsection (2.2.1), *Van den Burg*'s interpretation the Wild Birds Directive to favour an integrative aim at the expense of such protection stands as an outlier. This could, on the one hand, have simply stemmed from poor judgement, without expressing any authority for the interpretation of minimum harmonisation clauses more generally.[652] Yet the Court may, on the other hand, have been implicitly seeking to avoid an interpretation of Article 36. Indeed, had Article 14 of the Wild Birds Directive been deemed to constitute a grant of Treaty-based discretion, the Court would have had to pronounce on whether Member States could rely on Article 36 TFEU to adopt measures with extra-territorial effect. Taking this alternative approach, the AG to the case, AG Gerven, considered that the directive was not exhaustive and assessed the Dutch measure under Articles 34 – 36 TFEU. [653] As regards the question of extra-territoriality, he disputed that Article 36 could be used to protect animal life outside national territory, finding such an interpretation to be 'difficult to reconcile with the principle of mutual confidence between the Member States'.[654] Nonetheless, assuming that Article 36 TFEU could be used for such a purpose, the AG assessed the lawfulness of the Dutch measure and found it to be disproportionate, unnecessary, and unjustified. By invoking the *Tedeschi* leg, however, the Court restricted its judgement to an analysis of the directive and avoided having to pronounce on this tricky issue. *Hedley Lomas* and *CIWF* reveal a similar approach, as each case found the relevant legislative framework to pre-empt the UK from relying on Article 36 TFEU to justify extra-territorial restrictions on the export of live animals. Mirroring *Van den Burg*, the Court, by triggering *Tedeschi*, simultaneously avoided an assessment of whether Article 36 TFEU could cover such extra-territorial national restrictions in the first place.[655]

183. Such observations confirm our earlier conclusion, which is that the Court, when assessing a national measure in the presence of a potentially relevant EU product rule, generally aims to reflect the legislator's intention, while also enjoying latitude to ensure respect for primary law and take other relevant variables into account. To avoid such discretion from

[652] Ex. Dougan considers *Van den Burg* as 'an unstable foundation on which to construct a vision of the Court of Justice as a champion of the economic rights of importers as against the regulatory competence of the Member States to pursue legitimate social-welfare objectives, and as such might probably seem best confined to its own very particular facts'. See M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*., p. 872.
[653] Opinion in *Van den Burg*, C-169/89, EU:C:1990:124. Similar Opinions were delivered in *Hedley Lomas*, C-5/94, EU:C:1995:193 and *CIWF*, C-1/96, EU:C:1997:365.
[654] *Ibid*., point 7, paragraph 1.
[655] See also *Hedley Lomas*, note 24 and *CIWF*, note 33. For discussion, see J. Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO', *Jean Monnet Working Paper,* No. 03/99, 1999. Available at http://jeanmonnetprogram.org/archive/papers/99/990301.html (last accessed 29 September 2019) and M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit*., section 4.1.

leading it too far in one or another direction, however, the Court must explain and rationalise any potentially deviant judgement, as, for example, in *DaimlerChrysler*. Otherwise, case-law risks becoming, or appearing, incoherent, in a manner that could threaten the values of fairness and integrity. [656] Inconsistent case-law, which remains unexplained, and/or unjustified, could also perpetuate a misunderstanding that the Exhaustion Rule is a mechanism that favours a low standard agenda, thereby thwarting the legislator's intention, or that allows national measures to escape appropriate scrutiny under the free movement of goods. Either scenario, were it to become a sustained reality, could undermine the delicate balance between the judiciary and legislator, and between primary and secondary law. In the next section, we explore whether there is, in fact, a risk that the Exhaustion Rule could be relied upon for such ends.

3. THE RISK OF IMBALANCE

184. The dual character and conditional nature of the Exhaustion Rule allows it to be strategically invoked – or dis-applied – by parties seeking to privilege one particular aim over another, whether integration over regulation, national autonomy over EU rules, or *vice versa*. The Court generally assesses such claims in a balanced manner, where it enforces the legislator's intention, which can legitimately favour one goal over the other,[657] while assuring boundary Treaty control, including respect for the free movement of goods. As discussed, the Exhaustion Rule does not, generally, jeopardise this goal. Rather, it favours an abstract and deferential, yet Treaty-compliant analysis of the EU regulatory standard.

185. Still, the fact that the Rule requires the dis-application of Articles 34 – 36 TFEU might also lead the Court too far in one or another direction, for example, by allowing legitimate regulatory standards to be undermined at the expense of institutional balance, or by preventing review of potential national trade barriers, adopted within the framework of secondary legislation. In the former scenario, the Court might hide behind a claim of simply enforcing the legislator's intention to impose deeper market integration. In the latter, it might align with the legislator's intention, at the expense of free movement. Both situations risk pushing the Court and legislator from the legitimate exercise of discretion to potentially arbitrary and unconstitutional decision-making. In this section, we assess whether reliance on the Exhaustion Rule conceals, or even increases, the risk of such dangers materialising.

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[656] N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., p. 10.
[657] For discussion, see ex. Part I (Chapter Two), points 77 – 80.

3.1 An Integration or Free Trade Bias?

186. A longstanding fear of the European integration process is that the Court, when interpreting and applying EU law, could seek to achieve such integration through trade liberalisation and the downgrading, or removal, of national regulatory standards.[658] The risk of such bias has been frequently highlighted in the absence of harmonisation, where the Court interprets and applies the Treaty's free movement provisions.[659] However, it could also persist in the presence of secondary rules, as free movers, and the Court, rely on the *Tedeschi* leg to pursue the goal of integration, and free movement, at the expense of potentially legitimate regulatory protections. The specific concern in such cases is that (total) harmonisation, as enforced under the Exhaustion Rule, would place downward pressure on regulatory standards, and general welfare protection by pre-empting more protective national regulatory rules (3.1.1). Member States – and the EU – could then find themselves locked into the resulting low standards regime, given both the loss of national competence, and difficulty in adapting EU standards through the EU legislative process (3.1.2). At the same time, the EU legislator retains leeway to adopt high regulatory standards, which will be enforced by the Court, notwithstanding operation of the Exhaustion Rule. In this regard, the legislative agenda trumps the liberal agenda (3.1.3).

3.1.1 Facilitating a Low Standards Regime

187. Judicial reliance on the Exhaustion Rule (and the earlier 'exhaustion approach' to interpreting secondary legislation) enforces the integrative goal of secondary legislation by pre-empting the exercise of national regulatory competence, often without regard to the quality of the pre-empting EU standard. Indeed, the numerous 'pre-emption' cases, discussed in Chapter

[658] *Ibid*.
[659] Such concerns were particularly prevalent in the period before the Court delivered its judgement in *Keck & Mithouard*, (Joined Cases C-267/91 and C-268/91, EU:C:1993:905). Similar concerns have also been expressed since *Keck*, namely in relation to the Court's 'market access' approach to Article 34 TFEU. For analysis, see M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution, op. cit*., pp. 29 – 30 and p. 63, N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit*., pp. 234 – 250 and R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, Oxford, Oxford University Press, 2017, Chapter 4. See also the General Introduction, point 39, and citations at note 163.

One under 'integrative effect',[660] reveal the Court's willingness to strike down potentially legitimate national attempts to improve animal welfare,[661] enhance road safety,[662] reduce waste,[663] protect the environment, health[664] and consumer[665] and protect fundamental rights,[666] not because they were misguided or disproportionate – but because it considered the pre-empting EU rule to have comprehensively regulated the field. In such cases, 'the Court is not choosing between the merits of competing regulatory regimes. It is interpreting the Community provisions to determine whether they have occupied the field'.[667] The presumption of constitutionality enjoyed by exhaustive EU rules underlies this judicial focus and allows the Court to ignore the original 'necessity' condition to trigger the *Tedeschi* Rule. However, while such judicial deference assumes that the EU legislator has fulfilled its regulatory function, it could, in practice, encourage free movers to invoke *Tedeschi* to attack legitimate national rules.

188. In *Denkavit v Danish Ministry for Agriculture*,[668] for example, the Court precluded a national measure, despite evidence that the Community standard from which the Member State had deviated was inadequate. Specifically, the Danish measures had been adopted, unilaterally, to ensure that additives used in animal feed could be identified and their purity assured. While this field was, in principle, covered - and pre-empted – by an exhaustive directive, that directive had been amended in 1984 to reflect such quality criteria at Community level, *albeit* after proceedings were initiated against Denmark. According to the Danish Ministry, this amendment proved that the directive did not adequately regulate public health and that its protective action was justified under Article 36 TFEU. In other words, the standards adopted at Community level had not reached the necessary level to displace national competence under the *Tedeschi* leg. However, while the Court and AG conceded that the directive 'had not afforded the required degree of protection' and that impurities could have 'harmful effects upon health',[669] this regulatory weakness did not undermine the exhaustive nature of the Community measure. In

[660] See Chapter One, sections 1.1, 2.1.1, 2.2.1, 3.1.1 and 3.2.1.
[661] Ex. *Commission v Germany (Animal Feed)*, note 40, *Wulro*, note 47*, Hedley Lomas*, note 24, *CIWF*, note 33 and *Van den Burg,* note 434.
[662] Ex. *Dim Dip*, note 124 and *Commission v Poland (Right Hand Driving)*, C-639/11, EU:C:2014:173.
[663] Ex. *Walloon Waste*, note 420.
[664] *Commission v Denmark (Dangerous Substances),* note 152.
[665] Ex. *VTB-VAB*, note 329; *Telekommunikacja Polska*, note 331; *Mediaprint*, note 326 and *Wamo*, note 328.
[666] See A. Bailleux, 'Les droits de l'homme face à la libre circulation – un nouveau conflit porté devant la Cour de justice', *Revue trimestrielle des droits de l'homme*, vol. 2007, no. 72, 2007, pp. 1171-1184.
[667] S. Weatherill, 'Beyond preemption? Shared competence and constitutional change in the European Community', *op. cit.*, p. 18.
[668] *Denkavit v Danish Ministry for Agriculture*, note 43. See also *Wulro*, note 47.
[669] *Ibid*., paragraph 17. See also Opinion in *Denkavit v Danish Ministry for Agriculture*, Case 29/87, EU:C:1988:129, paragraph 7.

this context, neither the level of Community protection nor the fact that the directive had been subsequently amended was relevant. As noted by the AG, 'It is not possible to assert that any improvement in the Community rules means that previously there was no harmonisation'.[670] As a result, Denmark could not rely on Article 36 TFEU to justify additional national measures. Similarly, in *Wulro*, a Dutch requirement for eggs to bear additional markings to confirm the conditions under which they were produced was precluded by Community rules, even though a subsequent amendment to the relevant regulation authorised such marketing standards.[671] In reaching this conclusion, the Court explicitly rejected 'the argument … that the Netherlands system served as the model for the provisions adopted by the Commission in Regulation No 1943/85 and that therefore the Netherlands legislation was retroactively endorsed by the Community legislature'.[672]

189. While *Denkavit* and *Wulro* were strong on principle, their regulatory consequences were ultimately limited by the fact that the Community had updated its legislation to correspond to the more protective national measure at issue. The same cannot be said for other cases, where the Court, when faced with a legislative ambiguity, interprets the EU provision so as to promote free movement, even though an interpretation that privileged the public interest goal would have been equally plausible – and possibly more in line with the legislator's intention. Weatherill considers this concern in relation to *Dim Dip*,[673] which, as previously discussed, found that a directive precluded the UK from requiring all motorcars to have 'dim-dip' lights.[674] In assessing the case, Weatherill accepts that the UK rule may or may not have been a genuine road safety measure. His critique, however, is that, 'the constitutional decision that the directive exerted a total pre-emptive effect eliminated any discussion of the alleged merits of the dim-dip device in improving road safety'.[675] Similarly, the Court's restrictive definition of 'misleading advertising' in *Procureur de la République v X*, seems to accept '*some* consumer confusion' to 'facilitate the commercial opportunities of a parallel importer' and prevent territorial restrictions in the internal market.[676] This was so, even though the Misleading Advertising Directive,[677] which instituted minimum harmonisation, clearly sought to facilitate

[670] AG Opinion, *ibid.*, paragraph 8.
[671] *Wulro*, note 47. See in particular paragraph 11.
[672] *Ibid.*, paragraph 22.
[673] *Commission v United Kingdom (Dim Dip)*, note 124.
[674] S. Weatherill, *Law and Integration in the European Union*, Oxford, Clarendon Press, 1995, pp. 144 – 145.
[675] *Ibid*.
[676] S. Weatherill, *EU Consumer Law and Policy*, *op. cit.,* pp. 220 – 221.
[677] Directive 84/450/EEC, *op. cit.*

strong protections for consumers against deceptive practices. However, as discussed in Chapter One, the Court nonetheless found that the advertising of parallel imports of Nissan cars, which had been registered in Belgium, as 'new' and 'cheaper', would only be misleading if a 'significant number of consumers' would have been deterred from purchasing the vehicles had they known, first, that the car had already been registered and second, that the cheaper price was connected to the smaller number of accessories.[678] The Court was equally dismissive of potential consumer confusion in *Clinique*, where it found that a German prohibition on using the brand name 'Clinique' constituted a disproportionate restriction on the free movement of cosmetic products, in violation of the Cosmetics Directive. In doing so, it dismissed the German claim that consumers risked wrongly attributing medicinal qualities to Clinique products, given that the German word for hospital is *Klinik*. As outlined in Part I, the Court's position in this case contrasts with that of AG Gulmann, who argued that a cosmetic product lawfully marketed in one Member State could be misleading in another, considering linguistic, cultural and social differences.[679] What is more, the AG considered that a national measure wishing to protect consumers from misleading advertising had 'particular weight' when it had 'a health-protection aspect, namely, the desire to prevent consumers attributing to products medicinal properties which they do not have'.[680] Similar concerns could be raised in relation to *Van den Burg*,[681] discussed earlier and, more recently with the Court's reliance on the Unfair Commercial Practices Directive (UCPD)[682] to exclude national prohibitions on certain sales promotions, such as combined offers.[683]

190. It should be acknowledged that the pre-empting secondary measures being interpreted in these cases did set certain regulatory standards. As just noted, the fact that unilateral national measures were precluded in the first place was based on a presumption that such standards ensured the necessary degree of protection at EU level. Still, the resulting regulatory effect was pitched at a lower level than the impugned national measure, which, under *Tedeschi*, could no longer be justified. As a result, judicial reliance on the Exhaustion Rule to restrict national

[678] *Procureur de la République v X*, note 315, paragraphs 15 – 16. See also *Lidl Belgium***,** C-356/04, EU:C:2006:585, paragraph 80.
[679] Opinion in *Clinique*, C-315/92, EU:C:1993:823, paragraph 18.
[680] *Ibid.*, paragraph 20.
[681] *Van den Burg,* note 434.
[682] Directive 2005/29/EC, *op. cit.*
[683] Ex. *VTB-VAB & Galatea*, note 329. For discussion, see J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive'*, op. cit.*, sections 4.1.1 and 4.1.2.

regulatory diversity and privilege free movement also facilitated the lowering of regulatory standards more generally.

191. That the Court takes such a stance is, from one perspective, perfectly coherent with a key tenet of internal market regulation, which is that harmonised rules should ensure free movement for compliant products, free from additional national requirements. Indeed, it is on this basis that the EU legislator opts to harmonise the field in the first place. One consequence of this choice, however, is to downgrade national rules that go beyond the agreed standard.[684] Even if this standard is set at a high level, the fact that it ousts national regulatory leeway under *Tedeschi* will almost inevitably lead to the displacement of certain protections for local preferences and capabilities.[685] A further risk to the quality of protection is the influence of private interests during the standard-setting process, which often push to facilitate trade to the detriment of legitimate consumer protections.[686] The Court may then add to this trend by interpreting unclear or ambiguous legislative provisions in light of free movement aims, whereby the protection of public interest requirements continues to constitute an exception to the overarching goal of market integration.[687] Yet this latter presumption might also be challenged, on grounds that the internal market, far from requiring liberalisation through deregulation, is fully compatible with maintaining a high level of protection – whether at EU level or by accepting diverse national standards.[688] For, it is at least arguable, that in each of the cases cited above, the Court could have justified an alternative position, either by accepting that the Exhaustion Rule did not apply (*Denkavit*, *Wulro*, *Dim Dip*, *Van den Burg)* or by finding that the national measure complied with the EU standard (*Procureur de la République v X*, *Clinique*, the possibility to prohibit sales promotions under the UCPD). Its reliance on the Exhaustion Rule to side with the free mover and bar the national measure may therefore mask what is in fact a choice to prioritise integration over regulation, rather than a desire to enforce the balance sought by the legislator.

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[684] This arguably happened in Belgium following adoption of the UCPD, as the Court pre-empted the more stringent Belgian prohibition on sales promotions. See *ibid* for references. See also A. Garde, 'The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?' in P. Syrpis (ed.), 'The Judiciary, the Legislature and the EU Internal Market', *op. cit.*, pp. 118 – 146 at p. 131.
[685] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, p. 219.
[686] A. McGee & S. Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation', *Modern Law Review*, vol. 53, no. 5, 1990, pp. 578 – 596. The authors considered that the Community, at the time, was failing 'to take the protective function of commercial law as seriously as the facilitative function'. See p. 588.
[687] H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, p. 1244.
[688] See General Introduction, point 13 and section 1.3 (A New Vision for the Internal Market).

3.1.2 'Locked in' to a Low Standards Regime

192. Judicial reliance on *Tedeschi*, even to enforce a lower standard of protection, should not, in principle, preclude Member States from adopting necessary and appropriate regulatory standards, given, in particular, the possibility for legislative and Treaty-based safeguard measures. As we saw in Part I (Chapter Two), most harmonising measures incorporate the former to facilitate such residual national powers.[689] In reality, however, the safeguard procedure is generally subject to stringent conditions that restrict its application to all but the most exceptional of cases. More insidiously perhaps, the mere possibility to adopt safeguard measures could encourage the Court to adopt an aggressive pre-emption approach. This can be seen in *Ratti*, which transformed the 'white knight' status of the safeguard clause, so vigorously defended by Member States in *Tedeschi*, into the Trojan horse that would, in many cases, facilitate the ousting of national competence once it had made its way into an EU measure.[690] Given these limits, dissatisfied Member States must instead seek to upgrade and/or clarify unsatisfactory regulatory standards through the EU legislative procedure, as happened with the directives at issue in *Wulro* and *Denkavit*. Yet again, this route can prove difficult, given the length and complexity of the EU's legislative procedure, which, ultimately, remains subject to the political will – and configuration of a legislator that contains 'a natural in-built bias in favour of inertia'.[691] It is in this context that exhaustive EU rules could hold Member States hostage to a low-standards regulatory regime.

193. According to Weiler, the fear of such a legislative deadlock following *Tedeschi* contributed to a chilling of the regulatory environment, particularly in the early Community years, when unanimity prevailed at Council and the Treaty's objectives were almost exclusively economic.[692] Summing up the problem, he stated the following:

> Not only was it difficult to achieve consensus on one Community norm to replace the variety of Member State norms, but also there was the growing fear that once such a norm was adopted, it would lock all Member States into a discipline from which they could not exit without again reaching unanimity. If the Community once agreed on a norm on, for example, the permissible level of lead in gasoline, no Member State could

[689] See ex. analysis of the *Tedeschi* 'deal' in Part I (Chapter Two), points 145 – 147. See also Article 114 (10) TFEU.
[690] *Ratti*, note 69.
[691] S. Weatherill, 'Beyond preemption? Shared competence and constitutional change in the European Community', *op. cit.,* p. 19.
[692] See (ex.) Article 2 EEC.

subsequently reduce the level further without the consent of all twelve Member States within the Community decision-making process.[693]

194. The Community was, as a result, either beholden to the prevailing harmonised standard, interpreted by the Court to pre-empt potentially legitimate national measures; or the Community avoided adopting harmonising rules, for fear of triggering the *Tedeschi* Rule in the first place. This led to a number of interlinked problems for the integration process, in terms of both the quality of regulation and the division of regulatory authority, with negative consequences for consumer protection, competitiveness and, ultimately, market access.[694] On the one hand, a Community decision not to legislate allowed the difficulties of the negative integration process to persist, including legal uncertainty, trade disparities and the risk of deregulation and regulatory gap. Yet where the Community opted to legislate, pre-emption of national competences under *Tedeschi*, coupled with the Community's inability to adapt existing standards risked impeding innovation, experimentation and diversity, while also exacerbating the problem of regulatory gap associated with the negative integration process.[695] Weatherill considers this problems in his analysis of *Dim Dip*, discussed above, which he views as depriving the UK of the ability to either unilaterally improve road safety or adapt the law at Council, given the potential for insurmountable opposition.[696] Finally, political deadlock at national and EU level allowed the Court's interpretation of EU primary and secondary law to prevail. The system thus tilted towards a model of judicial exclusivity in assessing the balance between regulation and integration, and national and EU competences, bringing with it the problems outlined in Part I (Chapter One).

195. Member States responded to such difficulties by developing a 'traditional majoritarian democracy' in the EU, for example by introducing qualified majority voting, expanding the EU's competences, allowing regulatory diversity post-harmonisation under Article 114 (4 – 5) and 193 TFEU, and introducing flexible standard setting.[697] The Court has also become more

[693] J. Weiler, 'The Transformation of Europe', *Yale Law Journal*, vol. 100, no. 8, 1991, pp. 2403 – 2483 at p. 2457. See also K. Lenaerts, *Le juge et la constitution aux Etats-Unis d'Amérique et dans l'ordre juridique Européen*, Bruylant, Bruxelles, 1988, paragraph 466, p. 563.
[694] S. Weatherill, *Law and Integration in the European Union*, *op. cit*., pp. 144 – 145. See also M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution, op. cit.*, pp. 126 – 121.
[695] For discussion of the difficulties relating to the pre-emption principle, see Part I (Chapter One), points 30 – 31.
[696] S. Weatherill, *Law and Integration in the European Union*, *op. cit*., pp. 144 – 145.
[697] K. Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians in the European Community', *The University of Chicago Legal Forum*, vol. 1992, no. 1, pp. 93 – 133, at pp. 110 – 111. Maduro makes a similar point in M. P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', *European Law Journal*, vol. 3, no. 1, 1997, pp. 52 – 82 at pp. 55 – 56.

nuanced in its interpretation of EU secondary legislation, both in determining whether the Exhaustion Rule applies,[698] and in assessing the EU regulatory standard.[699] However, such changes have not fully tackled the challenges to formulating a legislative response to liberalising Court judgements. First, the pre-emptive effect of harmonising measures remains difficult to overturn at EU level, all the more given the increasingly heterogeneous make-up of the Council and the growing influence of the European Parliament. Second, flexible standards, such as those adopted under the new approach to harmonisation, do not undermine the pre-emptive impact of resulting directives on the host Member State.[700] Indeed, as illustrated in cases such as *Commission v Germany (pyrotechnic articles), Commission v Italy (Sealed Heaters)*, *A.G.M.-COS.MET, Nordiska Dental* and *Lidl*, the Court will not hesitate to ensure market access for products complying with the harmonised standards.[701] What is more, numerous products, such as medicinal products, food and automobile legislation, remain outside the scope of the new approach. Finally, while Member States can legislate in the presence of harmonisation since the SEA, this power remains largely symbolic.[702] In such circumstances, the risk that Member States, and the EU more generally, will remain locked into a low standard regulatory regime could sometimes persist.

196. A current example of the resulting regulatory gap can be seen with the EU's rules on food labelling for energy, fat and salt, as consolidated under the Food Information Regulation.[703] Although aimed at ensuring a high level of consumer protection, the mandatory labelling rules laid down thereunder appear to have little impact on consumer food choices in practice, given rising levels of obesity.[704] Macmaolán attributes this gap, in part, to the complexity and potentially misleading nature of these rules and suggests formats such as 'signpost labelling'[705] as a more appropriate alternative. The problem, however, is that the EU food labelling regime only allows voluntary and non-binding national recommendations for

[698] Ex. *Denkavit v Minister for Food, Agriculture and Forestry*, note 179; *Van Bennekom*, note 186 and *Holdijk*, note 81. See also Part I (Chapter Two), section 2.1.2.
[699] See *infra*, points 178 – 179 in relation to consumer protection and the CAP.
[700] S. Weatherill, *Law and Integration in the European Union*, *op. cit.*, p. 146.
[701] See Part II (Chapter One), points 32 – 35.
[702] See Part I (Chapter Two), section 2.3.3 (Treaty-Based Derogations).
[703] Regulation (EU) No. 1169/2011, *op. cit*.
[704] C. Macmaolán, 'Regulating Consumer Information: Use of Food Labelling and Mandatory Disclosures to Encourage Healthier Lifestyles', in A. Alemanno and A. Garde (eds.), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets'*, *op. cit*., pp. 46 – 67.
[705] Signpost labelling presents information in an easily understandable format through the use of a colour code to highlighting the levels of fat, sugar and salt in the product, with green indicating safe amounts, amber suggesting a higher level and red signifying a high level. For discussion, see C. Macmaolán, *ibid.*, pp. 58 – 62.

such alternative labelling. Any new national scheme is therefore restricted to domestic producers, with food imports that comply with the EU's traditional (and apparently inadequate) labelling rules enjoying market access. In line with the *Tedeschi* leg, the standard information disclosure requirements, as harmonised under the Food Information Regulation, pre-empt any stricter or more protective national labelling policy 'metamorphosing into national law where this would inhibit, directly or indirectly, actually or potentially, trade between EU Member States'.[706] In other words, the harmonised regime, as enforced through the Exhaustion Rule, blocks improvements to the labelling of risky consumer foods, thereby perpetuating Weiler's early observation.

3.1.3 The Legislative Agenda Trumps the Liberal Agenda

197. The food-labelling saga highlights the link between the Exhaustion Rule, low standards and the risk of a regulatory gap. At the same time, precluding disparate national rules under the Rule remains key to attaining the core integrative function of the internal market. The question, then, is how to balance the often-conflicting goals of protective standards and regulatory diversity with the aim of achieving market integration.

198. As discussed in our General Introduction, the Treaty does not take a concrete stance on where this balance should lie. As a result, its determination should fall to the legislator, subject to compliance with primary law. To this end, the legal framework governing the internal market, while maintaining the core impact of *Tedeschi* to ensure the free movement of goods, has evolved to facilitate this policy-making task and counter the potentially damaging effects of pre-emption. This includes ensuring high regulatory standards (ex. through Article 114 (3) TFEU, sectoral provisions, expanded Treaty objectives), flexibility (ex. the new approach to harmonisation), and regulatory diversity (ex. through different harmonisation models, such as minimum standards, and Treaty provisions, such as Article 114 (4 – 5) TFEU). The EU decision-making process is also increasingly responsive to evolving public interest concerns, not only by formalising the role of the European Parliament,[707] but also by ensuring a voice for

[706] C. Macmaolán, *ibid.*, p. 65.
[707] The European Parliament's impact on the EU's harmonisation programme is illustrated in the deliberations surrounding the Commission's proposal to transform a series of consumer protection measures from instruments of minimum to total harmonisation. For discussion, see S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 216 – 218.

consumer, environmental and worker groups in the standardisation process.[708] This is not to say that the decision-making process could not be improved,[709] or that the balance achieved between regulation and integration, and between national and EU competences, is always satisfactory. To the contrary, EU regulatory standards – or the Court's interpretation thereof – continue to be criticised as being too weak,[710] too constraining[711] or for encroaching too heavily on national regulatory discretion.[712] And, as acknowledged earlier, agreement at EU level remains notoriously difficult to achieve. Yet the political system has, at least from a legal perspective, the necessary tools to effectuate change, should the need arise. Indeed, it is at this stage that much of the battle takes place, for example, over which standard to set and whether to adopt exhaustive or minimum rules.[713] National parliaments also enjoy a formal *ex ante* role in monitoring the existence and exercise of legislative competence, which has, in practice, enriched the debate about the need for, and limits to, EU legislative intervention.[714]

199. Once a political decision is reached to consolidate that standard in an exhaustive legislative framework, the Exhaustion Rule will kick in, not only to preclude non-compliant national measures, but also to validate those measures that conform to the EU standard. Some 'authorised' national measure may directly implement the EU standard, as in *Doc Morris*[715] or *Bodin*.[716] Others are based on the correct exercise of legislation-based discretion, as in

[708] Ex. The EU's standardisation bodies, CEN, CENELEC and ETSI now grant a direct role for societal stakeholders in setting standards. Such developments should assuage the fear, expressed by McGee & Weatherill, that private business interests could hijack the process. See A. McGee & S. Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation', *op. cit.*

[709] Ex. Maletic calls for a permissive and conciliatory notification procedure under Article 114 (4 – 5) TFEU, whereby Member States would enjoy greater leeway to respond to genuine national regulatory concerns. See I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, Edward Elgar Publishing, 2013, Chapter 5.

[710] See ex. Macmaolán's analysis of EU rules on food labelling. C. Macmaolán, 'Regulating Consumer Information: Use of Food Labelling and Mandatory Disclosures to Encourage Healthier Lifestyles', *op. cit.*

[711] Ex. Traders increasingly challenge EU regulatory standards as infringing on their fundamental rights. Ex. *Deutsches Weintor*, note 361 and *Neptune Distribution*, note 361.

[712] See ex. criticism of Commission's call to transform consumer protection directives from instruments of minimum harmonisation to instruments that exhaustively regulate the field. Ex. S. Weatherill, 'Maximum or Minimum Harmonisation – What Kind of Europe do we Want'?, in K. Boele-Woelki, & F. W. Grosheide (eds.), *The Future of European Contract Law, Liber Amicorum E.H.Hondius*, 2007, Kluwer Law International, pp. 133-146; J. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', *European Review of Private Law*, vol. 18, no. 1, 2010, pp. 5 – 14 and G. Howells, 'Unfair Commercial Practices Directive – A missed opportunity ?', in S. Weatherill & U. Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, Hart Publishing, 2007, pp. 103 – 114.

[713] For discussion see S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, chapter 15.

[714] *Ibid*., pp. 180 – 186.

[715] *Doc Morris*, note 139.

[716] *Bodin*, note 164.

ADBHU[717] and *Belgische Petroleum Unie*.[718] We have also noted that the Court increasingly strikes down national measures that fail to live up to the high EU standard, thereby pre-empting the Member State from adopting *lower* standards – as seen, for example, in the context of consumer protection.[719] As Weatherill notes, 'the commitment to a high level of protection has played a prominent role in the Court's interpretation of relevant legislative texts, sometimes in a remarkably ambitious manner'.[720]

200. This approach should dispel concerns that transferring competence to the EU under (exhaustive) internal market rules – as enforced through the Exhaustion Rule - *necessarily* undermines regulatory standards. To the contrary, while confirming the EU's authority in setting, interpreting and changing the regime imposed by such rules, the Rule's activation should also remain indifferent to the quality of the standard set.[721] In this context, and as outlined in Chapter One, the Rule's function should be limited to guiding judicial enforcement of the legislator's integration and regulatory agenda, without necessarily pushing it in one or another direction. What determines the lawfulness of such national measures, and the standard set thereunder, is the content of the EU legislation – not the Court's blind pursuit of market integration at the expense of legitimate regulatory standards.[722] If this content is consolidated under an exhaustive regulatory regime, with low or ambiguous standards and limited scope for national diversity, the Court will activate the Exhaustion Rule to duly enforce such provisions, often to the detriment of higher national standards. That it does so reflects both the value, and difficulty, of the Rule's *Tedeschi* leg – and of the decision to adopt exhaustive standards. Yet the Court can also rely on the Exhaustion Rule to enforce high standards and, to the extent that Member States enjoy 'legislation-based discretion', a degree of regulatory diversity. Such possibilities also indicate that the EU legislator is not, in fact, confronted with a binary choice between total and minimum harmonisation, and thus uniformity and diversity, but enjoys a more complex array of options, which, as will be discussed in Part III, can be accommodated under a more nuanced understanding of the Exhaustion Rule. For the Court, and the Rule, the legislative agenda trumps the liberal agenda.

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[717] *ADBHU*, note 446.
[718] *Belgische Petroleum Unie*, note 454.
[719] Ex. *Content Services*, note 374; *Messner*, note 376; *Heinrich Heine*, note 377; *Heininger*, note 378; *Schulte*, note 378; *Leitner*, note 380 and *Club Tour*, note 380.
[720] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 160 – 161 and case-law cited.
[721] At least insofar as its relationship with the free movement of goods is concerned. The standard set can, however, be assessed for compliance with the Charter of Fundamental Rights. See General Introduction, point 52.
[722] For a discussion of the difficulties of attributing a *certaine idée de l'Europe* to the Court, see N. Nic Shuibhne, *The Coherence of EU Free Movement Law*, *op. cit.*, pp. 5 – 6 and citations.

3.2 Undermining the Free Movement of Goods?

201. Far from requiring national regulation to be eliminated at the expense of the underlying public interest, the Treaty's vision of the internal market provides space for the EU legislator to adopt protective and responsive regulatory standards, which go beyond that accorded to individual Member States and which the Court can defer to under the Exhaustion Rule.[723] In this context, the main concern might not be the Rule's potential to thwart such standards by promoting a deregulatory bias. Rather, the risk is that the Rule could allow the legislator to undermine the free movement of goods. What is more, ousting the direct application of primary law under the Rule could conceal such an interpretation behind the mantra that the Court is simply enforcing the legislator's intention, expressed in a manner presumed compatible with Articles 34 – 35 TFEU. This threat, which has existed since the Community's foundation,[724] explains why the Court was initially reticent in accepting the second leg of the Exhaustion Rule. And while such reticence has now subsided, judicial tools to preserve the hierarchy of norms in the presence of exhaustive legislation, such as consistent interpretation and judicial review, could appear ineffective if potential trade barriers escape appropriate judicial review. While relatively rare, at least from the case-law surveyed, such incidents can arise when the Court seeks to trigger the Exhaustion Rule (3.2.1) and review national measures thereunder (3.2.2).

3.2.1 Triggering the Exhaustion Rule

202. We have seen that exhaustive EU legislation will trigger the Exhaustion Rule but only with respect to matters falling within its sphere of application. As a result, the lawfulness of a national measure regulating a matter outside the scope of that legislation will be assessed by reference to primary law, where it can continue to be justified under Treaty-based regulatory discretion. This fact frequently prompts Member States to defend national trade rules by arguing that the scope of the exhaustive measure is limited, as in *Commission v Germany (Animal Feed),*[725] *Wulro*[726] and *Dim Dip*.[727] Their attempts, however, are often unsuccessful,

[723] On why the EU legislator enjoys more latitude than Member States, see Part I (Chapter One), point 117.
[724] For an early discussion on this risk, M. Waelbroeck, 'The Emergent Doctrine of Community pre-emption - Consent and redelegation', in Sandalow & Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, vol. II, Oxford, Oxford University Press, 1982, pp. 548–580, at pp. 571 – 577.
[725] *Commission v Germany (Animal Feed)*, note 40.
[726] *Wulro*, note 47.
[727] *Commission v United Kingdom (Dim Dip)*, note 124.

as the Court, siding with the free mover, triggers the Exhaustion Rule to enforce the integrative effect of harmonisation and invalidate the rule. Yet concluding, on this basis, that the Rule is a tool, not just for integration, but also for deregulation masks a more complex reality. As highlighted throughout this research, the dual function of EU legislation, and varying national interests, means that the EU and Member States can play different functions in the integration process. Indeed, Member States will sometimes argue that the matter falls *within* the regulatory scope of the EU rule in order to rely on its protective regulatory effect and avoid systematic review by reference to the Treaty.[728] The Court can, in such cases, legitimately side with the Member State, once its decision is rooted in a plausible, constitutional interpretation of the EU measure. What it cannot do, however, is enforce the regulatory effect of an EU measure in a manner that does not pay due respect to the free movement of goods. Yet this is what it seems to have done in *EU Wood Trading*.[729]

203. As discussed in section one, this case assessed a German decision, taken under the 'exhaustive' WSR, to object to the shipment of waste to Italy for recovery, on grounds that the Italian standards to recover such waste were set at an unacceptably low level. The standard of review, however, was light-touch and deferential, facilitated, no doubt, by the Court's exclusive reliance on the WSR, which, having been adopted under ex. Article 130s EEC to limit movements of waste, allowed the Court to privilege this regulatory goal.

204. Our concern with this case is not the result achieved, but relates to the Court's analytical approach – and in particular, its apparent mis-application of the Exhaustion Rule. As outlined earlier, the impugned German action had relied on Article 7 (4)(a) WSR, which allowed objections to be raised based on an instrument of minimum harmonisation (being the Waste Directive). Germany could, on this basis, restrict the free movement of waste to Italy – and, by extension, impose its higher standards on another Member State. Yet its action was ultimately based on stricter national standards set under a separate minimum harmonisation directive. As such, Article 7 (4)(a), by referring to the Waste Directive, may, in fact, have granted *Treaty*-based discretion to the Member States. If this was the case, the German measure adopted thereunder should have been reviewed under Articles 34 – 36 TFEU.

[728] *DaimlerChrysler*, note 424; *Antroposana & others*, note 161 and *Commission v Germany (Garlic Capsules)*, note 137. See, more generally, Part I (Chapter One), cases discussed under 'regulatory effect'.
[729] *EU Wood Trading*, note 409.

205. Had the Court carried out such a Treaty review, the German action would have been found to constitute an obstacle to trade, subject, potentially, to a more exacting proportionality test, with the burden shifting more obviously to Germany to prove Treaty compliance. Reference in this regard could be made to the Court's decision in *FFAD*,[730] where it reviewed and struck down elements of a Danish waste recovery scheme, set up under the Waste Directive, on grounds that they constituted an unjustified violation of Article 35 TFEU. The national measure may also have survived, as in *Walloon Waste*.[731] Either way, the Court would have sent an important message that it would continue to scrutinise Member State action to ensure respect for the Treaty's delicate balance between free movement and the pursuit of legitimate public interest objectives. However, by relying on the Rule to avoid such a review, the Court essentially protected national action that furthered the aim of an exhaustive regulation, even though that action could have stemmed from the exercise of Treaty-based discretion. In doing so, it introduced a mechanism under which (exhaustive) secondary legislation could facilitate Member States in potentially avoiding their free movement obligations.

206. The *EU Wood Trading* judgement was subsequently codified under Article 12 (c) of the second WSR (2006),[732] which explicitly allows a Member State of dispatch to raise a low standards objection against the waste shipments to the state of destination. This is, from one perspective, a positive development since the potential for wide national discretion is placed on a statutory footing and subject to important controls and limitations not explicitly laid down by the Court in its judgement. In particular, the second WSR clarifies that a low standard objection must respect the 'proper functioning of the internal market' and cannot be raised if standards in the Member State of destination are based on an EU standard, if they are 'broadly equivalent' to those in the Member State of dispatch or if the higher standards were not notified to the Commission. Yet Article 12 (c) also allows national action, taken under a minimum harmonisation directive, to avoid a direct review under the free movement principles, to the potential detriment of market integration. Such concerns clearly fuelled the Commission's strong opposition to Article 12 (c), where it argued against national solutions to waste management problems on grounds, *inter alia*, that they could create trade barriers without improving environmental standards.[733] Despite these concerns, however, the Member States, in

[730] *FFAD*, C-209/98, EU:C:2000:279.
[731] *Commission v Belgium (Walloon Waste),* note 420.
[732] Regulation (EC) No. 1013/2006, *op. cit*.
[733] Part I (Chapter Two), point 82.

absence of a European waste management strategy, sought to retain the possibility of issuing a low standards objection, as far as waste recovery was concerned and as long as there was no harmonisation at EU level.

3.2.2 Assessing the National Measure

207. We have noted that the Court must, in the presence of exhaustively regulating EU legislation, take great care to correctly classify any national measure adopted thereunder, since this will dictate its approach to – and intensity of – review. As previously discussed, measures that directly and correctly implement the EU standard are, like that EU standard, presumed to comply with Articles 34 – 35 TFEU. In contrast, the Court must specifically assess acts of legislation-based discretion to determine compliance with the exhaustive framework. While the Court mostly succeeds with this task, thanks largely to vigilant litigating parties, it has sometimes mis-categorised a national measure as direct implementing an EU standard or process, thereby allowing what is in fact an act of national discretion to escape appropriate review. Such a scenario arose in *Berger*.[734]

208. The facts of *Berger* have been previously discussed.[735] However, to ensure a comprehensive understanding of this judgement, it is useful to first outline the aims and content of the Foodcode, which was the EU legislation being interpreted and enforced.[736] Adopted in 2002 under *inter alia* ex. Article 95 EC, this regulation governs decision-making in matters of food and feed safety at all stages of production and distribution, including emergencies and crises. It has, like other internal market rules, a dual aim, being to both protect human life and consumer interests in relation to food, and to ensure the effective functioning of the market.[737] This dual purpose implies that an exercise of national discretion within its regulatory framework must achieve an appropriate balance between the regulatory and integrative goals. Indeed, such balance is specifically mandated under Article 17 (2) of the Foodcode, which states:

> Member States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution.

[734] *Berger*, note 356.
[735] Part II (Chapter One), point 92.
[736] Regulation (EC) No. 178/2002, *op. cit.*
[737] These objectives are laid down, respectively, in Articles 5 (1) and 5 (2), in Recitals (2) and (3) of the Preamble, and under Recital 1, which refers to the need for 'the free movement of safe and wholesome food'.

> For that purpose, they shall maintain a system of official controls and other activities as *appropriate to the circumstances*, including public communication on food and feed safety and risk, food and feed safety surveillance and other monitoring activities covering all stages of production, processing and distribution. (Emphasis added)

209. The reference in paragraph (2) to 'appropriate in the circumstances' indicates that a Member State, when enforcing the Foodcode, should take both consumer and economic interests into account. Therefore, despite an emphasis on food safety and consumer protection, the Foodcode does not presume that an act of national discretion adopted thereunder automatically furthers those aims in a proportionate manner. Instead, national authorities should first conduct a balancing exercise to ensure compliance with all interests concerned, including the fundamental freedoms, and to prevent any abuse of power. The Court must also retain scope to assess whether such requirements have been respected.

210. Turning back to *Berger*, this judgement validated a German public alert in respect of certain meat products, even though the latter did not pose any risk to consumer health. The ruling was reached on grounds that Article 10 of the Foodcode obliged public authorities 'to inform, where there are reasonable grounds to suspect that a food or feed may present a risk to human or animal health'.[738] The Court also referred to the second paragraph of Article 17 (2), which authorises Member States to issue public communications on food safety, and Article 14, which considers as 'unsafe' food found by competent authorities to be 'unfit for human consumption'.[739] Thus, Member States were entitled to issue warnings about such food, even though they did not harm public health.[740] However, Berger, as a producer of the banned meat, suffered considerable loss as a result of the alert and claimed that the authority's public statement interfered disproportionately with its free movement rights – all the more given the EU-wide rapid alert that had also ensued. Yet the Court, in its assessment, did not consider whether the authority had taken Berger's economic rights into account before issuing the public alert. Instead, in justifying the Member State's action, it referred exclusively to the objective of consumer protection, which was protected under Article 5 (2) of the Foodcode, stating as follows:

[738] *Berger*, note 356, paragraph 29.
[739] *Ibid.*, paragraphs 32 – 34.
[740] *Ibid.*, paragraph 36.

> In so far as a foodstuff is unacceptable for human consumption and accordingly unfit therefore, it does not fulfil the food safety requirements under Article 14(5) of Regulation No 178/2002, and is, in any event, such as to prejudice the interests of consumers, the protection of whom, as stated in Article 5 of that regulation, is one of the objectives of food law.[741]

211. In doing so, the Court appeared to frame the German authority as directly implementing an EU obligation, with its decision to issue national alert as the inevitable consequence of a literal reading of the Foodcode. Indeed, this inevitability could explain why an AG Opinion was deemed unnecessary. Accordingly, since that alert was simply implementing an EU measure, it benefited from the presumption of constitutionality enjoyed by the latter and, in an implicit activation of the Exhaustion Rule, was not subjected to a further review to ensure compatibility with the free movement of goods. In our view, however, while the Exhaustion Rule was appropriately triggered, the German determination of what was 'appropriate in the circumstances' stemmed from an exercise of legislation-based discretion under Article 17 (2), taken within the context of the exhaustively regulating EU measure. As a result, the national decision should have been reviewed by reference to the Foodcode to ensure compatibility with both consumer protection and free movement. However, the Court appeared to bypass the need for such a balancing test and, in doing so, implied that 'the protection of consumer interest (would) always take precedence over economic considerations'.[742]

212. In another type of case, the Court might correctly identify but fail to review an act of legislation-based discretion, assuming that such national action is constitutional simply because it was authorised by an EU secondary rule. In *Gallaher*,[743] for example, the Court confirmed that the UK could impose labelling requirements on tobacco products that went beyond the 4% threshold in the directive, which ensured 'latitude' as regards the size of the health warning and tar/nicotine yields. However, the presence of a market access clause limited these stricter rules to domestic production. Although resulting in reverse discrimination, such consequences were 'attributable to the degree of harmonization sought by the provisions in question, which lay down minimum requirements.'[744] This judgement is praiseworthy in its purposive and flexible approach to interpreting EU rules and resulting national obligations. However, it ultimately falls short for failing to confirm that the Member States, while retaining regulatory discretion

[741] *Ibid*., paragraph 35.
[742] For analysis, see K. Purnhagen, 'Beyond Threats to Health', *op. cit*.
[743] *Gallaher*, note 173. See also *Philip Morris*, note 174.
[744] *Ibid*., paragraph 22.

under Articles 3 (3) and 4 (4) of the directive, must also ensure that any exercise of discretion thereunder is proportionate and will be reviewed accordingly, either by the Court itself or the national court. Indeed, as noted by the AG to the case, 'the Directive does not specify any maximum limit for the percentage which may be imposed by Member States. Consequently, that figure could - theoretically - lie anywhere between 5% and 100%. I cannot imagine that those who drafted the Directive intended to bring about such a position in law.'[745] This is particularly so, given the importance of multilingual labelling in ensuring the free movement of goods. As Wyatt highlights, while a '4%' rule would make such multilingualism possible, this might not be so with larger sized labels, thereby undermining the whole purpose of the directive.[746] Yet the Court does not assess the potential impact of the UK rules on Article 35 TFEU, or whether the UK considered this impact when reaching its decision. This approach contrasts with its assessment of national measures adopted under a traditional minimum harmonisation clause under Articles 34 – 36 TFEU. The omission of this step in *Gallaher* could imply that secondary rules can allow Member States to regulate beyond what the Treaty allows.[747]

213. *Opus Supplies* provides a further example of this attitude.[748] As discussed in Chapter One, this case confirmed that Member States retain discretion under Article 5(5) of the Copyright Directive to decide who should pay fair compensation to copyright holders to ensure remuneration in the case of distance sales.[749] The Netherlands could, as a result, establish a national system that imposed the duty of compensation on the manufacturer or importer of relevant media. However, by linking the payment of 'fair compensation' to the goods themselves, the Dutch measure appeared to have a stronger effect on cross-border trade than other methods of compensation, leading to a possible conflict with Articles 34 – 36 TFEU.[750] Indeed, it was on this basis that Opus Supplies suggested a compensation fund in favour of rightsholders, as a less restrictive alternative.[751] The Commission thus considered that the

[745] Opinion in *Gallaher*, C-11/92, paragraph 43. For discussion see D. Wyatt, 'The Community Competence to Regulate the Internal Market', *op. cit.*, p. 31.
[746] *Ibid.*, p. 32.
[747] Similar observations could be made with respect to judgements such as *Grunert*, note 185 and *Zino Davidoff & Others,* note 228, where the Court accepted that the relevant secondary measure granted (or confirmed) national regulatory discretion, without reviewing the exercise of that discretion under Articles 34 – 36 TFEU.
[748] *Opus Supplies*, note 255.
[749] Directive 2001/29/EC, *op. cit.*
[750] Opinion in *Opus Supplies*, C-462/09, EU:C:2011:133, paragraph 28.
[751] *Ibid*., paragraph 31, footnote 12.

system was not necessarily compatible with the free movement of goods, and, as a result, with the directive (as consistently interpreted).

214. In dismissing such arguments, AG Jääskinen first confirmed that the Copyright Directive itself complied with the free movement of goods, and that it could legitimately harmonise the conditions relating to the exercise of IP rights to ensure effective enforcement.[752] This included granting a wide margin of national discretion to implement the directive. While secondary legislation had to be interpreted in line with the Treaty, Member States could also benefit 'from the leeway of transposition afforded to them by the EU legislator unless, by giving such leeway, the directive itself conflicts with the Treaty'.[753] In such circumstances, they could choose freely between the different means of transposition made available to them. Moreover, since it was inherent in the nature of a directive that these alternatives should be equal, the existence of a less restrictive alternative did not invalidate the Netherlands' choice:

> To conclude otherwise would, in my view, contradict the very nature of a directive. There are often many different ways in which a directive may be implemented in national law. In such cases arguments that these alternatives are not equal in view of the principles embodied in the Treaty would be contrary to the express choice of the EU legislator to allow more than a single method of transposition.[754]

215. The AG then considered that sellers of reproduction media could not be exempt from a private copying levy when exporting material to other Member States since they would otherwise avoid fair compensation, in violation of international conventions on copyright law. As such, the levy on imports could not be disproportionate. [755] Thus the AG does in fact review the Dutch scheme – although its approach is closer to the review of EU measures. Moreover, his reasoning could imply that such a proportionality test is not necessary.

216. While the AG does not explicitly mention the Exhaustion Rule, his analysis implies that the national discretion enjoyed over the question of fair compensation was legislation-based, and thus free from having to be directly scrutinised under Articles 34 -36 TFEU.[756] This

[752] *Ibid*., paragraphs 28 – 30.
[753] *Ibid*., paragraph 32.
[754] *Ibid*., paragraph 33.
[755] *Ibid*., paragraph 34.
[756] One could also argue that the Dutch measures stemmed from an exercise of Treaty-based discretion, since the Copyright Directive had not exhaustively regulated the level of 'fair compensation' or the method of collection. Moreover, as noted by the AG (see Opus Supplies, note 255, paragraph 20), Member States enjoyed a large margin

implication tallies with AG Trstenjak's finding in an earlier case that the concept of who must pay 'fair compensation' had been 'exhaustively regulated'. [757] Yet the AG fails to confirm the next step – which is that acts of legislation-based discretion, such as the impugned Dutch measure must be reviewed, in this case, by reference to the balance achieved under the Copyright Directive between free movement and copyright protection. Rather, he presumes that exercise of discretion is legitimate, simply because it stems from a legitimate *grant* of discretion. This deferential approach appears to have fed into the Court's finding that the Dutch rules imposing the duty of fair compensation on the manufacturer or importer came within the limits of national discretion. As regard the impact on the free movement of goods, the Court held that this requirement of fair compensation, as correctly implemented by the Netherlands, was not impacted by the fact that the commercial seller, upon whom the obligation was imposed, was based in another Member State.[758]

217. Whether or not this conclusion was ultimately correct, we would question the AG's suggestion that, as long as the *grant* of discretion complies with the Treaty, the alternatives available to the Member States within the margins of discretion are presumed equal and need not be reviewed separately. Such an approach would, it seems, run the risk that secondary legislation could authorise Member States to avoid their Treaty obligations. Indeed, recalling the Waste Oil and Cosmetics Directive sagas, discussed in Part I (Chapter Two), the Court usually limits specific national actions taken within the framework of an EU rule to what is compatible with free movement, even if its intensity of review can vary. Such an explicit review of the Dutch rule by reference to the Copyright Directive would likely have confirmed that it was proportionate and as such would not have altered the AG (or Court's) finding. Indeed, the Court has confirmed that the EU legislator need not opt for the least restrictive standard when determining how to regulate a particular field.[759] However, while the same flexibility can be extended to Member States, compatibility between the free movement of goods and a national trade rule that stems from the exercise of national discretion should never be presumed but needs to be demonstrated and justified through express review. This is all the more, when it is the Member State, and not the EU legislator, that sets the standard.

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of appreciation to define who paid such compensation. If this was so, the Dutch rules should have been reviewed under Articles 34 and 36 TFEU, as is the case for any exercise of Treaty-based discretion.

[757] *Padawan*, note 255.

[758] *Ibid*., paragraph 40.

[759] See Part I (Chapter One), point 114, with citations at note 440.

218. These cases are highlighted, not to contest their substantive finding, but to show how reliance on the Exhaustion Rule might prevent the Court from assessing whether, and how, national exercise of legislation-based discretion impacts on traders' free movement rights. This privileging of the EU and Member States' regulatory choices may be the desired result, as indicated by the AG in *Opus Supplies,* or could stem from inadvertence, as seems to have happened in *EU Wood Trading*. Both scenarios could, however, pose a risk to the oft maligned, but constitutionally protected, free mover.

CONCLUSION OF CHAPTER TWO

219. The Court's interpretation and enforcement of EU secondary product oscillates between ousting national trade barriers and authorising EU compliant national regulation, and from imposing the EU standard under the Exhaustion Rule, to deciding that it does not apply. Far from signalling incoherence or subjectivity, however, this case-law generally reflects the varied legislative *acquis*, interpreted according to legitimate judicial discretion. As such, it confirms the conclusion reached in Part I regarding the role of the Exhaustion Rule. That said, reliance on the Exhaustion Rule can sometimes engender confusion, inconsistencies and a risk that certain acts of national discretion could escape appropriate review. The risk of the latter is heightened when Member States exercise legislation-based discretion, particularly when the Court fails to identify that such discretion has been exercised, and/or that it needs to be reviewed.

CONCLUSION OF PART II

220. The Exhaustion Rule determines which norms apply to review national legislation in the presence (and absence) of exhaustive EU legislation. In practice, it also facilitates a coherent interpretation of EU legislation, as the Court generally aligns with the legislator's appreciation of how to balance regulation and integration in the internal market for products. This is not to say that judgements are always uncontroversial or obvious. To the contrary, the Court might interpret harmonisation so as to preclude protective national standards, leading to a concern that internal market regulation could trigger a regulatory race to the bottom. It can also impose upward constraints on the Member States, and on free movers, fuelling the opposing fear of over-regulation and the loss of business opportunities. These concerns could then be exacerbated by the difficulty in adopting a legislative response, either at national level, under the *Tedeschi* Rule, or at EU level, given the laborious decision-making procedure. In such circumstances, Member States might not only be tied to a particular regulatory regime. They could also be tied to a bad deal. Still, resolving such issues should not, in principle, depend on the application, or not, of the Exhaustion Rule, but requires legislative – or even constitutional – solutions, for example, by ensuring a more fluid decision-making process, widening the EU's objectives beyond the economic and/or allowing for a degree of regulatory diversity. The role of the Exhaustion Rule is, rather, to enforce resulting decisions in a manner that respects both the legislator's intention and the Treaty. In this context, the Court's varied 'Exhaustion Rule' case-law generally represents a legitimate reflection of the legislative *acquis*, interpreted according to legitimate judicial discretion.

221. In some cases, however, it seems that the Exhaustion Rule, far from ensuring balance and coherence, could allow the promotion of one strategic goal over another in a manner that disrupts, not only the balance between regulation and integration, but also between the Court and the legislator – and primary and secondary law. One narrative of internal market integration could consider this imbalance to tilt in favour of market integration and even deregulation. Yet in reality, (mis)application of the Exhaustion Rule could equally privilege regulatory concerns at the expense of free movement. As just discussed, AG Jääskinen appeared to express some ideological support for this possibility in *Opus Supplies*. A similar view may also have been implied by AG Trstenjak in *Commission v Germany (Public Ambulance Services)* by suggesting that an 'authorisation in secondary law' has 'priority over a prohibition in primary

law' (and *vice versa*), with any tensions between such rules being resolved in favour of the EU legislation.[760] This perspective retains echoes of 'legislative supremacy', which we discussed in Part I in the context of Syrpis's second 'extreme' vision on conceiving the relationship between the judiciary and legislator.[761] While not advocating that Member States flout the fundamental freedoms, it considers that secondary legislation should sometimes enjoy a near un-rebuttable presumption of constitutionality, since to find otherwise would 'seriously undermine the validity of the secondary legislation'.[762] Yet it should be recalled that EU legislation can legitimately reset the balance between integration and regulation, laid down under Articles 34 – 36 TFEU, while also authorising national acts of legislation-based discretion, which can, under the Exhaustion Rule, escape direct review by reference to these primary law provision. In this context, privileging the position of secondary legislation could, under the Exhaustion Rule, provide wide scope for both the EU and national legislator's vision to have priority over primary law. This is all the more when the EU and national regulator defend the same protective interpretation of the EU regulatory standard against the trader, as illustrated in the *Berger* case.

222. It is true that the Court, in both *Opus Supplies* and *Commission v Germany (Public Ambulance Services)*, reached the same conclusion as that suggested by the AG. At the same time, it did not explicitly endorse their vision. What is more, the orthodox position, whereby Articles 34 – 35 TFEU must be respected *notwithstanding* the presence of secondary legislation, largely prevails in the case-law.[763] In this regard, it is useful to recall AG Cruz Villalón's recent utterings on the matter, which, in our view, correctly sum up the Court's current conception of the relationship between exhaustive EU product rules and Articles 34 – 35 TFEU.[764] As noted in Part I, the AG insists that the 'procedural situation created' by the Exhaustion Rule 'cannot have the effect of excluding the application of the fundamental freedoms guaranteed by the Treaty'.[765] Not only would this threaten the hierarchy of norms but it would challenge the Court's repeated findings that secondary law must, first, comply with, and therefore be reviewable in light of the fundamental freedoms, and secondly, be interpreted in light of

[760] Opinion in *Commission v Germany (Public Ambulance Services),* C-160/08, EU:C:2010:67, paragraphs 105 – 112.
[761] Part I (Chapter One), point 52.
[762] Opinion in *Commission v Germany (Public Ambulance Services)*, note 760, paragraph 107.
[763] Part I (Chapter One).
[764] Opinion in *Commission v France (Excise Duty on Tobacco)*, C-216/11, EU:C:2012:819.
[765] *Ibid*., paragraph 39.

primary law.[766] As such, the Court must, where necessary, consistently interpret or judicially review secondary law provisions by reference to the Treaty, and review national acts of legislation-based discretion by reference to the exhaustive regulatory framework. The fact that the Exhaustion Rule applies should not have any impact on this obligation. In such circumstances, potentially deviant cases such as *EU Wood Trading*, *Berger* and *Gallaher* could point, not to a flaw with the Exhaustion Rule itself, but rather to a wider misunderstanding of its function, and in particular, its relationship with national discretion. In Part III, we assess why this could be so, and consider how such misunderstanding could be remedied.

[766] *Ibid*., paragraphs 40 – 41.

PART III

TOWARDS A NEW FRAMEWORK FOR REVIEW

1. While internal market product rules can accommodate national regulatory diversity, such diversity cannot undermine the goal of market integration or create an unjustifiable barrier to trade. The Court must therefore police the grant and exercise of national regulatory discretion, whether Treaty or legislation-based, to ensure compliance with primary law, and, in particular, the free movement of goods. It is in this context that regulatory disputes can arise, as parties disagree over whether, and the extent to which, secondary legislation has pre-empted or authorised a particular national measure. A preliminary task for the Court in resolving such disputes is to establish a normative framework to assess the national measure. To this end, the Exhaustion Rule will, if applicable, confirm the EU measure as the sole norm of reference.

2. Judicial reliance on the Exhaustion Rule, which implies the existence of exhaustive harmonisation, often precludes (more protective) national standards. Yet, Part II illustrates that harmonisation can establish a *protective* regulatory framework that *raises* national standards and, in some cases, grants scope for national discretion. These observations should counter any narrative of EU (exhaustive) regulation as triggering weaker standards. They also underscore the need to distinguish the tension over balancing the requirements of integration and regulation from the battle over how to share competence. Indeed, while certain parties might consider exhaustive EU rules (which generally favour EU competence) to privilege market integration in a manner that *lowers* national regulatory standards, such an effect should not be presumed. The internal market can accommodate and protect regulatory diversity *and* high standards, once there is compliance with primary law.[1] And the Court generally achieves such compatibility in the presence of secondary legislation by consistently interpreting the latter with the Treaty. However, this approach may be insufficient to defuse validity issues that arise when Member States exercise legislation-based discretion, particularly when the Court fails to identify its existence and/or that needs review. The question explored in Part III is whether application of

[1] As outlined in the General Introduction and in Part I, EU legislation must respect the hierarchy of norms, including the fundamental freedoms, the general principles of law and the Charter of Fundamental Rights. National law must also respect such EU rules, to the extent that it falls within the scope of EU law.

Exhaustion Rule could increase this latter risk, thus jeopardising the Court's goals of achieving institutional balance, and respecting the legislator's intention, in a Treaty-compliant manner.

3. Chapter One explains that this, and other, difficulties are not *inherent* to the Exhaustion Rule, but stem from a misunderstanding with regards to the Rule's function. This misunderstanding is, in turn, rooted in an out-dated binary vision of EU regulation provided by harmonisation models, where the Rule is seen as synonymous with total harmonisation and the absence of any national discretion. In reality, exhaustive legislation can grant some national discretion, while minimum harmonisation can impose significant constraints. Such observations highlight a gap between the discourse and reality of EU regulation, which can trigger a series of problems including, *in extremis*, a threat to free movement of goods. Chapter Two responds to these concerns by suggesting a more appropriate framework to describe and assess the impact of EU internal market legislation on the regulatory landscape. Relying on the Court's recent best practice as well as the views of certain commentators, this framework introduces a new categorisation of national measures adopted in the presence of EU legislation, which identifies the category of legislation-based discretion. The proposal also identifies *regulatory character* as a distinct feature of an EU measure, thus decoupling the exercise of national discretion from the application, or not, of the Exhaustion Rule. In doing so, it advances a more nuanced understanding of secondary legislation as it interacts with the free movement of goods and national law. This can, in turn, guide the Court's approach to dispute resolution and enhance the transparency of its judgements.

CHAPTER ONE – AN OUTDATED FRAMEWORK

4. The Exhaustion Rule is concerned with establishing the Court's normative framework of reference to review national product rules. However, while its successful invocation (or exclusion) can have both procedural and substantive implications, application (or not) of the Rule does not, of itself, resolve all disputes. This clarification can sometimes be lost in the discourse surrounding the relationship between secondary and national law, which can consider the pre-emption of Treaty-based discretion under the Rule's *Tedeschi* Leg – to be synonymous with an absence of *all* national discretion.

5. At the heart of this perspective is a failure to distinguish between the principles of EU primacy, which resolves all regulatory conflict in favour of the EU norm, and of pre-emption, which insists that national regulatory competence, in a field of shared competences, is only ousted *to the extent of* the conflict. This failure remains rooted in the traditional understanding of total harmonisation, which, by removing all scope for national regulation (pre-emption), automatically ousts any deviant national measure in favour of the harmonised standard (primacy). As such, national action can only survive if it correctly implements the EU rule, or regulates a matter outside the scope of the EU framework. What results is a binary vision of regulation, in which 'harmonisation' (and the Exhaustion Rule) is associated with an absence of any regulatory leeway under total harmonisation, while regulatory diversity can only persist if the Rule does not apply i.e. in the presence of minimum or partial harmonisation.

6. As discussed in Part I, this vision is understandable when disputing parties agree that the EU measure pre-empts the field, or in some instances of rule pre-emption. In such cases, the Court can impose the EU standard without having to search for its pre-emptive effect and the principles of primacy and pre-emption can coincide. However, in other cases, the fact that EU legislation enjoys primacy is insufficient to determine the extent to which it pre-empts national competence, even where that legislation triggers the Exhaustion Rule. For this, the Court must take a further step of interpreting that measure to establish its scope and substantive effect on the national measure. To this end, it assesses whether the EU measure institutes (what the US pre-emption framework has classified as) field, rule or obstacle pre-emption. As such, while total harmonisation implies the Exhaustion Rule, the opposite does not necessarily stand. That is to say, legislation might sometimes activate the Rule while also authorising Member States to continue regulating, albeit within a more restricted (legislative) framework. A further,

related, point is that the Exhaustion Rule is not only concerned with ousting national discretion to achieve market integration. It also enforces the regulatory effect of EU legislation.

7. These observations point to a complex, multifaceted role for EU internal market regulation as it interacts with national law, and in how it is interpreted and enforced by the Court. This Chapter explores why this role can no longer be understood exclusively through the lens of harmonisation models. Section one recalls the classic definition of the main models, while section two reflects on how such models can lead to a distorted vision of the relationship between EU and national law. Section three discusses the consequences of this vision on institutional and academic discourse, and on the Court itself.

1. THE TRADITIONAL CATEGORISATION

8. The TFEU authorises the EU legislator to regulate different aspects of the internal market for products, with a varied impact on national regulatory powers. As noted in the General Introduction, different harmonisation models have emerged to describe such legislative acts, which diverge depending on the scope and content of the powers left to the Member States. This section looks at how the four main models are traditionally defined, those being total (exhaustive) harmonisation, minimum harmonisation, optional harmonisation and partial harmonisation.[2]

1.1 Total (Exhaustive) Harmonisation

9. The most longstanding and intensive mode of harmonisation, insofar as it relates to national law, is 'total harmonisation',[3] the defining characteristic of which is to oust all national regulatory discretion over the relevant subject matter.[4] This type of harmonisation has also been

[2] Other harmonisation models have also been identified. Ex. Slot refers to 'alternative harmonisation', which allows Member States to choose between alternatives, while Barnard refers to 'reflexive harmonisation', which seeks to 'devolve or confer rule-making powers to self-regulatory processes'. Both also consider the role of mutual recognition as a *de facto* harmonisation model, since it leads the industry concerned to follow the most favourable rules. P. Slot, 'Harmonisation', *European Law Review*, vol. 21, no. 5, 1996, pp. 378 – 397, at p. 386 and C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, Fifth Edition, Oxford, Oxford University Press, 2016, p. 581 and p. 595.

[3] Ex. *'Agrodetalė' UAB*, C-513/15, EU:C:2017:473, paragraph 23 and *Commission v Poland (Right Hand Steering)*, C-639/11, EU:C:2014:173, paragraph 35. See also R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, Oxford, Oxford University Press, 2009, pp. 196 – 204 and S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods' in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union*, Fifth Edition, Oxford-Portland Oregon, Hart Publishing, 2010, pp. 467 – 471.

[4] *Ibid*.

referred to as 'exhaustive',[5] 'full',[6] 'complete'[7] and 'maximum'[8] harmonisation, exhaustive regulation,[9] or simply 'harmonisation',[10] although not necessarily in a consistent manner.[11] This section retains the traditional definition just outlined.

10. Total harmonisation is achieved by establishing a complete and comprehensive regulatory regime over a particular field, which transfers protection of the relevant public interest(s) to the EU level. As a result, a Member State that is subject to total harmonisation can only establish regulatory standards by implementing obligatory EU rules and no longer *needs* to adopt its own protective measures. To put it another way, without the 'necessity' requirement to invoke Article 36 TFEU, national competence to regulate thereunder is pre-empted and any 'additional' national product requirement will automatically constitute an unjustified trade barrier under EU primacy. If an unforeseen development threatens the public interest that is subject to harmonisation, 'regulatory adaptation is in principle to be achieved by the Community authorities',[12] unless a national measure can be adopted under the legislative safeguard procedure[13] or by activating a constitutional (Treaty-based) derogation.[14] A Member State cannot, therefore, respond to a suspected breach of a harmonised requirement by adopting unilateral corrective or protective measures. It must instead 'rely entirely upon the controls carried out by the Home State as to the compliance with the harmonised standards of goods originating therein'.[15] Total harmonisation is also generally incompatible with reverse

[5] Ex. *Commission v France (Cosmetics)*, C-246/91, EU:C:1993:174, paragraph 7; See also C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit*., p. 582.
[6] *Commission v Italy (Pure Chocolate)*, C-47/09, EU:C:2010:714, paragraph 29. See also the Commission in its Green Paper on the review of the consumer acquis, COM (2006) 744 final, 8 February 2007, and Directive 2011/83 of the European Parliament and of the Council on consumer rights, OJ L. 304, 22 November 2011, pp. 64 – 88 at recitals 5 and 7 (the Consumer Rights Directive).
[7] Ex. *ATRAL*, C-14/02, EU:C:2003:265, paragraph 44.
[8] Opinion in *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2009:511, paragraph 69. See also S. Weatherill, *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, Chapter 15.
[9] Ex. Opinion in *UNIC*, C-95/14, EU:C:2015:270, paragraphs 57 – 58.
[10] This was particularly so in early case-law. Ex. *Tedeschi*, Case 5/77, EU:C:1977:144 and *Ratti*, Case 148/78, EU:C:1979:110.
[11] *Infra*, paragraph 127. See also Opinion in *Novo Nordisk Pharma*, C-310/13, EU:C:2014:1825, paragraph 23. The variety of terms used to describe 'total harmonisation' has been criticised in literature. Ex. J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, Fourth Edition, Groningen, Europa Law Publishing, 2012, p. 104. See also Slot, 'Harmonisation', *op. cit*., p. 389.
[12] M. Dougan 'Minimum Harmonisation and the Internal Market', *Common Market Law Review*, 2000, vol. 37, no. 4, pp. 853 – 885 at pp. 854 – 855.
[13] Ex. *Commission v Germany (Male Pigs)*, C-102/96, EU:C:1998:529, paragraph 38.
[14] Ex. Under Article 114 (4 – 7) TFEU or Article 193 TFEU.
[15] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between Sein and Solen'*, Jean Monnet Working Paper,* No. 03/10, 2010, p. 60. Available at https://jeanmonnetprogram.org/paper/the-doctrine-of-union-preemption-in-the-eu-single-market-between-sein-and-sollen/. Last accessed 5 September 2019. See also *Hedley Lomas,* C-5/94, EU:C:1996:205, paragraph 20, and cases cited thereunder.

discrimination since the rights and obligations it contains often apply to both national products *and* imports, unlike under Article 34 TFEU.[16]

11. Total harmonisation imposes a far-reaching pre-emptive impact on national regulatory autonomy. Indeed, the field covered by the legislation is effectively transferred into an exclusive competence.[17] Identifying *whether* an EU measure is in fact one of total harmonisation will be therefore be key to establishing the (in)validity of a particular national rule. The Court, when tasked with resolving this question, generally takes the same approach as when assessing regulatory character. As discussed in Part I (Chapter Two), this involves looking at the comprehensiveness of the legislative obligations, the legal basis and objectives of the measure and the context in which it was adopted.[18] The presence – or absence – of an exclusivity and/or market access clause also plays a role since they, together, 'expressly (forbid) certain Member State legislation or expressly (require) that Community regulation of an area is exclusive or exhaustive'.[19] A measure that contains both will therefore strip the Member States of (Treaty-based) discretion to regulate the field, thus implying total harmonisation and precluding 'additional' national rules.[20]

12. Commentators frequently link the definition of total harmonisation to the presence of exclusivity and market access clauses.[21] This perspective was reinforced by the *Tobacco Advertising* cases,[22] which tied the validity of the Tobacco Advertising Directives,[23] and their reliance on ex. Article 95 EC (now Article 114 TFEU) as a legal basis, to the presence, or not, of a market access clause. When the exhaustive nature of the directives in *Gintec*[24] and *Cindu*

[16] *SARPP*, C- 241/89, EU:C:1990:459, paragraph 16. See also R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., p. 204.
[17] S. Weatherill, *Law and Integration in the European Union*, *op. cit.*, p. 137. See also R. Schütze, *ibid.*, pp. 202 – 205.
[18] See Part I (Chapter Two), section 2.1.2 (Triggering the Exhaustion Rule).
[19] E. Cross, 'Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis', *Common Market Law Review,* vol. 29, no. 3, 1992, pp. 447 – 472 at pp. 458 – 459.
[20] The Court often follows this pattern when assessing directives adopted under the new approach to harmonisation. See Part II (Chapter Two), points 32 – 35.
[21] Ex. C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit*., pp. 582 – 583; A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit*., p. 70 and S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', *op. cit.*, p. 467.
[22] *Germany v European Council & Parliament*, C-376/98, EU:C:2000:544 (*Tobacco Advertising I*) and *Germany v European Council & Parliament*, C-380/03, EU:C:2006:772 (*Tobacco Advertising II*).
[23] Directive 98/43/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L. 213, 30 July 1998, pp. 9 – 12 and Directive 2003/33/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L. 152, 20 June 2003, pp. 16 – 19.
[24] *Gintec,* C-374/05, EU:C:2007:654.

Chemicals[25] was linked to Article 114 TFEU, a further extrapolation was made – which was that all Article 114 directives *had* to institute total harmonisation.[26] Yet as cautioned in Part I (Chapter Two), the absence of such clauses will not automatically exclude total harmonisation, while the presence of a market access clause is not always sufficient to restrict all national regulatory options to safeguard measures and constitutional derogations. [27] The Court itself has acknowledged that such clauses have 'no independent value, being no more than the necessary complement of the substantive provisions contained in the (directive's) articles and designed to ensure the free movement of the products in question'.[28] Moreover, EU legislation might contain a market access clause, while also authorising some national regulatory discretion. This arises, for example, when different harmonisation models coexist in the same regulatory framework[29] or when Member States retain 'legislation-based discretion' to regulate domestic production,[30] and, in some cases, imports.[31]

1.2 Minimum harmonisation

13. Minimum harmonisation, which has been a feature of internal market regulation since the 1970s, was formally recognised under the SEA as a legitimate means of standard setting. Consolidated in successive Treaty amendments, minimum standards constitute an obligation in some fields, such as public health policy, and a possibility in others, such as general internal market regulation.[32] The function of minimum harmonisation is to establish a baseline of

[25] *Cindu Chemicals*, Joined Cases C-281/03 and C-282/03, EU:C:2005:549.
[26] See *infra*, section 3.2.1 ((Mis)Understanding Article 114 TFEU).
[27] Ex. Part I (Chapter Two), paragraph 215.
[28] *Ratti*, note 10, paragraph 13. See also Opinion in *Ratti*, Case 148/78, EU:C:1979:44, p. 1651, second last paragraph of point one.
[29] Ex. European Parliament and Council Directive 94/62/EC on packaging and packaging waste, OJ L. 365 31 December 1994, pp. 10 – 23 (the Waste Packaging Directive), as interpreted in *Commission v Denmark (Waste Packaging),* C-246/99, EU:C:2002:477 and *Commission v Germany (Waste Packaging),* C-463/01, EU:C:2004:797.
[30] Ex. Council Directive 89/622/EEC on the labelling of tobacco products, OJ L. 359, 8 December 1989, pp. 1 – 4 (the first Tobacco Labelling Directive) contained a market access clause under Article 8 while also authorising stricter national standards with respect to national production under Articles 3 (3) and 4 (4).
[31] The first and second Food Labelling Directives (no longer in force), and the current Consumer Information Regulation (in force), contain market access clauses under, respectively, Article 15 (1), Article 18 (1) and Article 38, while allowing protective national measures to be imposed on imports under, respectively, Article 15(2), Article 18 (2) and Article 39. See Council Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L. 33, 8 February 1979, pp. 1 – 14; Directive 2000/13/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ L. 109, 6 May 2000, pp. 29 – 42 and Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, OJ L. 304, 22 November 2011, pp. 18 – 63.
[32] N. Boeger, 'Minimum Harmonisation, Free Movement and Proportionality', in P. Syrpis (ed.), 'The Judiciary, the Legislature and the EU Internal Market', Cambridge, Cambridge University Press, 2012, pp. 62 – 91 at p. 65.

regulatory standards, which Member States cannot fall below, while allowing more stringent national standards to protect the relevant public interest.[33] This baseline is not 'limited to the lowest common denominator, or even to the lowest level of protection established by the various Member States', but simply allows a higher level of national protection than under EU law, 'high as it may be'.[34]

14. This regulatory leeway allows the EU and national level to act as 'co-legislators',[35] thereby accommodating flexibility and diversity.[36] The question prompted, however, is whether, and the extent to which, higher national standards can apply to imports that comply with the (lower) harmonised rule. The response to this question will lead to different understandings of minimum harmonisation, with a 'thin conception' preventing stricter standards being imposed on imports, and a 'thick conception' accepting a greater degree of regulatory differentiation by allowing the higher domestic standard to prevail.[37] Certain commentators have argued for the former, given the overriding need to protect the internal market from domestic policy preferences.[38] As just noted, this argument has particular force with respect to directives based on Article 114 TFEU, which must ensure the functioning and establishment of the internal market.[39] In practice, however, such directives sometimes allow higher national standards to have a cross-border impact,[40] which the Court will enforce.[41] It is

[33] P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, Oxford, Oxford University Press, Sixth Edition, 2015, p. 626.
[34] *UK v Council (Working Time)*, C-84/94, EU:C:1996:431, paragraph 56.
[35] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., p. 198.
[36] For discussion, see M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit.*, section 3 and S. Weatherill, 'Supply of and Demand for Internal Market Regulation: Strategies, Preferences and Interpretation', in N. Nic Shuibhne (ed.), *Regulating the Internal Market*, Cheltenham & Northampton, Edward Elgar, 2006, pp. 29 – 60. See also S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit*., pp. 210 – 211, and Chapter 15 more generally.
[37] This terminology is relied upon by Boeger in N. Boeger, 'Minimum Harmonisation, Free Movement and Proportionality', *op. cit.*, pp. 70 – 73.
[38] Ex. N. Bernard, 'The Future of European Economic Law in the light of the Principle of Subsidiarity', *Common Market Law Review*, 1996, vol. 3, no. 4, pp. 633 – 666 at pp. 646 – 647; D. Chalmers, G. Davies & G. Monti, *European Union Law*, Cambridge, Cambridge University Press, 2014, pp. 692 – 693; J. Jans, 'Minimum Harmonisation and the Role of the Principle of Proportionality' in M. Führ, R. Wahl & P. von Wilmowsky, (eds.), *Umweltrecht und Umweltwissenschaft; Festschrift für Eckard Rehbinde,* Berlin, Erich Schmidt Verlag, 2007, pp. 705 – 717 (as cited by Boeger, *ibid*); I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, Cheltenham & Northampton, Edward Elgar, 2013, pp. 63 – 67 and P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *Common Market Law Review*, 2003, vol. 40, no. 5, pp. 1107 – 1135 at section 2.2; See also Opinions in *Antroposana & Others*, C-84/06, EU:C:2007:301, paragraph 41 and *Gintec*, note 24, paragraphs 25 – 29.
[39] *Tobacco Advertising I*, note 22.
[40] Ex. Article 14 (1) of Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, OJ L. 144, 4 June 1997, pp. 19–27 (The Distance Selling Directive).
[41] Ex. *Buet,* Case 382/87, EU:C:1989:198; *Aher-Waggon,* C-389/96, EU:C:1998:357; *A-Punkt,* C-441/04, EU:C:2006:141 and *Gysbrechts,* C-205/07, EU:C:2008:730.

on this basis that much of the literature, correctly in the author's view, agrees that Article 114 TFEU can be relied upon to adopt a thicker conception of minimum harmonisation,[42] unless there is a specific indication, such as a market access clause, stating the contrary.[43]

15. The potential for Member States to rely on minimum harmonisation legislation to impede free movement raises a further question: How can resulting standards remain compatible with Articles 34 – 35 TFEU? The Court's response has been emphatic: Member States cannot rely on secondary legislation, including minimum harmonisation clauses, to somehow flout their free movement obligations.[44] Rather, the Court will subject higher national standards to the same forms of control as is applied in the absence of harmonisation, that is, a review for compatibility with Articles 34 – 35 TFEU.[45] That certain EU measures often explicitly require higher standards to comply with the Treaty confirms this obligation.[46] Weatherill sums up this understanding of minimum harmonisation, in his oft-quoted statement, that 'secondary Community law sets the floor for national action; primary Community law sets the ceiling'.[47] As a result, higher national standards adopted to protect the public interest defined in secondary rules must comply with the free movement of goods, to the extent that they have a cross-border impact.[48] The scope for national regulation should therefore correspond to what is allowed under Article 36 TFEU or by invoking a mandatory requirement,[49] excluding lower standards. As Dougan notes, 'in the absence of more explicit

[42] Ex. P. Slot, 'Harmonisation', *op. cit*., p. 385; M. Dougan 'Minimum Harmonisation and the Internal Market', *op. cit.*, p. 878; A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op cit*., pp. 72 – 73 and S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.,* Chapter 15.
[43] Ex. Council Directive 89/622/EEC (the first Tobacco Labelling Directive), *op. cit.*, as interpreted in *Gallaher,* C-11/92*,* EU:C:1993:262.
[44] *Karner,* C-71/02, EU:C:2004:181, paragraph 34.
[45] For examples for the case-law, see *supra*, note 41. In other cases, the Court does not carry out this review. Ex. *Hönig*, C-128/94, EU:C:1995:341. In a further category of cases, the Charter of Fundamental Rights could place additional limits on the adoption of stricter national standards. See ex. *Alemo-Herron*, C-426/11, EU:C:2013:521.
[46] See ex. P. Rott, "Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*., section 2.1.5.
[47] S. Weatherill, *Law and Integration in the European Union*, *op. cit.*, p. 153.
[48] National measures adopted within this 'upwardly-flexible area' that fall within the scope of EU law must also comply with EU law, including general principles of law, the Charter and other secondary measures, even if they do not have a cross border effect. See F. De Cecco*,* 'Room to Move? Minimum Harmonisation and Fundamental Rights', *Common Market Law Review*, vol. 43, no. 1, 2006, pp. 9 – 30.
[49] Slot questioned whether mandatory requirements, which could only apply 'in the absence of harmonisation' could be available in addition to Article 36 derogations to justify obstacles to free movement. See P. Slot, 'Harmonisation', *op. cit*., p. 385. However, this limitation has subsequently been dismissed, both in the literature and by the Court's practice. See case-law cited at note 41 (which concern consumer protection) and M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit.*, pp. 868 – 869.

legislative provision, more stringent domestic standards can restrict the free movement of goods and services, if either objectively justified or saved by a Treaty exception'.[50]

16. One related issue is whether the presence of a minimum harmonisation standard could influence the Court in assessing whether the higher national rule is indeed proportionate. Following a review of relevant case-law, Boeger concludes that the Court, while frequently striking down such rules as disproportionate barriers to trade,[51] neither presumes this to be the case nor applies a more stringent standard of review than in the absence of harmonisation. Rather, it considers the proportionality test as an independent step, which sometimes incorporates a light-touch review[52] but where the EU minimum standard 'carries little independent normative weight.'[53]

17. As with total harmonisation, the Court takes a contextual and teleological approach to identifying minimum harmonisation, looking at various factors, such as the wording of the directive, as well as its objective and context.[54] The legal basis of the measure can also play a role, even if this is not definitive. The above definition of total harmonisation notes that reliance on Article 114 TFEU might sometimes imply that the directive has instituted exhaustive rules.[55] Environmental protection directives based on Article 192 TFEU are, to the contrary, often seen as instituting minimum harmonisation by definition.[56] In this context, the presence of an explicit grant of regulatory discretion – and the absence of a market access clause – will be particularly relevant to rebut any such presumption with respect to Article 114 measures. Such grants of discretion traditionally state that Member States can adopt 'more stringent national measures'.[57] However, they can also come in softer forms, for example, by requiring Member States to

[50] M. Dougan, *ibid*., p. 878.
[51] Ex. *Doc Morris,* C-322/01, EU:C:2003:664; *Commission* v *Germany (Waste Packaging)*, note 29; *Monsees*, C-350/97, EU:C:1999:242; *Andre Ambry,* C-410/96, EU:C:1998:578 and *Dusseldorp*, C-203/96, EU:C:1998:316.
[52] Ex. *Aher-Waggon*, note 41. See also *infra,* points 88 – 89.
[53] N. Boeger, 'Minimum Harmonisation, Free Movement and Proportionality', *op. cit.*, section 6.
[54] Ex. *Hönig*, note 45, paragraph 9 and *Compassion in World Farming (CIWF)*, C-1/96, EU:C:1998:113, paragraph 49.
[55] Ex. *Gintec,* note 24 and the first Tobacco Advertising case, note 22. For discussion, see P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*.
[56] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 118. See also Part I (Chapter Two), point 260.
[57] Ex. Article 14 (1) of Directive 97/7/EC, *op. cit.*; Article 8 of Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ L. 372, 31 December 1985, pp. 31 –33 (the Doorstep Selling Directive); Article 8 of Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising, OJ L. 376, 27 December 2006, pp. 21 – 27 (the Misleading and Comparative Advertising Directive).

comply 'at least' with the applicable EU standard[58] or by allowing Member States to adopt 'necessary measures' or 'special conditions' to protect a public interest.[59] Some such provisions specify that resulting national measures must comply with the Treaty, therefore indicating the need for a review by reference to Articles 34 – 36 TFEU.[60]

1.3 Optional Harmonisation

18. Legislation that institutes optional harmonisation provides for a harmonised common standard, with a market access clause for compliant products but without any exclusivity clause. Member States can, as a result, depart from that harmonised standard insofar as national products are concerned and recognise 'other standards on their own markets, so that two parallel markets exist'.[61] However, given the market access clause, Member States must also accept imports complying with the harmonised rule. An example of optional harmonisation can be seen under Recital 84 and Article 26 of the Audiovisual Media Services Directive, which confirm that Member States can lay down different conditions for certain television broadcasts 'intended solely for the national territory'.[62]

19. In an early article on this subject, Currall notes the advantages of optional harmonisation as including: avoiding disruption to existing markets; facilitating innovation; allowing local and national standards; preventing domination by large companies and giving manufacturers flexibility over when, if ever, to adapt to the EU standard.[63] Optional harmonisation is therefore presented as giving producers a choice, as they can adhere to less restrictive national rules

[58] Ex. Article 3 of the first Tobacco Labelling Directive, *op. cit.* For examples from directives adopted under other legal bases, see Article 3 (1) of Council Directive 80/51/EEC on the limitation of noise emissions from subsonic aircraft, OJ L. 18, 24 January 1980, pp. 26 – 28 and Article 3 (1)(a) of Council Directive 88/166/EEC on the protection of battery hens, OJ L. 74, 19 March 1988, pp. 83 – 87.
[59] Ex. Article 7 of Directive 94/62/EC (the Waste Packaging Directive), *op. cit*., which required Member States to adopt 'necessary measures' to establish systems for the return and reuse/recovery of packaging waste. See *Valev Visnapuu*, C-198/14, EU:C:2015:751. See also Article 7 (3) of Council Directive 75/442/EEC on Waste, OJ L. 194, 25 July 1975, pp. 47 – 49, as interpreted in *FFAD*, C-209/98, EU:C:2000:279, paragraphs 89 – 95.
[60] Ex. Article 14 (1) of Directive 97/7/EC, *op. cit.*; Article 5 of Directive 94/62/EC and Article 26 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L. 134, 30 April 2004, pp. 114 – 240.
[61] J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *Yearbook of European Law,* vol. 4, no. 1, 1984, pp. 169 – 205, at p. 179.
[62] Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L. 95, 15 April 2010, pp. 1 – 24.
[63] J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *op. cit*., p. 179.

internally, while complying with the harmonised standards to export to other Member States.[64] However, as noted by Arena, 'the true "option" is granted to Member States, which can choose whether to subject certain situations, typically purely internal ones, to less demanding requirements than those set out in the harmonisation measure'.[65]

20. As with total harmonisation, products that comply with the harmonised rules in optional directives can enjoy unhindered market access throughout the EU, while national measures that adhere to the EU standard will be presumed to comply with the Treaty. However, similar to 'more stringent national measures' under minimum harmonisation, optional harmonisation also allows (often more lenient) non-harmonised national measures to persist. The same question thus emerges, which is whether products based on the authorised but divergent *domestic* standard can continue to enjoy free trade throughout the EU. The Court considered this matter in *Van der Veldt*, as it assessed whether Belgium could rely on a higher community standard to prohibit imports from a country that had lawfully opted not to implement that standard.[66] The standard at issue was laid down under Article 6 (5)(b) of the first Food Labelling Directive,[67] which required that ingredients belonging to *inter alia* preservatives were to be designated by the name of that category, followed by their specific name or EEC number. However, the Netherlands, in accordance with Article 23 (1)(a) of the directive, opted not to apply this Community standard. As a result, products lawfully manufactured on its territory did not set out their specific name or EEC number, but merely referred to the general category 'preservative' on the label. In assessing Belgium's prohibition on the marketing of the Dutch products, the Court agreed that it constituted a trade restriction. Yet it also found the Belgian measure to be justified by the mandatory requirement of consumer protection or under Article 36 TFEU. To reach this conclusion, the Court referenced the first Food Labelling Directive, which aimed to ensure that consumers were both informed and protected. Since use of labelling to achieve this goal was one means that was least restrictive of trade,[68] the Belgian measure was deemed proportionate.

[64] See P. Slot, 'Harmonisation', *op. cit.*, p. 383, R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., pp. 197 – 198 and A. Arena, ''The Doctrine of Union Preemption in the EU Single Market', *op. cit*., p. 75.
[65] A. Arena, *ibid*., p. 76.
[66] *Van der Veldt*, C-17/93, EU:C:1994:299.
[67] Directive 79/112/EEC, *op. cit.*
[68] *Van der Veldt*, note 66, paragraphs 28 – 32.

21. It follows that optional harmonisation, in contrast to total harmonisation 'will not prohibit the marketing of non-conforming goods'.[69] As illustrated in *Van der Veldt*, such goods may rely on Article 34 TFEU to penetrate the markets of other Member States, with the Community standard functioning 'more as a ceiling than a floor.'[70] However, this case also shows that a national measure based on the common but non-obligatory EU standard to prevent such market access may enjoy a more sympathetic hearing before the Court when assessing whether it is proportionate. In other words, the Court might not consider the host regulator with the same degree of suspicion as might be applied in the absence of *any* harmonisation.[71] This could, in turn, facilitate high EU standards, notwithstanding their voluntary nature, since domestic rules adopted under optional harmonisation tend to be more lenient.[72]

1.4 Partial Harmonisation

22. Partial harmonisation arises when an EU measure only regulates certain elements of a particular product, leaving other elements subject to national rules and, in cross-border scenarios, the Treaty.[73] On this understanding, partial harmonisation is defined 'by reference to the *scope* of the EU measure' and is distinguished from the other harmonisation models. On the one hand, the harmonised element may be subject to total, optional or minimum rules, as defined above. On the other hand, national rules that regulate the non-harmonised element(s) are not 'derogating' from a common standard, as under optional harmonisation, or adopting higher national standards beyond the common floor, as under minimum harmonisation. Rather, they are in an 'in the absence of harmonisation' situation. A trader can therefore export such 'national' products and enjoy market access under Articles 34 – 35 TFEU, while the importing state can seek to justify national barriers to trade under Treaty-based discretion. However, national measures adopted to oppose products regulated under the non-harmonised element of partial harmonisation are not based on an EU standard and may not enjoy the same light touch review that could have been at play in *Van der Veldt*.[74]

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[69] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law, op. cit*., pp. 197 – 198. See also J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *op. cit.*, p. 179.
[70] R. Schütze, *ibid*.
[71] See Court's response to the first and second questions in *Van der Veldt*, note 66. For discussion on how the Court relies on EU legislation to ascertain the 'majority opinion', see *infra* points 88 – 89.
[72] A. Arena, ''The Doctrine of Union Preemption in the EU Single Market', *op. cit*., p. 75.
[73] Partial harmonisation has been subject to alternative definitions. Ex. P. Slot, 'Harmonisation', *op. cit.*, p. 384.
[74] Ex. *Commission v Italy (Chocolate),* C-14/00, EU:C:2003:22, and Opinion in the same case, paragraph 24; *Commission v Spain (Chocolate),* C-12/00, EU:C:2003:21 and Opinion in the same case, paragraph 25; *Ruwet,* C-3/99, EU:C:2000:560 and *Ker-Optika*, C-108/09, EU:C:2010:725.

EU measures generally highlight partial harmonisation by excluding certain matters from their scope, referred to by Cross as 'express saving clauses', although Arena prefers the term 'subordination' or 'deference' clauses. Examples include Article 3 (10) of the Unfair Commercial Practices Directive (UCPD)[75] and Article 1 of the Services Directive.[76]

2. A BINARY VISION …

23. Harmonisation models generally focus on the pre-emptive effect of EU legislation, while presuming that all grants of national discretion stem directly from the Treaty. In doing so, they promote a binary vision of the EU's legislative programme, whereby national regulatory discretion is either ousted by a harmonising rule or allowed to persist under the negative integration regime, because a certain element has not been harmonised. As summed up by AG Colomer*,* either EU rules are 'exhaustive, with no leeway at all for the national legislature, or … they lay out a minimum programme, leaving the Member States free to adopt other rules and tighter restrictions'.[77]

24. This binary vision, which reflects two different conceptions of the internal market, provides the EU legislator with an important justification for its choice of harmonisation model: on the one hand, total harmonisation seeks to integrate the market by transferring regulatory control to the EU level, while minimum, partial and optional harmonisation, on the other, privileges national diversity. Deciding between these visions leads, in practice, to much political debate and haggling during the legislative procedure,[78] with adopted directives often aligning with one or another, in terms of impact on the regulatory landscape (2.1). Yet in other cases, the regulatory impact of adopted legislation appears to deviate, with certain directives, traditionally classified as instituting 'minimum harmonisation', constraining national action and measures of 'total harmonisation' authorising national regulatory discretion. (2.2). This

[75] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ L. 149, 11 June 2005, pp. 22 – 39 (the UCPD). Article 3 (10) provides that it 'shall not apply to the application of the laws, regulations and administrative provisions of Member States relating to the certification and indication of the standard of fineness of articles of precious metal'.
[76] Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ L. 376, 27 December 2006, pp. 36 – 68. Article 1 sets out a number of areas not covered by the directive and which therefore remain within national control (in conformity with EU law).
[77] Opinion in *Gintec*, C-374/05, EU:C:2007:93, paragraph 22.
[78] For a presentation of how this debate played out in response to the Commission's consumer protection package, see S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 215 – 219.

more nuanced reality could call both the binary vision and the Exhaustion Rule into question (2.3).

2.1 A Binary Vision of EU legislation

25. Harmonisation models promote a binary vision of EU legislation whereby national regulatory discretion is either completely ousted by a harmonising rule or allowed to persist in the absence of such harmonisation, subject to compliance with Articles 34 – 36 TFEU. On this understanding, EU measures that institute total harmonisation, being based on the first part of this binary, prevent Member States from exercising *any* regulatory discretion over that field, subject to very limited exceptions outlined in our definition above. Weatherill & McGee reflect this position by noting that the 'essential point' of exhaustive regulation is 'the exclusion of Member States' competence in the area' to the extent that 'States are not entitled to impose domestic requirements which exceed the Community standard'.[79] It is repeated by Craig & de Búrca, who state that 'the EU can pass maximal legislation that covers the entire area. This entails exhaustive regulation of the given field, with the EU rules setting both the floor and the ceiling of regulatory protection, *the corollary being the pre-emption of national action*'.[80]

26. The other three harmonisation models allow for some diversity by combining both elements of the binary, that is, facilitating the coexistence of national Treaty-based discretion with EU harmonised rules. And so, under minimum harmonisation, Member States lose discretion over cross-border trade in relation to lower standards, while retaining it to adopt higher standards, which can, in some cases, extend to imports. Under optional harmonisation, Member States can no longer invoke the Treaty to regulate cross-border trade in products that comply with the harmonised standard but may rely on national powers to regulate domestic production only. Where products based on national rules are exported abroad, they are subject to review under Articles 34 – 36 TFEU. Finally, under partial regulation, Member States can rely on the Treaty to regulate non-harmonised elements but lose any such discretion in relation to the harmonised elements. The extent of their loss will depend on the harmonisation model(s) adopted.

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[79] A. McGee & S. Weatherill, The Evolution of the Single Market – Harmonisation or Liberalisation, *Modern Law Review*, 1990, vol. 53, no. 5, pp. 578 – 596 at p. 584.
[80] P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, *op. cit*., p. 626. (Emphasis added). See also C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit.*, pp. 582 – 583.

27. This binary vision is generally accepted by the Commission[81] and in the literature, particularly when discussing EU law at a general level[82] or assessing the relationship between the EU and the Member States.[83] Here, commentators generally describe the positive integration regime by listing the main harmonisation models outlined above, with exhaustive/total harmonisation cast as a means to pre-empt national discretion, and the other models as a means to preserve regulatory flexibility under Articles 34 – 36 TFEU. Their vision, which presumes a coincidence between the principles of EU primacy and pre-emption, is rooted in the early understanding of harmonisation as excluding all national action from the regulated field, the *locus classicus* being the *Ratti* judgement.[84] It was in this context that the *Tedeschi* leg first emerged to prevent Member States from justifying national measures under Article 36 TFEU and, subsequently, by invoking a mandatory requirement. Since the absence of such Treaty-based discretion was, at the time, synonymous with the absence of *any* regulatory discretion, exhaustive regulation was seen as synonymous with total harmonisation and field pre-emption.[85] This link remains to this day, as harmonisation models continue to provide the framework to describe the impact of EU legislation. From this perspective, activation, or not, of the Rule should correspond to the binary vision just described, that is, triggered by total harmonisation, with national regulatory discretion persisting, in the presence of one of the other harmonisation models, where the Rule does not and cannot apply.

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[81] Ex. European Union Directives, Europa Summaries of Legislation, Publication Office, 2018, which distinguishes between 'minimum' and 'maximum' harmonisation. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3Al14527. Last accessed 5 September 2019.

[82] Ex. S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', *op.* cit., pp. 467 – 471; S. Weatherill, *Cases and Materials on EU Law*, Eighth Edition, Oxford, Oxford University Press, 2007, Chapter 17; P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials, op. cit.,* pp. 626 – 627; C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit*., pp. 582 – 590; E. Vos, 'Differentiation, Harmonisation and Governance', *op. cit.*, section 2.1; C. Blumann *et al*, *Introduction au marché intérieur – Libre circulation des marchandises*, Troisième édition, Bruxelles, Editions de L'Université de Bruxelles, 2015, paragraph 412; N. Foster, *Foster on EU Law*, Second Edition, Oxford, Oxford University Press, 2009, pp. 259 – 260 and I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*. For a more nuanced view, see P. Slot, 'Harmonisation', *op. cit.*; J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit*., Chapter Three; M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *European Law Review*,, vol. 31, no. 5, 2006, pp. 613 – 641 at pp. 618 – 620 and A. McGee & S. Weatherill, The Evolution of the Single Market – Harmonisation or Liberalisation, *op. cit*.

[83] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., pp. 195 - 199; A. Arena, 'The Doctrine of Union Preemption in the EU Single Market'*, op. cit*.; S. Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', in D. O'Keeffe & P. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London, Chancery, 1994, Chapter Two; P. Syrpis, 'The Relationship between Primary and Secondary Law in the EU', *Common Market Law Review*, vol. 52, no. 2, 2015, pp. 461 – 488 at p. 464 and L. Gormley, 'Free Movement of Goods and EU Legislation in the Court of Justice', in P. Syrpis (ed.), 'The Judiciary, the Legislature and the EU Internal Market', *op. cit.*, pp. 56 – 57.

[84] *Ratti*, note 10.

[85] See General Introduction. See also A. McGee & S. Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation', *op. cit.*, pp. 582 – 583 and S. Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', *op. cit*., pp. 16 – 17.

28. This understanding of EU harmonisation often corresponds to practice. Indeed, it is clear that total harmonisation triggers the Rule to prevent Member States from exercising any regulatory discretion over that field, while its non-application allows regulatory diversity to persist. The former logic explains cases like *Ratti*, *Commission v UK (Dim Dip)*, *Commission v Italy (Pure Chocolate)*, and a myriad of others discussed in Part II (Chapter One) under 'integrative effect'. In such cases, the impugned national measure was invalidated simply for imposing requirements beyond what was foreseen by the exhaustive directive. This logic also underlies cases where the Rule was applied to validate national measures that correctly implemented harmonised requirements, as with certain cases discussed under 'regulatory effect'.[86] Finally, as illustrated in the case-law classified under 'conditional effect', Member State ability to adopt higher standards under minimum harmonisation, to prevent lower standard imports under optional harmonisation and to regulate matters falling outside the scope of partially harmonising measures, persists because the Rule does not apply to oust such Treaty-based possibilities. In other words, the national standards are adopted outside the harmonised framework and remain subject to the negative integration regime. In *Buet*, for example, the Court examined (and validated) a French ban on doorstep sales of certain educational material by reference to Articles 34 – 36 TFEU, since the relevant EU measure, the Doorstep Selling Directive,[87] had only instituted minimum standards and did not trigger the Rule.[88] By the same token, Belgium was allowed, in *Van der Veldt*, to rely on Article 36 TFEU to oppose imports from the Netherlands, which had (lawfully) opted out of the higher harmonised standards.[89] Finally, since the 1965 Medicinal Products Directive[90] had only partially harmonised the field, the Netherlands could subject substances falling outside its scope, such as vitamins, to national authorisation procedures, notwithstanding their free circulation in other Member States, provided such procedures complied with Articles 34 – 36 TFEU.[91]

29. Thus, in each of the above examples, the impact of the EU measure corresponded to the binary vision promoted under the harmonisation models. Yet for other EU legislative

[86] Ex. *Bellamy*, C-123/00, EU:C:2001:214. For further relevant cases, see Part II (Chapter One).
[87] The Doorstep Selling Directive 85/577/EEC, *op. cit*.
[88] *Buet,* note 41. See also *A-Punkt*, note 41.
[89] *Van der Veldt*, note 66.
[90] Council Directive 65/65/EEC on the harmonisation of laws relating to proprietary medicinal products, OJ L. 22, 9 February 1965, pp. 369-373.
[91] *Van Bennekom,* Case 227/82, EU:C:1983:354. See also *Eyssen*, Case 53/80, EU:C:1981:35, *Toolex*, C-473/98, EU:C:2000:379 and *Confédération paysanne & Others*, C-528/16, EU:C:2018:583, paragraphs 77 – 82.

provisions, this vision no longer seems appropriate, if it ever was in the first place. Indeed, a closer look at certain measures reveals that directives traditionally classified as instituting 'minimum harmonisation' can often constrain national action, while measures of 'total harmonisation' can authorise national regulatory discretion. What is more, the Court, having triggered the Exhaustion Rule, may still need to interpret the EU measure to determine its exact effect on national regulatory competence.

2.2 A More Nuanced Reality

30. Turning first to minimum harmonisation, it was noted above that measures classified as such can sometimes include a market access clause or other territorial restriction to limit more stringent national measures to domestic production. For example, more protective tobacco labelling requirements, adopted under the first Tobacco Labelling Directive, could not apply to imports by virtue of the market access clause under Article 8.[92] By the same token, Article 11 (2) the Veal Crate Directive limited stricter protections for calves to the national territory.[93] Moreover, to the extent that the Member State does not invoke the minimum harmonisation clause, that State can remain subject to a series of obligations imposed by the directive's other provisions – as evidenced in certain consumer protection directives. For example, while the Misleading and Comparative Advertising Directive allows higher national standards to protect against misleading advertising under Article 8 (1), Articles 3 and 5 impose precise requirements to establish when advertising is misleading and with respect to enforcement.[94] Similarly, the Distance Selling Directive, while allowing higher standards under Article 14, also imposed obligations regarding information disclosure and the right of withdrawal.[95] The same conclusion emerges with the Unfair Contract Terms Directive (UCTD)[96] and the Consumer Goods Directive,[97] which Rott views as harmonising the notions of 'unfairness' (in the former) and conformity with the contract (in the latter).[98] As such, these measures have restricted national discretion over these terms, notwithstanding the presence of a minimum harmonisation

[92] Directive 89/622/EEC, *op. cit*.
[93] Council Directive 91/629/EEC on laying down Minimum Standards for the Protection of Calves, OJ L. 10, 15 January 2009, pp. 7 – 13 (the Veal Crate Directive).
[94] Directive 2006/114/EC, *op. cit.*
[95] Directive 97/7/EC, *op. cit.*
[96] Directive 93/13/EEC, *op. cit.*
[97] Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees, OJ L. 171, 7 July 1999, p. 12 – 16.
[98] P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*., sections 2.1.2 and 3.

clause.[99] For example, Rott notes that '(a)s far as the regulation of the conformity of goods with the contract and the remedies concerned, (the Consumer Goods Directive) provides for a definite solution which the Member States cannot alter'.[100] He also notes that 'the minimum harmonisation clause (in the Misleading Advertising Directive[101]) does not appear to make a difference where the ground for action "misleading advertising" is concerned'.[102]

31. A similarly complex picture emerges with respect to measures classified as instituting exhaustive or total harmonisation. As noted above, such measures can activate the Exhaustion Rule, thereby ousting all Treaty-based discretion. Yet they might also authorise Member States to continue regulating, albeit within a more restricted (legislative) framework. This leeway has been traditionally accepted within the framework of total harmonisation insofar as it relates to safeguard measures.[103] In *A.G.M.-COS-MET*, for example, the Court accepted that the Machinery Directive,[104] which instituted total harmonisation, also allowed national safeguard measures with regard to machinery presumed to comply with the EU requirements (although such measures had not been adopted by the Member State *in casu*).[105] Yet, as illustrated throughout the research, and as detailed below, the possibilities for such 'legislation-based discretion' are not limited to exceptional safeguard provisions, but can sometimes grant wider leeway to Member States to diverge from common standards. Two early examples of such discretion were Article 6 (2) of the Cosmetics Directive[106] and Article 15 (2) of the first Food Labelling Directives.[107] A more recent example arises under Article 4 (2) of the Pyrotechnic Directive,[108] which allows derogations from the market access clause in Article 4 (1) on grounds of public order, security, health and safety, or environmental protection. As discussed, the first two directives are commonly recognised as instituting 'total harmonisation', as they

[99] *Ibid*.
[100] *Ibid*., p. 1127.
[101] Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L. 250, 19 September 1984, pp. 17 – 20.
[102] P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*., p. 1112.
[103] P. Slot, 'Harmonisation', *op. cit.*, p. 382.
[104] Directive 98/37/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to machinery, OJ L. 207, 23 July 1998, pp. 1 – 46.
[105] *A.G.M-COS.MET*, C-470/03, EU:C:2007:213, paragraph 62.
[106] Council Directive 76/768/EEC on the approximation of national laws relating to cosmetic products, OJ L. 262, 27 September 1976, pp. 169 – 200 (the Cosmetics Directive).
[107] Directive 79/112/EEC, *op. cit*.
[108] Directive 2013/29/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of pyrotechnic article, OJ L. 178, 28 June 2013, pp. 27–65. See also Article 6 of its predecessor, Directive 2007/23/EC of the European Parliament and of the Council on the placing on the market of pyrotechnic articles, OJ L. 154, 14 June 2007, pp. 1–21.

harmonise relevant standards for, respectively, cosmetics and food labels, with a free movement access clause for compliant products.[109] Yet the provisions mentioned allowed a degree of independent national action which was unsurprisingly capitalised upon by the Member States. As outlined in Parts I and II, Germany relied on Article 6 (2) of the Cosmetics Directive to ban cosmetics products from using the name 'Clinique'[110] and from referring to 'lifting'[111] on their labels while Austria sought to prohibit, subject to authorisation, references to expert medical opinion[112] and claims that certain toothpastes could prevent or limit tartar.[113] In the same vein, Article 15 (2) of the first Food Labelling Directive (or, where relevant, its successor) was relied upon by France to justify a ban on references to the word 'sugar' on food labels[114] and by Austria to prohibit health-related information on foods for consumption.[115] Finally, Article 6 (2) of the Pyrotechnic Directive enabled Belgium to justify its ban (subject to authorisation) on the possession and sale of fireworks containing more than one kilogram of pyrotechnic material.[116]

32. Such regulatory discretion might also arise if a measure of 'total harmonisation' imposes an obligation on the Member States using ambiguous terminology,[117] which requires further interpretation at the national level. This can be seen in the Unfair Commercial Practices Directive (UCPD), which, while instituting total harmonisation, relies on open concepts such as 'professional diligence', 'average consumer' and 'good faith'.[118] Although essential to the relationship between private parties, these concepts are often not defined in relevant legislation, while the EU has yet (if ever) to develop its own consumer code, or to codify private law more generally. Member States may, as a result, enjoy *de facto* discretion to flesh out the precise meaning of such concepts, the degree of which will depend *inter alia* on the subject matter and

[109] M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit.*, p. 866, footnote 42, C. Barnard, *The Substantive Law of the EU – The Four Freedoms*, *op. cit.* pp. 582 – 583 and S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', *op. cit.*, p. 467.
[110] *Clinique,* C-315/92, EU:C:1993:823.
[111] *Estée Lauder*, C-220/98, EU:C:2000:8.
[112] *Linhart & Biffl,* C-99/01, EU:C:2002:618.
[113] *Unilever,* C-77/97, EU:C:1999:30.
[114] *SARPP*, note 16.
[115] *Commission v Austria (Food Labelling),* C-221/00*,* EU:C:2003:44. See also *Sterbenz,* Joined Cases C-421/00, C-426/00 and C-16/01, EU:C:2003:46.
[116] *Van Gennip & Others*, C-137/17, EU:C:2018:771.
[117] For an early discussion of 'indeterminate notions' in Community law, see H. Bauer-Bernet, 'Notions indéterminées et droit communautaire', in C. Perelman & R. Vander Elst (éds.), *Les notions* à *contenu variable en droit*, Travaux du Centre National de Recherches de Logique, 1984, Bruxelles, Bruylant, pp. 269 – 296. See, more generally, J. Van Meerbeeck, *De la certitude à la confiance. Le principe de sécurité juridique dans la jurisprudence de la Cour de justice de l'Union européenne*, Bruxelles, Anthémis-Publ. de l'U. Saint-Louis, 2014, pp. 399-400.
[118] Ex. Directive 2005/29/EC *op. cit.* See *infra*, Chapter One, section 3.1 for detailed discussion of this directive.

the Court's approach to interpretation.[119] This 'discretion' will often fall short of what Member States enjoy under Treaty-based discretion, or more generally in the 'upward flexible area' of minimum harmonisation.[120] Indeed, to the extent that such concepts constitute 'EU concepts', they remain subject to the 'hermeneutic primacy' of the Court.[121] Yet their presence can nonetheless dilute the traditional definition of total harmonisation by ensuring leeway for national action, at the very least, until the Court has provided clarification.[122] They are, as such, difficult to accommodate within the traditional harmonisation framework. A further example of regulatory discretion coexisting with 'total harmonisation' can be seen under the REACH regulation,[123] which, while imposing an exhaustive regulatory framework to identify and classify chemical substances, provides mechanisms for contestation and learning in relation to their evaluation, authorisation, restriction and labelling. In this context, the Commission is not the sole decider (as under Article 114 derogations) and the decision-making process is more inclusive by granting, for example, a role to the European Parliament and third parties. As such, REACH articulates a model for regulatory federalism that 'actively institutes a multi-level and multi-actor dialogue about risk and about how best to respond to it'.[124]

33. The Court's response to this more complex reality has not, in practice, been constrained by the binary vision associated with harmonisation models, even if it relies on related terminology. Rather, and in line with the pre-emption analysis described in Part I (Chapter One), it generally takes a case-by-case approach of each EU legislative act, and in some cases, individual provisions, to assess the impact on national competences, regardless of the harmonisation model purportedly followed. This has enabled it to recognise and enforce the 'pre-emptive potential' of certain minimum harmonisation rules, acknowledge and review the exercise of national discretion adopted within the framework of exhaustive measures and accept that various harmonisation models can coexist within the same EU legislative act.

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[119] *Ibid.*
[120] F. De Cecco, 'Room to Move? Minimum Harmonisation and Fundamental Rights', *op. cit*., section 3.
[121] *Ibid*., p. 13.
[122] See H. Bauer-Bernet, 'Notions indéterminées et droit communautaire', *op. cit.*, who notes at p. 287 that such concepts can be progressively clarified over time, by the legislator or judge, to the point that they become less indeterminate. See section 3.1 for a discussion of this phenomenon in consumer protection measures.
[123] Regulation (EC) No. 1907/2006 of the European Parliament and of the Council on the registration, evaluation, authorisation and restriction of chemicals, OJ L. 396, 30 December 2006, pp. 1 - 520.
[124] J. Scott, 'REACH – Combining Harmonisation and Dynamism in the Regulation of Chemicals' in J. Scott, (ed.) *Environmental Protection: European Law and Governance*, Oxford, Oxford University Press, 2009, pp. 56 – 91.

34. Turning first to minimum harmonisation, it is clear that such measures can limit regulatory choice by imposing obligations, which can be subject to a restrictive or expansive definition by the Court. For example, by interpreting the term 'misleading advertising' to allow 'some consumer confusion', the Court limited the scope for Member States to protect consumers from this practice within the framework of the Misleading Advertisement Directive,[125] even though that directive instituted minimum harmonisation.[126] A similar constraining approach can be seen in the Court's interpretation of other consumer protection measures, although this time by adopting a more protective approach. For example, the Court held that provision of information to the consumer via a hyperlink was insufficient to meet the information disclosure requirements laid down in the (first) Distance Selling Directive.[127] It also found that this 'minimum harmonisation' directive prohibited Member States from providing, as a general rule, that consumers who exercised their right of withdrawal would have to compensate the seller for use of that good[128] and precluded sellers from charging the consumer with the cost of delivery in the event of consumer withdrawal from the contract.[129] When interpreting the UCTD[130] in *Pénzügyi*, the Court seemed to transform the indicative (and hitherto non-obligatory) list of what *could* constitute an unfair contract term into a *de facto* mandatory point of reference, leaving little room for manoeuvre for the national courts – and the national legislator.[131] In doing so, it appeared to follow AG Trstenjak, who held that the Court has 'gradually to give specific expression to the abstract criteria for reviewing whether a term may be classified as unfair and, with increasing experience, to establish a profile for reviewing the unfairness of terms at the level of Community law'.[132] This approach was repeated in *Aziz*, where the Court gave detailed guidance to the national court to determine what would constitute a 'correct' and 'fair' interpretation of three terms in Spanish mortgage contracts.[133] In doing so, it ultimately assessed and weighed the fairness of contract terms 'to a

[125] Directive 84/450/EEC, *op, cit*.
[126] *Procureur de la République v X,* C-373/90, EU:C:1992:17. See also discussion of this case by S. Weatherill, *EU Consumer Law and Policy*, *op. cit.,* pp. 220 – 221 and *Lidl Belgium***,** C-356/04, EU:C:2006:585, paragraph 80.
[127] *Content Services,* C-49/11, EU:C:2012:419. Although see *Majdoub*, C-322/14, EU:C:2015:334. See Directive 97/7/EC, *op. cit*.
[128] *Messner*, C-489/07, EU:C:2009:502, although room was left for the provision of fair compensation to sellers under civil law principles, once the right of withdrawal was not adversely affected.
[129] *Heinrich Heine*, C-511/08, EU:C:2010:189.
[130] Council Directive 93/13, *op. cit*.
[131] *Pénzügy*, C-137/08, EU:C:2010:659. For discussion see H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *Common Market Law Review*, vol. 51, no. 3, 2014, pp. 771 – 808 at section 3.1.
[132] Opinion in *Pénzügy*, C-137/08, EU:C:2010:401, paragraph 99.
[133] *Aziz*, C-415/11, EU:C:2013:164.

degree of detail which can normally only be found at the level of national appeal courts'.[134] By the same token, the Doorstep Selling Directive was interpreted as obliging the bank to inform the consumer of his/her right to withdraw from a contract, with failure to do so meaning it bore the consequences of any risk,[135] while the term 'damages' under Article 5 (2) of the Package Travel Directive was deemed to include a right to compensation for certain non-material damage resulting from the non-performance of the contract.[136]

35. A more nuanced judicial approach is equally evident in the interpretation of 'exhaustive' EU measures, although resulting in the opposite trend. Thus, the Court accepts that such measures oust *Treaty-based* discretion, without necessarily excluding that discretion might be authorised by the EU measure itself. For example, the Court acknowledges such discretion as inherent to the implementation of directives and (EU) regulations, even when that measure regulates the field, once the directive's objectives, and regulation's direct applicability, are respected.[137] National regulatory discretion was also accepted in relation to the Cosmetics, Food Labelling and Pyrotechnic Directives, discussed above, when various implementing measures were challenged for having interfered with the market access clause and/or free movement of goods. In cases such as *Clinique*, *Estée Lauder* and *SARPP*, the Court did not deny that the Member States retained some *capacity* to regulate, even if it ultimately invalidated the national rule.[138] Rather, it assessed whether or not those rules were proportionate by reference to the legislative balance struck in the relevant directive.[139] In *Van Gennip & Others*, the Court held the Belgian ban on some products containing pyrotechnic material to constitute a proportionate exercise of discretion, by reference to the Pyrotechnic Directive.[140] A similar

[134] H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*., p. 798.
[135] Directive 85/577/EEC, *op. cit.* See *Heininger*, C-481/99, EU:C:2001:684 and *Schulte*, C-350/03, EU:C:2005:637. For discussion, see H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, section 4.2 and V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights' Directive, *European Review of Private Law*, vol. 1, 2011, pp. 25 – 42.
[136] Council Directive 90/314/EEC on package travel, package holidays and package tours**,** OJ L. 158, 23 June 1990, pp. 59 – 64. See *Leitner*, C-168/00, EU:C:2002:163. See also *Club Tour*, C-400/00, EU:C:2002:272.
[137] *Danske Svineproducenter II*, C-316/10*,* EU:C:2011:863, paragraph 38. See also *Danske Svineproducenter I,* C-491/06, EU:C:2008:263, paragraph 27. See *infra,* point 105.
[138] Although see *Müller*, C-229/01, EU:C:2003:153, where the Court validated as proportionate an Austrian measure based on Article 18 (2) of Directive 2000/13/EC, *op. cit.* (the second Food Labelling Directive).
[139] Ex. *SARPP*, note 16, paragraph 21; *Sterbenz*, note 115, paragraphs 34 – 41; *Commission v Austria (Food Labelling),* note 115, paragraphs 47 – 55; Opinion in *Commission v Austria (Food Labelling)*, C-221/00, EU:C:2002:419, paragraphs 34 and 38 – 40; *Müller*, note 138, paragraph 34; *Clinique*, note 110, paragraph 16 ; *Estée Lauder*, note 111, paragraphs 26 – 31; *Linhart & Biffl*, note 112, paragraphs 26 – 37 and *Unilever,* note 113, paragraphs 30 – 36. See also Part I (Chapter Two), points 182 – 183.
[140] *Van Gennip & Others*, note 116.

approach is taken in numerous other cases, where the Court does not automatically strike down the impugned measure for exceeding the 'exhaustive' EU requirements, as in *Ratti* and *Dim Dip*. Rather, it reviews the measure by reference to the exhaustive framework of the relevant directive, and the *legislative* balance struck thereunder, notwithstanding the Exhaustion Rule.[141] Finally, the Court's interpretation of an ambiguous or open concept in a measure of total harmonisation might leave some discretion to the national level. For example, the Court interprets the 'average consumer', who is protected from 'aggressive practices' under Articles 5 (4)(b) and 8 of the UCPD, as someone who is 'reasonably well informed and reasonably observant and circumspect, *taking into account* social, cultural and linguistic factors'.[142] In assessing how this term has been implemented in Member States, however, Mak notes that Dutch and German law offers stronger protection for the consumer than under English law, which leans closer to the less protective EU average, thus creating potential for divergence.[143]

2.3 The Court's Approach to Review

36. The Court's, generally, nuanced interpretation of EU legislation corresponds to the assessment in Part I of the relationship between EU secondary and national law. Here, it was explained that the pre-emptive effect of the former precludes the latter, but *only to the extent* that there is a normative conflict.[144] Since such conflict cannot – and should not – always be presumed, the Court must sometimes depart from the binary vision to determine whether and how a particular EU measure impacts on national regulatory competence. Indeed, Part II highlighted that difficulties are more likely to arise when the Court does not to take this step, for example, when it fails to identify or review an act of legislation-based discretion that could have a cross-border impact. Section 3 below considers how this binary vision can feed into such problems. However, section 2.3.1 first explores its influence on the Court and whether departing from this vision could undermine the justification for triggering the Exhaustion Rule in the first place.

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[141] Ex. See case-law stemming from implementation of the Waste Oil Directive, the Waste Packaging Directive, the Waste Shipment Regulation, the Trademarks Directive, the Copyright Directive and various consumer protection and animal welfare measures, all of which are discussed in Part II (Chapter One) and (Chapter Two).
[142] *Orange Polska*, C-628/17, EU:C:2019:480, paragraph 30. (Emphasis added). See also *Wind Tre*, Joined Cases C-54/17 and C-55/17, EU:C:2018:710, paragraph 51 and *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 22.
[143] V. Mak, The 'Average Consumer' of EU Law in Domestic and European Litigation', in D. Leczykiewicz & S. Weatherill, *The Involvement of EU Law in Private Law Relationships*, Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford and Portland, Oregon, 2013, Chapter 15, p. 356.
[144] See Part I (Chapter One), section 1., ex. at point 23.

2.3.1 Interpreting and Enforcing EU Law

37. The Court's interpretation of EU law in a request for a preliminary ruling is often a proxy for reviewing the constitutionality of Member State action.[145] Indeed, even if the Court has no jurisdiction to interpret national law, or to apply national implementing law to the specific case, it often limits the leeway of national legislatures and courts in practice. To this end, the Court enjoys discretion to determine the specificity of its rulings, which, according to Tridimas, results in three categories of cases.[146] In the first category, the Court provides a 'ready-made solution to the dispute' that leaves no room for manoeuvre to the national court (outcome cases). In the second, the Court provides guidelines to resolve the dispute, which can vary according to their detail (guidance cases). The third category sees the Court answering at such a general level that it defers to the national court (deference cases).

38. Re-examining the case-law in light of this categorisation, it seems that the Court often tailors the specificity of its interpretation to correspond to the harmonisation model instituted by the EU measure. As such, reliance on the Exhaustion Rule (which indicates total harmonisation) generally veers towards 'outcome cases' by pre-empting (or confirming) the national rule.[147] This is particularly so when the EU measure is *presumed* to oust all national regulatory discretion in a field, or *directly conflicts* with (or confirms) the national rule. In such cases, the Court can resolve the conflict immediately in favour of the EU measure.[148] In contrast, a finding that the Rule does not apply (minimum or partial harmonisation) can lead to a guiding or deferential approach, where the Court accepts the persistence of national discretion, including Treaty-based discretion. Whether the Court assesses the resulting national measure directly,[149] or sends it back to the national court,[150] scope for national regulatory diversity has been preserved, with the legislator and national court and empowered.

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[145] T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction', *International Journal of Constitutional Law*, 2011, vol. 9, no. 3 – 4, pp. 737 – 756 at pp. 737 – 738.
[146] *Ibid.*
[147] As Tridimas notes, 'many cases on statutory interpretation of directives and regulations are also outcome cases'. *Ibid.*, p. 740.
[148] Ex. *Delhaize Frères*, Joined Cases 2/82, 3/82 and 4/82, EU:C:1983:268. See also *Commission v Italy (Pure Chocolate)*, note 6.
[149] Ex. *Motte,* Case 247/84, EU:C:1985:492; *Forest & Others*, Case 148/85, EU:C:1986:438; *Nertsvoederfabriek Nederland*, Case 118/86, EU:C:1987:424; EU:C:1986:438 and *Hahn,* C-121/00, EU:C:2002:611.
[150] Ex. *Prantl*, Case 16/83*,* EU:C:1984:101 and *Centre d'Insémination de la Crespelle,* C-323/93, EU:C:1994:368.

39. The above observations correspond to the traditional justification for harmonisation outlined above, and reinforce the binary vision. They tally with Garde's suggestion that the Court, when interpreting an instrument of total harmonisation such as the Unfair Commercial Practices Directive (UCPD),[151] should give 'far more detailed guidance to national courts entrusted with the application of its provisions than it would have done for a text of minimum harmonisation'.[152] The opposite impulse should, by the same token, influence the interpretation of certain minimum harmonisation measures, which aim to preserve scope for national regulatory discretion and diversity. It was on this basis that AG Geelhoed implied that the Court, when interpreting the Unfair Contract Terms Directive (UCTD),[153] should avoid a uniform interpretation of its provisions and, respecting its minimum harmonisation character, veer towards guidance or deference.[154] And the Court often does follow this logic when interpreting and applying EU legislation.[155] Yet other cases can highlight an alternative trend, with the degree of harmonisation bearing little, if any, correlation to the specificity of the ruling.[156] Indeed, as just noted, the Court's interpretation of minimum harmonisation directives sometimes *restricts* the scope for national discretion and imposes a specific outcome on the national court and regulator, while its interpretation of certain 'total harmonisation' measures might confirm the existence of some national discretion.[157] In such cases, the Court breaks from the binary vision to allow 'total harmonisation' to coexist with national discretion, and 'minimum harmonisation' to impose regulatory constraints.

40. This more active judicial approach responds to the complex and nuanced reality of EU legislation, where the Court will not presume pre-emption, but establishes, on a case-by-case basis, the extent to which the EU measure ousts or leaves intact national regulatory discretion. Indeed, it is in this way that the Court respects the legislator's intention and national competence. Yet the very fact of such judicial input, which indicates the exercise of judicial discretion, could also trigger concerns over the division of competences and the justification for harmonisation, as well as compliance with the economic freedoms. For example, Unberath

[151] Directive 2005/29/EC, *op. cit.*
[152] A. Garde, 'The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?' in P. Syrpis (ed.), 'The Judiciary, the Legislature and the EU Internal Market', *op. cit.*, pp. 118 – 146 at p. 131.
[153] Directive 93/13/EEC, *op. cit*.
[154] Opinion in *Freiburger Kommunalbauten*, C-237/02, EU:C:2003:504, paragraph 30.
[155] See cases cited *supra*, notes 148 – 150.
[156] Instead, factors such as time and context play a decisive role. For discussion, see Part II (Chapter Two), points 177 – 183.
[157] See ex. *Danske Svineproducenter I*, *Zino Davidoff*, *Opus Supplies*, *Gallaher*, *EU Wood Trading* and *Estée Lauder*, all of which are discussed in Part II, as well as case-law regarding the UCPD, discussed below.

& Johnston criticise the Court's restrictive interpretation of 'minimum harmonisation' consumer protection measures as imposing an 'unduly narrow and detailed reading' on directives that should in principle leave flexibility to the Member States.[158] They further consider that such an approach could usurp the function of the Community legislature, which could have provided more detail in the directive if this had been its intention.[159] Similarly, Micklitz & Reich note, in relation to the UCTD, that the transformation of minimum standards into binding, even maximum standards could challenge the division of tasks with national courts and prevent legitimate, political solutions to tensions underlying Europe's social contract law.[160] In the same vein, accepting that 'total harmonisation' can leave some discretion to the national level could facilitate differentiated standards, thereby undermining the objective of harmonisation, the functioning of the internal market,[161] and even the market freedoms,[162] particularly given the Exhaustion Rule.

41. A final point to mention is that much of the case-law concerning the relationship between national and EU consumer protection rules does not have obvious cross-border effect.[163] As a result, the Court's interpretation of the directives can impact on the scope for national regulation *outside* the context of exercising Treaty-based discretion (and thus, application of the Exhaustion Rule). Yet such 'internal' cases remain relevant, first, because they illustrate the inadequacies of the harmonisation model template to describe the impact of EU legislation on national law. Indeed, whenever the Member State exercises discretion, which can include the implementation of EU law at national level, it must still comply with the general rules and principles of the Treaty.[164] It is therefore important to recognise such discretion, whether or not in a cross-border situation. What is more, consumer protection directives are generally based on Article 114 TFEU (or its predecessors), with the *aim* of removing disparities

[158] See H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, p. 1260.
[159] *Ibid*., p. 1277.
[160] H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*., section 8.
[161] A. Adinolfi, 'The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary', in H.-W. Micklitz & B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States*, Cambridge – Antwerp – Portland, Intersentia, 2012, pp. 281 – 303 at pp. 294 – 296. For a discussion of this risk, see *infra*, section 3.1 (The Consumer Protection Sag).
[162] M. Schillig, 'The Interpretation of European Private Law in the light of Market Freedoms and Fundamental Rights', *Maastricht Journal of European and Comparative Law*, vol. 15, 2008, pp. 285 – 321 at pp. 301 – 305.
[163] Indeed, while Articles 34 – 35 TFEU only cover cross-border situations, harmonising rules apply irrespective of the purely internal nature of the situation. See, recently, *Sziber*, C-483/16, EU:C:2018:367, paragraphs 56 – 59.
[164] *DaimlerChrysler,* C-324/99, EU:C:2001:682, paragraph 45. See also F. De Cecco*,* 'Room to Move? Minimum Harmonisation and Fundamental Rights', *op. cit.*

in the internal market.[165] Different approaches to private law concepts such as 'average consumer' and 'good faith' could therefore lead to inconsistencies and, ultimately, potential trade barriers.[166] In this context, the dividing line between national measures having an internal and EU-wide effect can be tenuous, given the integrated nature of the internal market, the broad definition of trade barrier and, more recently, the growth in online cross-border commerce.[167] If the Court is not alerted to the potential for national discretion within a 'total harmonisation' measure, it might not even consider whether there is a cross-border element to the dispute in the first place. The risk that potential barriers to trade could escape review is therefore exacerbated, as in *Berger*. The potential for such problems is discussed below. However, an important point is first clarified regarding the relationship between the specificity of the Court's ruling, and the scope for national regulatory options.

2.3.2 Constraining the National Court, or the National Regulator?

42. It could be argued that the Court's interpretation of EU legislation, and the specificity of its rulings, does not necessarily undermine the traditional categorisation of harmonisation, or its binary vision of regulation. This is because the scope left by EU legislation for national regulatory discretion is directed towards the national legislator.[168] Thus, total harmonisation can prevent different national *regulatory* standards, without necessarily constraining the national court, while Member States retain power to adopt more stringent rules under a minimum harmonisation measure, regardless of the Court's interpretation of its provisions.[169] From this perspective, the specificity of the Court's ruling – whether categorised as an 'outcome', 'guidance' or 'deference' case, is directed at the national court, without impacting

[165] See ex. Recitals 2 – 5 of the UCPD (Directive 2005/29/EC, *op. cit*.).
[166] P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*., section 2.1.2. For discussion of this risk in the context of national interpretations of 'average consumer', see V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights' Directive, *op. cit*., and V. Mak, The 'Average Consumer' of EU Law in Domestic and European Litigation', *op. cit*.
[167] This cross-border dimension will often impact on other fundamental freedoms, such as the free movement of services and/or establishment. In principle, at least, the Exhaustion Rule applies equally to EU legislation in the latter fields, although the extent to which has not been explored by this research. See ex. *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 63 and *Citroën Belux*, C-265/12, EU:C:2013:498, paragraph 31.
[168] I am grateful to A. Bailleux for raising this key distinction. See also A. Garde, 'The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?', *op. cit.*, p. 131.
[169] Ex. Straetmans & Cauffman note that Member States can adopt higher standards under the minimum harmonisation clause of the UCTD with respect to the entire area covered by the directive, subject to compliance with the Treaty and requirements of transparency. G. Straetmans & C. Cauffman, 'Legislators, Courts and the Unfair Terms Directive', in P. Syrpis (ed.), 'The Judiciary, the Legislature and the EU Internal Market', *op. cit.*, pp. 92 – 117 at pp. 104 – 106.

on the possibility for the national regulator to act in the presence of the underlying EU measure. This observation resonates in the field of private law, where the Court interprets open concepts, such as 'good faith', 'average consumer', 'fairness' and 'professional diligence', to facilitate the national court in applying EU law and in balancing national procedural autonomy with the principles of effectiveness and equivalence.[170] Such judicial instructions, while impacting on the national court, and the relationship between two private parties, need not affect the regulator or undermine the model of harmonisation adopted by EU legislation.

43. On closer examination, however, it appears that the presence of vague notions, and the Court's interpretation thereof, can impact on the national regulator, all the more given the absence of an EU consumer code. This is because national regulators, like national courts, will often refer by default to their own national legal culture for clarification. In this context, '(w)hile national courts are meant to be European courts too, in fact, it is still up to the ECJ to preserve the interest of the EU as a whole'.[171] In performing this duty, the Court will often refine, or even invalidate, this national definition to the extent that it falls within the scope of EU law. And given their obligations stemming from the principle of mutual sincere cooperation, all organs the Member State will be bound by such rulings when implementing and applying EU law.[172] Until the Court makes a definitive pronouncement on the matter however,[173] the national conception of that term could hold sway, even if the term is in principle an 'EU' concept. In

[170] On the specific duties of national courts with respect to the principles of effectiveness and equivalence, see *Kuhar*, C-407/18, EU:C:2019:537, paragraph 46 and *XC & Others*, C-234/17, EU:C:2018:853.

[171] C. Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?', in C. Barnard & O. Odudu (eds.), *The Outer Limits of European Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, pp. 273 – 305, at. p. 299. Indeed, the correlation between the national regulatory and national court may be reinforced by the fact that many national judges remain unaware of the nuances of EU law. As such, even in the presence of a Court ruling, the national level may continue to rely on the national understanding of that term. In this regard, Mortelmans notes that national courts, insofar as they perform their role as Community courts, remain 'the Achilles' heel of the internal market'. See K. Mortelmans, 'The Common Market, the Internal Market and the Single Market, What's in a Market?', *Common Market Law Review*, vol. 35, no. 1, 1998, pp. 101 – 136 at p. 126. See also M. Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: 'Don't Do as I Say'?, *Cambridge Yearbook of European Legal Studies*, vol. 10, 2008, pp. 1 – 34.

[172] Article 4 (3) TEU. See ex. *Von Colson,* Case 14/83, EU:C:1984:153, paragraph 27, *Pfeiffer & Others,* Joined Cases C-397/01 to C-403/01, EU:C:2004:584, paragraphs 110 – 115 and *XC & Others*, note 170, paragraph 40.

[173] In this context, time will clearly play a role, as the Court, in response to an increasing number of references, progressively replaces general or uncertain interpretations with concrete standards. This evolution can be observed with respect to its interpretation of Directive 93/13/EEC, *op. cit*. Given the controversy surrounding the clause of 'good faith' in Article 3 (2), early case-law avoided embarking on its clarification. However, the Court has now almost eliminated the scope for national discretion to determine what could constitute an unfair term. See H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*., p. 790. Time could also help explain the Court's robust interpretation of the first Trademarks Directive, when compared to its initial hesitancy in considering the more novel notion of 'misleading advertising' under the Cosmetics Directive. For discussion, see Part I (Chapter Two), points 218 – 221. See, more generally, T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction', *op. cit.,* p. 751 and H. Bauer-Bernet, 'Notions indéterminées et droit communautaire', *op. cit.*

other words, a strong correlation will remain between implementation of the latter by the national regulator and their interpretation/application by the national court, since both belong to the same level of governance and are rooted in the same national legal culture.[174]

44. For example, in a comparative study on implementing the UCPD, Ruggiero observes a difference in how the UK and Italy perceive an 'average consumer', and, as a result, in how the term is both transposed by the regulator and interpreted by the national court in each Member State.[175] Specifically, while each country understands the 'average consumer' as needing more protection than the standard EU definition, the Italian legislation appears to go further. This approach could be influenced by the fact that Italy transposed the UCPD into a pre-existing consumer law code, which generally considers the average consumer as vulnerable. The Italian judge thus protects 'the trusting as well as the suspicious' and pays more attention to the obligations of the trader.[176] The UK, which simply copied the UCPD in a new regulation, is more aligned with the less protective EU standard. Considering this context, the specificity with which the Court defines the term 'average consumer' in a preliminary ruling request will not only impact on the discretion of the national court, and the dynamic between the consumer and trader. It could also have reverberations on the implementing national rules, and the legal culture within which those rules are rooted, particularly in the case of Italy. Similar observations are made by Mak, in relation to directives covering credit and investment law,[177] and by Straetmans & Cauffman regarding the UCTD.[178] As regards the latter, the authors note that a German court considered as unfair a contract term that allowed a bank to charge a consumer for expenses incurred, in a situation where that bank was unable to process a payment due to lack of funds. This judicial response, which reflects Germany's traditionally protective approach to the consumer, contrasts with that of the Austrian court, which considered the same term to be fair.[179] If the Court was called upon to clarify the matter, the specificity with which

[174] A similar interdependence between EU and national conceptions can be observed with respect to the concept of 'public order'. See S. Franq, 'L'ordre public: Limite ou condition de l'autonomie dans l'union européenne ?', in C. Kessedjian (éd.), *Stratégie des citoyens, des entreprises et des États*, Éditions Panthéon-Assas, Paris, 2013, pp. 223 – 243. See also Rigaux for an outline of the complex relationship between the international and national legal orders, and the necessity for notions of variable content (notions à contenu variable) in the field of international private law. F. Rigaux, 'Les notions à contenu variable en droit international privé', in C. Perelman & R. Vander Elst (éds.), *Les notions* à *contenu variable en droit*', *op. cit*., pp. 237 – 249.
[175] M. Ruggiero, *Unfair Commercial Practices, Consumer and Internal Market Protection: A Comparative Study*, (Masters Thesis), Wageningen University & Research, Law and Governance Group, 2017. Available at http://edepot.wur.nl/414071. Last accessed 5 September 2019.
[176] *Ibid*., p. 41.
[177] V. Mak, The 'Average Consumer' of EU Law in Domestic and European Litigation', *op. cit.*, section III.
[178] G. Straetmans & C. Cauffman, 'Legislators, Courts and the Unfair Terms Directive', *op. cit.*, p. 107.
[179] *Ibid*.

it interprets that term will have an impact, not only on the national court in resolving the dispute, but also on the national regulator.

45. The intersection between private law and EU law, and between national regulatory and judicial discretion, raises important and complex questions that need further consideration and analysis.[180] For the purposes of our research, however, suffice is it to highlight that there can be a link between the interpretation of open 'private law' concepts by national courts and the scope for national regulatory action. The specificity of the Court's ruling in such cases, while directed towards the national court, could, as a result, reverberate through the national legal system in its entirety, including the scope for national regulation, triggering a 'domino effect', and possibly even the revision of other national legislative provisions.[181] Indeed, Johnston notes in this regard that the Court's expansive reading of the Doorstep Selling[182] and Package Travel[183] Directives could pose 'various challenges for national law, under which the traditional national approaches to causation and fault as a prerequisite for liability may be threatened.'[184] In this context, coherence imposed by the EU level could potentially render national systems less coherent as they adapt to the EU standard, notwithstanding the national political bargain and protections upon which they have been built.[185] Finally, measures classified as 'total harmonisation' often do grant discretion specifically to national regulator (ex. the first Food Labelling Directive), while minimum harmonisation rules can impose significant constraints, in the absence of more stringent national standards (ex. the UCTD).

46. In sum, the model of harmonisation instituted by an EU measure will inevitably impact on whether, and the extent to which, Member States can continue to regulate in that field. While

[180] For a discussion of this challenge, see H.-W. Micklitz, 'The EU as a Federal Order of Competences and the Private Law', in L. Azoulai (ed.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, pp. 125 – 152 and the various contributions in D. Leczykiewicz & S. Weatherill, *The Involvement of EU Law in Private Law Relationships*, *op. cit*. See also S. Weatherill, *EU Consumer Law and Policy*, *op. cit.,* Chapter 7 and citations.

[181] A. Adinolfi, 'The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case Law: Is Judicial Activism Still Necessary', *op. cit.*, p. 287. For an outline of specific instances of such spillover, where EU law impacts on national law by virtue of its mere presence, even if the area is not intended to be covered by EU law, see A. Johnston, '"Spillovers" from EU Law into National Law: (Un)intended Consequences for Private Law Relationships', in D. Leczykiewicz & S. Weatherill, *The Involvement of EU Law in Private Law Relationships*, *op. cit.*, Chapter 16.

[182] Directive 85/577/EEC, *op. cit.* See *Heininger* and *Schulte*, note 135.

[183] Directive 90/314/EEC, *op. cit*. See *Leitner*, note 136.

[184] A. Johnston, '"Spillovers" from EU Law into National Law: (Un)intended Consequences for Private Law Relationships', *op, cit.*, p. 362.

[185] Weatherill makes this point in relation to the impact of total harmonisation. S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 219 – 222. In our view, a similar disjuncture could arise, for example, following a very specific interpretations of a provision in a minimum harmonisation directive.

total harmonisation restricts regulatory discretion over cross-border (and internal) matters, minimum harmonisation authorises the adoption stricter national standards. At the same time, adoption of a particular harmonisation model will not always be sufficient, on its own, to determine the room for manoeuvre actually left for the national legislator. As highlighted above, EU measures can include a complex array of provisions with a varying impact on the autonomy of national courts, the scope for national regulation and commercial freedom. When the Court interprets and enforces these legislative provisions, its rulings can also vary in terms of their specificity and thus impact on the discretion of the national court and, in some cases, the national regulator. This impact, however, does not always correlate to what might be presumed, considering the model of harmonisation adopted by the relevant EU measure. To the contrary, the Court might interpret minimum harmonisation measure in a manner that constrains the national level, while accepting that legislation instituting 'total harmonisation' can host a degree of national discretion. The question, then, is whether, and the extent to which this more nuanced legislative and judicial reality could impact on the objective of harmonisation, and in the context of 'total harmonisation' and cross-border measures, the legitimacy of ousting Articles 34 – 36 TFEU under the Exhaustion Rule.

2.3.3 Harmonisation Models and the Exhaustion Rule

47. As explained in Part I, the Exhaustion Rule, and in particular its *Tedeschi* leg, was originally justified by reference to the traditional definition of total harmonisation, which precludes all national regulatory discretion and prevents the circulation of non-conforming products. Since the potential for any national trade restrictions is, in this context, removed, there is 'no reason of principle why total harmonisation should not be held to exclude (Article 34 TFEU)'[186] – in other words, the Exhaustion Rule. At the same time, any scope for, or resurgence of, national regulatory discretion would also undermine the understanding of total harmonisation and, by extension, the justification for ousting Articles 34 – 36 TFEU.

48. This interconnection between 'total harmonisation' and the Exhaustion Rule explains, in part, why the Court, Commission and national courts were initially reticent to assess acts of national regulatory discretion by exclusive reference to the secondary rule, relying instead on Articles 34 – 36 TFEU as parallel norms of reference to avoid that Member States would flout

[186] J. Currall, 'Some Aspects of the Relation between Articles 30 – 36 and Article 100 of the EEC Treaty, with a Closer Look at Optional Harmonisation', *op. cit.*, p. 195.

their free movement obligations.[187] However, such *ad hoc* reliance on primary law led to a series of problems, including uncertainty and litigation. The Court responded by reconciling the existence of legislation-based discretion with application of the Exhaustion Rule, namely by developing a case-by-case approach to triggering and applying the Rule, and ensuring that its second leg would not undermine the hierarchy of norms. In doing so, the Court confirmed that it would control national exercise of such discretion by reference to the exhaustive legislative framework, presumed to comply (or interpreted in compliance) with primary law.[188] Reflecting a growing trust between the Member States and EU, such developments allowed the Rule to transform into a generally applicable tool to resolve disputes in the presence of harmonisation, even when the latter granted legislation-based discretion.[189]

49. The Exhaustion Rule was therefore decoupled in practice from the traditional definition of harmonisation. Yet EU legislation, at least formally, continues to be classified as instituting 'total' or 'minimum' harmonisation, while activation of the Rule – and the ousting of Treaty-based discretion – remains associated with an absence of all national discretion. Indeed, 'total harmonisation' is often justified by reference to the benefits for market integration brought about by excluding Treaty-based discretion under the *Tedeschi* Rule.[190] The question, then, is whether judicial recognition and review of legislation-based discretion under the Exhaustion Rule could undermine the decision to adopt 'total harmonisation' in the first place.

50. This research would argue not. The Court's case-law, far from undermining the objective of harmonisation, expresses a more realistic understanding of the internal market's regulatory regime, which, to accommodate its unsettled nature and respond to persistent tensions, has evolved in a manner that no longer corresponds to traditional harmonisation models. In this context, the Court's departure from the binary vision is often a necessary and pragmatic reaction to the legislator's intention, as opposed to a deviant or overly activist approach. That being said, harmonisation models, and the binary vision implied thereunder, continue to permeate academic, institutional and even judicial discourse, and remain intrinsically linked to the traditional understanding of the Exhaustion Rule. However, their inability to adequately describe certain EU secondary rules and their interpretation by the Court

[187] See Part I (Chapter Two), points 153 – 158.
[188] Ex. *Bristol-Myers Squibb & Others,* Joined cases C-427/93, C-429/93 & C-436/93, EU:C:1996:282.
[189] See Part I (Chapter Two), section 2 (Refining the Exhaustion Rule).
[190] Specifically, by precluding divergent national trade rules that could otherwise be justified under Article 36 TFEU or by relying on a mandatory requirement.

leads to a gap with the more complex reality of EU legislation, and a distorted view of its interaction with national and primary law. This, in turn, triggers a series of problems that could, *in extremis*, threaten the hierarchy of norms. It is to these difficulties that the research now turns.

3. … WITH UNDESIRABLE CONSEQUENCES

51. Internal market rules pre-empt certain national powers while also authorising and justifying national regulatory programmes. This reflects their dual function, as well as Member States' role in building the EU's regulatory regime for the free movement of goods, not only through Council membership, but also by implementing and applying EU measures at national level. According to the classic definition of total harmonisation, these measures impose, by definition, a series of direct obligations on Member States, with no leeway to diverge. Yet it was seen that such measures can also grant national regulatory options, not only via derogations or under less intensive modes of harmonisation, but also *as part of* the EU regulatory framework, through 'legislation-based discretion'.

52. The previous section highlighted that the Court generally responds to this complexity by departing from the binary vision imposed by harmonisation models. A similar nuance is sometimes detected in the literature, particularly in the sectoral analyses of EU law. For example, commentators such as Jans & Vedder[191] and Temmink,[192] in relation to environmental law, and De Vries,[193] in relation to consumer law, have moved away from this vision by decoupling the concept of 'exhaustive regulation' (and application of the Exhaustion Rule) from the substantive impact of that regulation (harmonisation models). Slot has also sought to distinguish the task of determining the normative framework of assessment in the presence of harmonisation from the impact that harmonising measure has on national reserved powers.[194] Other commentators have acknowledged elements of legislation-based discretion, not simply

[191] J. Jans & H. Vedder, *European Environmental Law – After Lisbon*, *op. cit*.
[192] H. Temmink, 'From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection – A Case Law Analysis', *Yearbook of European Environmental Law*, vol. 61, 2001, pp. 61 – 102.
[193] A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonisation', *European Review of Private* Law, no. 4, 2012, pp. 913 – 931.
[194] Slot, 'Harmonisation', *op. cit.*, pp. 388 – 389.

as a subcategory of minimum harmonisation,[195] but as a distinct source of regulatory options.[196] However, these efforts have not (yet) become mainstream[197] and are sometimes rejected outright.[198] Even if a more nuanced view of minimum harmonisation is accepted,[199] the discourse seems constrained by the language and framework provided by harmonising models, which often either overlooks legislation-based discretion as a distinct phenomenon or casts it as an exceptional or secondary issue, without identifying any specific concerns.[200]

53. In this context, an EU measure, which imposes an exhaustive regulatory framework, is often presumed to have simultaneously ousted all national discretion under total harmonisation. Schütze sums up this position by stating: 'it is advisable to identify exhaustive regulation with total harmonisation and occupation of the field'.[201] On the flip side, when EU legislation grants *any* national discretion, this should be commensurate with what is authorised in the absence of harmonisation, with anything less being viewed as an exception to be justified. This deduction is regularly reinforced by the Court, which, while taking a more nuanced position in practice, insists that the Exhaustion Rule is triggered by total or 'exhaustive' harmonisation,[202] with no

[195] See *supra*, note 109.
[196] Ex. Cross's reference to express saving clauses, which arise 'when Community legislation expressly preserves certain Member State legislative authority or forbids a pre-emptive interpretation of Community legislation', could include legislation-based discretion, as could his assertion that Member States can legislate in the presence of secondary legislation as long as they do not offend the objective of that legislation. E. Cross, "Pre-emption of Member State law in the European Economic Community: A Framework for Analysis", *op. cit*., section 3.1. Dougan goes further by grouping 'legislation-based discretion' into three categories, those being when the Member State relies on an express derogation in the legislation, when the legislation creates or confers discretionary powers and when the Member States exercises ancillary discretionary powers. M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit*., p. 619. Sorensen frames 'legislation-based discretion' as 'authorisations granted to Member States'. See K. Sorensen, 'Reconciling secondary legislation with the Treaty Rights of Free movement', *European Law Review*, 36, 3, 2011, pp. 339 – 361 at p. 341.
[197] *Infra*, Chapter Two, section 2.3 (Judicial and Academic Consideration of Regulatory Character).
[198] Ex. R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., p. 197 at footnote 19.
[199] Some commentators accept that minimum harmonisation directives can also *constrain* national regulatory action. See ex. H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit*. section 4; A. Arena, *ibid*., pp. 72 – 74 and P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*., section 3.1.
[200] Ex. Many commentators categorise regulatory discretion that is restricted to domestic territory as a *subcategory* of minimum harmonisation and/or ignore the potential for legislation-based discretion in 'total harmonisation'. See. Slot, 'Harmonisation', *op. cit.*, pp. 384 – 385, M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit*., p. 878 and A. Arena, 'The Doctrine of Union Preemption in the EU Single Market', *op. cit*., pp. 72 – 74. See *infra,* points 65 – 67. Others just note the phenomenon without any further comment. See C. Blumann *et al, Introduction au marché intérieur – Libre circulation des marchandises*, paragraph 415. See *infra*, Chapter Two, section 2.3 (Judicial and Academic Consideration of Regulatory Character).
[201] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit*., p. 197 at footnote 19.
[202] Ex. Opinion in *UNIC*, C-95/14, EU:C:2015:270, paragraphs 57 – 58.

explicit or systematic acknowledgement that discretion can persist, or that its exercise must be reviewed by reference to that exhaustive regulatory framework.[203]

54. This is not to deny an association between the Exhaustion Rule and total harmonisation. However, assimilating these concepts can lead to a series of difficulties, including the misrepresentation and misinterpretation of EU legislation (3.1) and of certain judgements (3.2), as well as fears that EU legislation, as interpreted by the Court, could undermine the vertical and horizontal distribution of power.[204] It can also feed into the Courtroom itself, with erroneous submissions (3.3) and, in some cases, a risk that potential national trade barriers are not appropriately reviewed (3.4). It is in such latter instances that identifying the Exhaustion Rule exclusively with 'total harmonisation' could pose a risk for the free movement of goods.

3.1 The 'Consumer Protection' Saga

55. The difference between total and minimum harmonisation lies in the possibility for national regulatory divergence, with the former prohibiting any such divergence, while the latter allows more protective national rules. Weatherill notes in this regard that 'the minimum model allows more space for diversity and local autonomy' and 'preserves to a degree the independence of relevant institutions at state level'. Total harmonisation, in contrast, 'seems to promise greater uniformity' and 'transfers regulatory responsibility to the EU's legislative institutions – and … to its Court too'.[205] And indeed, this narrative seems to hold when comparing the UCPD (which institutes total harmonisation) with the UCTD (which establishes minimum harmonisation). Specifically, the former precludes higher national standards and lays down an exhaustive and obligatory list of what constitutes an unfair commercial practice, while the latter allows more stringent national rules and includes only an indicative list of unfair contract terms. On more careful analysis, however, each directive reveals a capacity to impact on the scope for national discretion in a manner that seems to contradict its apparent *raison d'être*. For example, both directives grant national discretion on implementation, while national courts enjoy jurisdiction to apply EU law to specific disputes, in line with the principle of

[203] A typical approach is observed in the recent case, *Van Gennip & Others*, note 116. Here AG Bot first described the Pyrotechnic Directive (*op. cit.*) as instituting 'total harmonisation', before proceeding to assess, and authorise, the considerable leeway enjoyed by the Member State thereunder to restrict the free movement of certain relevant products. See Opinion in *Van Gennip & Others*, C-137/17, EU:C:2018:272, paragraph 81 *et seq.*
[204] Ex. H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, sections 4.2.4 and 4.3.
[205] S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, p. 210.

national procedural autonomy. This discretion is particularly evident in the context of open legal concepts, such as 'good faith', the notion of 'unfairness' and 'average consumer', which can be interpreted and applied differently in each Member State, depending on their national legal culture.[206] However, the specificity with which the Court interprets such provisions appears unaffected by the model of harmonisation adopted thereunder, with room for national discretion creeping into the regulation of unfair commercial practices and significant constraints being imposed on Member States in determining the unfairness of a contract term. What is more, the Court's rulings impact, not only on the national court but also, potentially, on the scope for national regulation. Considering the traditional binary logic, this reality could call the justification for, and the legitimacy of, either directive (and the Court's interpretation thereof) into question. Indeed, it is on this basis that Unberath & Johnston criticise the Court's strict interpretation of the UCTD, and other minimum harmonisation directives, as reducing the national flexibility inherent to directives, by giving them a meaning that was not easily apparent from their wording.[207] The opposite critique has been levied against the UCPD, as commentators consider the existence of open terms to contradict the initial justification for total harmonisation.[208] In our view, however, this anxiety is, at least partially, animated by the unsustainable binary logic of EU regulation, leading to the misrepresentation and misinterpretation of these directives in the first place.

56. The UCPD is of particular interest to this research, given that it, in principle, institutes total harmonisation to trigger the Exhaustion Rule. By way of background to its adoption, the Commission had, under its Consumer Policy Programme (2002 – 2006)[209] and Strategy (2007 – 2013),[210] called for a shift from minimum to total harmonisation, whereby 'legislation should not, within its given scope, leave room for further rules at national level'.[211] It justified this shift by referring to the familiar internal market goals of reducing national legal disparities, preventing regulatory fragmentation, introducing legal certainty and ensuring a high level of

[206] *Supra*, point 44 and citations.
[207] See H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, p. 1260.
[208] *Supra*, notes 214 & 215.
[209] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Consumer Policy Strategy 2002-2006, COM/2002/0208 final, OJ C. 137, 8 June 2002, pp. 2 – 23.
[210] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - EU Consumer Policy strategy 2007-2013 - Empowering consumers, enhancing their welfare, effectively protecting them, COM (2007) 99 final, 13 March 2007. See also Commission Green Paper on the Review of the Consumer Acquis, *op. cit*.
[211] *Ibid*., p. 4.

consumer protection.[212] This led the Commission to propose a series of directives that removed the possibility for stricter national standards by establishing 'uniform rules at Community level'.[213] However, many observers attacked the Commission's approach, and the resulting directives, for imposing 'rigid, uniform and immutable Community norm(s)'[214] that eliminate all national regulatory options in the field, and which, in turn, pose a risk to consumer protection standards and national diversity.[215] They also argued that the loss of national competence flowing from such harmonisation implied a significant – and controversial – transfer of regulatory competences to the EU, which was neither appropriate nor desirable in an EU of 27/28 Member States.[216] This backlash was not lost on the Commission, which tempered its ambitious 2007 strategy by reducing from four to two the number of directives to be transformed from minimum to total harmonisation. At the same time, several directives adopted since 2002 have succeeded in instituting total harmonisation, including the UCPD, the Consumer Rights Directive (insofar as it relates to distance and off-premises contracts),[217] the Timeshare Directive[218] and the Consumer Credit Directive.[219]

57. The criticism levied against the Commission's strategy is, from one perspective, well founded. There is no doubt but that the abovementioned directives transfer competence to the EU by stripping Member States of their general ability to adopt 'stricter standards', as evidenced by the Court's interpretation of the UCPD.[220] This has resulted in the lowering of

[212] *Ibid*. See also the Consumer Rights Directive, *op. cit*., recitals 4 – 7 and the UCPD, *op. cit.*, recitals 3 – 5. For discussion, see J. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', *European Review of Private Law*, vol. 18, no. 1, 2010, pp. 5 – 14.
[213] The Consumer Rights Directive, *ibid*., recital 7. See also the Green Paper on the Review of the Consumer Acquis, *op. cit*., p. 10.
[214] S. Weatherill, 'Maximum or Minimum Harmonisation – What Kind of Europe do we Want'?, in K. Boele-Woelki & F. W. Grosheide (eds.), *The Future of European Contract Law, Liber Amicorum E.H.Hondius*, 2007, Kluwer Law International, pp. 133-146 at p. 146.
[215] S. Weatherill, 'Maximum or Minimum Harmonisation – What Kind of Europe do we Want'?, *ibid.*; S. Weatherill, *The Internal Market as a Legal Concept*, *op. cit.*, pp. 215 – 219, and citations at footnote 32; J. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', *op. cit.*; G. Howells, 'Unfair Commercial Practices Directive – A missed opportunity?', in S. Weatherill & U. Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, Hart Publishing, 2007, pp. 103 – 114; Editorial, 'The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes', *European Review of Private Law*, vol. 19, no. 2, 2011, pp. 163 – 166, and references at footnotes 11, 12 and 13.
[216] *Ibid.*
[217] 2011/83/EU, *op. cit.*
[218] Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ L. 33, 3 February 2009, pp. 10–30 (the Timeshare Directive).
[219] Directive 2008/48/EC on Credit Agreements, *op. cit.*
[220] Ex. *Plus Warenhandelsgesellschaft*, C-304/08, EU:C:2010:12, paragraph 41. See also *Commission v Belgium*, C-421/12, EU:C:2014:2064; *Wamo*, C-288/10, EU:C:2011:443, paragraph 33 and *Europamur*, C-295/16, EU:C:2017:782, paragraph 39. For discussion, see A. Garde, 'The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?', *op. cit.*

certain consumer protection standards in some cases such as *VTB-VAB*, *Plus Warenhandelsgesellschaft* and *Mediaprint*, which relied on the UCPD to invalidate national prohibitions on various sales promotions.[221] Yet even if one dismisses Stuyck's observation that these national prohibitions protected, not the consumer, but other business interests,[222] the fact that the UCPD prohibits some such measures does not mean *all* national discretion over the regulated field is lost and that national standards are *systematically* lowered. To make such extrapolation not only views the directive from the binary perspective of harmonisation models. It also amalgamates the questions of regulatory diversity and regulatory standards, both of which are subject to a more nuanced reality under the UCPD. For, on the one hand, this directive has also succeeded in confirming, and even raising certain national consumer protection standards.[223] On the other, it, like other consumer protection measures, allows a limited degree of national discretion to persist within its exhaustive regulatory framework, for example, by relying on open legal concepts to impose certain obligations.[224] This can be seen under Article 5, which prohibits unfair commercial practices - defined as being 'contrary to the requirements of professional diligence' and as materially distorting the economic behaviour of the 'average consumer'. Professional diligence is further defined as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'. However, the terms 'average consumer', 'honest market practice, 'good faith' or the 'standard of special skill and care' are not given any further clarification.[225] Similarly, while Article 6 and 7 UCPD prohibit misleading actions and omissions, the question as to whether the 'average consumer' has been, or is likely to be, misled will always depend on subjective appreciation.[226]

[221] *Ibid*. See also *VTB-VAB & Galatea,* Joined Cases C-261/07 & C-299/07, EU:C:2009:244 and *Mediaprint,* C-540/08, EU:C:2010:660.
[222] J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', *Common Market Law Review*, 2015, vol. 52, no. 3, pp. 721 – 752.
[223] Ex. *Purely Creative*, C-428/11, EU:C:2012:651, which, by classifying a commercial practice as aggressive and thus prohibited because it exploited 'the psychological effect created in the mind of the consumer', could have implied that the Court has abandoned the notion of an average consumer as circumspect and well informed in favour of the more protective German understanding, which has traditionally protected the consumer from psychological pressure to buy. See also *CHS Tour Services*, C-435/11, EU:C:2013:574, which Stuyck describes as 'consumer friendly but not equitable'. For discussion of both cases, see J. Stuyck, *ibid.*, sections 5 and 6.1. See also *Orange Polska*, note 142, for a nuanced interpretation of what could constitute an aggressive practice.
[224] See *infra*, note 230 for case citations. For discussion, see M. Schillig, 'The Interpretation of European Private Law in the light of Market Freedoms and Fundamental Rights', *op. cit.*, and A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonisation', *op. cit.*
[225] A. De Vries, *ibid*., p. 929.
[226] See ex. *Ving Sverige*, note 141 and *Carrefour Hypermarchés,* C-562/15, EU:C:2017:95.

58. The use of ambiguous concepts is not necessarily incompatible with the classification of 'total harmonisation', since they might be defined by the Court in a manner that eliminates all national discretion. In *Leitner*, for example, the open concept of 'damages', referred to in Article 5(2) of the first Package Travel Directive,[227] was defined as including a right to compensation for certain non-material damage resulting from the non-performance of the contract. As a result, Austria was obliged to adapt its national laws to specifically reflect this unambiguous interpretation.[228] However, other terms, such as 'misleading', 'unfair' and 'average consumer', are inherently ambiguous and cannot be so easily subjected to a single definitive definition that is directly applicable in all cases. To implement them in a given situation necessarily implies reaching a balance, at national level, between conflicting rights and interests, which can legitimately vary, depending on the specific facts of the case, as well as more general issues such as culture and language.[229] As a result, 'divergences between Member States remain, as the application in concreto of the Directive's general clauses (prohibition of conduct contrary to professional diligence, misleading and aggressive practices), is reserved to the national courts'.[230] Such cases undermine the criticism that 'total harmonisation' deprives Member States of all scope for regulatory leeway and threaten high consumer standards.[231] Yet by re-opening legal uncertainty,[232] they simultaneously question the classification of directives, such as the UCPD, as measures of total harmonisation in the first place.[233] This latter critique is reinforced by the EU's limited competences over consumer protection and by the practical overlap between EU and national law in this field.[234] Indeed, the

[227] Directive 90/314/EEC**,** *op. cit.*

[228] *Leitner*, note 136. For discussion, see M. Schillig, 'The Interpretation of European Private Law in the light of Market Freedoms and Fundamental Rights', *op. cit*., pp. 297 – 298.

[229] This is acknowledged by AG Gulmann in relation to the term 'misleading' in his Opinion in *Clinique,* C-315/92, EU:C:1993:823, paragraph 18. For discussion, see V. Mak, 'Standards of Protection: In Search of the 'Average Consumer' of EU Law in the Proposal for a Consumer Rights' Directive', *op. cit*. For an insight into the practical difficulties, see P. Giliker, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonisation Directive', *European Review of Private Law*, 2015, vol. 23, no.1, pp. 5 – 28.

[230] J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', *op. cit.*, p. 721. See in particular *Purely Creative*, note 223; *Canal Digital Danmark*, C-611/14, EU:C:2016:800; *Deroo – Blanquart*, C-310/15, EU:C:2016:633; *Carrefour Hypermarchés,* note 226 and *DHL Paket*, C-146/16, EU:C:2017:243.

[231] Following an extensive review of relevant case-law, Stuyck notes that there is no proof that the UCPD has undermined consumer protection. J. Stuyck, *ibid*.

[232] See A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonisation', *op. cit.* and citations at footnote 42. See also P. Legrand, 'European Legal Systems are not converging', *International and Comparative Law Quarterly*, vol. 45, no. 1, 1996, pp. 52 – 81 at p. 63.

[233] A. De Vries, 'Maximum Harmonisation and General Clauses: Two Conflicting Concepts', *SSRN*, 2011, pp. 1-20. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1703078. Last accessed 5 September 2019.

[234] This critique has particular resonance in relation to implementation of Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L. 210, 7 August 1985, pp. 29 – 33 (the Product Liability Directive). For discussion see V. Mak, 'Review of the Consumer Acquis: Towards Maximum Harmonisation?', *European Review of Private Law*,

Commission itself notes that total harmonisation can apply 'in conjunction with other national provisions of general contract law' and that 'differences between the contract laws of the Member States will remain a reality'.[235] It is on this basis that Mak states that the UCPD's goal of total harmonisation is 'illusory',[236] a view that is shared by other commentators.[237]

59. When considered by reference to the traditional understanding of total harmonisation, the above criticism is legitimate. There is undoubtedly a dichotomy between the legislative aim of uniformity and the Court's acceptance of diverse national interpretations for certain legislative provisions. From this perspective, the Commission, and indeed Court's, language appears to have misrepresented the legislation by classifying it as imposing total or maximum harmonisation. This conclusion is further illustrated when considering the Court's approach to the UCTD, which, while instituting minimum harmonisation, has been interpreted in a manner that significantly *reduces* national flexibility. It is true that disputes arising under both directives often concern private parties, where the Court's interpretation of open concepts can constrain or empower the national court in assessing the acts of traders and consumers, without impacting on the national regulator. As highlighted however, the specificity of the Court's interpretation might also impact on the substance of national contract rules – and thus, the national regulator, regardless of the parties to the proceedings. As such, insofar as their relationship with national discretion is concerned, it no longer seems appropriate to place the UCPD and UCTD on the opposite side of the regulatory spectrum. The question then is, how should the UCPD be classified?

60. The solution is not necessarily that imposed by the binary legacy of harmonisation, being, to revert to minimum harmonisation and soft law instruments[238] as the only alternative

vol. 17, no. 1, 2009, pp. 55 – 73 and J. Smits, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights', *op. cit*., p. 9.

[235] Green Paper on policy options for progress towards a European Contract Law for consumers and business, COM (2010)348 final, p. 5.

[236] V. Mak, 'Review of the Consumer Acquis: Towards Maximum Harmonisation?' *op. cit.*, p. 72.

[237] Ex. J. Stuyck, 'The Court of Justice and the Unfair Commercial Practices Directive', *op. cit*. and A. Garde, 'The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?', *op. cit.* For a broader discussion, see P. Legrand, 'European Legal Systems are not converging', *op. cit.*

[238] 'Soft law is the term applied to EU measures, such as guidelines, recommendations, declarations and opinions, which – in contrast to regulations, directives, and decisions – are not binding on those to whom they are addressed'. While soft law is not legally binding, it can have an impact on behaviour in practice. For definition, see https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law. Last accessed 10 September 2019.

to total harmonisation.[239] Indeed, such a reaction could betray a simplistic view that no longer reflects the complexity of EU internal market regulation. What the research suggests, instead, is a more nuanced approach to classifying EU measures, which accepts that exhaustively regulating EU legislation can coexist with the phenomenon of legislation-based discretion, defined earlier. As will be discussed in Chapter Two, this understanding of EU regulation requires making a distinction between the respective concepts of *regulatory character* and *regulatory impact*. As outlined, the former refers to the legal framework established by EU measure which, when exhaustive, will trigger the Exhaustion Rule to oust direct reliance on Treaty-based exceptions. The latter refers to the substantive effect of EU legislation – which can include the granting of legislation-discretion, as well as the imposition of direct and unambiguous regulatory obligations. Turning back to the UCPD, this directive clearly has an exhaustive regulatory *character* that triggers the Exhaustion Rule, with national measures adopted thereunder subject to review by exclusive reference to its legislative framework. However, its regulatory *impact* will vary, depending on which provision of the UCPD is at issue. For example, a provision that relies on an open concept such as the 'average consumer' may open a possibility for national discretion, not only by the national court, but also at the level of national regulation, which can vary between Member States. It can, as such, be classified as a form of legislation-based discretion, with implementation subject to review and clarification by reference to the UCPD. De Vries incorporates this understanding of the UCPD to her own assessment, by observing that harmonisation, as interpreted by the Court, is often about establishing a 'legal framework that offers a uniform legal benchmark for all Member States', but without harmonising 'the content of this benchmark'. The latter is 'primarily up to the national courts to decide'.[240] She concludes on this basis that the Commission's understanding of maximum harmonisation is 'a highly political statement, expressing largely an aspiration rather than a legal reality'.[241]

3.2 Misinterpreting Court Judgements

61. As noted earlier, the Court generally takes a nuanced approach when reviewing regulatory relations in the presence of harmonisation, where it correctly identifies and reviews acts of national legislation-based discretion, regardless of which harmonisation model is

[239] As discussed by A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonisation', *op. cit.*
[240] *Ibid.*, p. 923.
[241] *Ibid*., p. 926.

imposed by the relevant EU legislation. However, commentators continue to assess this jurisprudence from the binary perspective imposed by harmonisation models. Relying on two examples, this section illustrates how a gap can follow between the Court's reasoning and the way this reasoning is interpreted.

3.2.1 (Mis)Understanding Article 114 TFEU

62. This first example of this 'gap' is found by exploring certain perspectives on the relationship between Article 114 TFEU and total harmonisation. As discussed earlier, there has been a longstanding debate over whether directives based on Article 114 TFEU can institute minimum harmonisation, whereby Member States can adopt divergent national rules with cross-border effect, justifiable in accordance with Articles 34 – 36 TFEU.[242] Those that answer in the negative find some justification in the internal market *raison d'être* of Article 114 TFEU, the fact that Article 114 TFEU does not refer to minimum requirements,[243]unlike the 'sectoral-specific environmental, health and consumer provisions', [244] and its formal derogation mechanism.[245] This narrow vision also seemed to gain support from certain judgements that implied a link between Article 114 TFEU and the presence of a market access clause (which pre-empts Treaty-based discretion), on the one hand, and total harmonisation, on the other. For example, in the Tobacco Advertising saga, the Court concluded that the first Tobacco Advertising Directive[246] was wrongly based on Article 114 TFEU, partly because it contained no market access clause.[247] Six years later, the Court validated the directive's successor,[248] which corrected this omission by providing that 'Member States shall not prohibit or restrict the free movement of products or services which comply with this Directive'.[249] This saga was followed by cases such as *Gintec* and *Cindu Chemicals*, where the Court classified the relevant EU legislation as instruments of 'complete' or 'exhaustive harmonisation', partly because they had relied on Article 114 TFEU as a legal basis.[250] Certain commentators have extrapolated

[242] See *supra*, points 12 and 14.
[243] P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit.*, p. 1109.
[244] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit.*, p. 63. Respectively, Articles 193, 168 and 169 TFEU.
[245] P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit.*
[246] Directive 98/43/EC *op. cit.*
[247] *Tobacco Advertising I*, note 22, paragraph 104.
[248]*Tobacco Advertising II*, note 22.
[249] Article 8 of Directive 2003/33/EC, *op. cit*. See also Opinion in *Germany v European Council & Parliament (Tobacco Advertising)*, C-380/03, EU:C:2006:392, paragraph 143.
[250] *Gintec*, note 24, paragraph 19 and *Cindu Chemicals*, note 25, paragraphs 41 – 43.

from this jurisprudence that Article 114 directives must contain a market access clause/oust Treaty-based discretion, and by extension, institute total harmonisation, with divergent national rules limited to 'the relatively narrow Commission-managed authorisation procedure in Article 114(4)ff'.[251] Indeed this position is echoed by AG Colomer in *Gintec*, who holds that if an Article 114 directive that aims to harmonise national barriers to free movement should leave 'absolutely no room for national differences' and that total harmonisation is 'essential', particularly if the regulatory objective is met through the common rules'.[252]

63. Considering the standard definition of total harmonisation and its link to the presence of a market access clause, the above conclusion is unsurprising. Yet it is also based, in our view, on an erroneous deduction. First, as noted earlier, it reflects neither legislative practice, which continues to adopt minimum harmonisation directives under Article 114 TFEU,[253] nor judicial practice, which enforces their provisions.[254] Second, while the Court often relies on elements such as legal basis or the presence/absence of a market access clause to indicate a particular model, such factors are rarely, if ever, sufficient, on their own, to reach such a conclusion. In *Tobacco Advertising 1*, for example, the Court annulled the Tobacco Advertising directive for reasons other than the absence of market access clause, namely the 'weak connection between market integration and the regulation of advertising on media such as ashtrays and parasols'.[255] The same can be said for *Gintec* and *Cindu*, which also relied on other elements to conclude that the relevant directives instituted total harmonisation, such as their wording and their general scheme and purpose.[256] Finally, even when such directives do contain a market access clause, this may not be sufficient to limit national regulatory options to constitutional derogations. To suggest otherwise is to adopt the out-dated binary vision imposed by harmonisation models, which, by limiting regulatory discretion to that which is authorised by the Treaty, casts market access clauses, which remove all such discretion, as implying total harmonisation by definition. In reality however, exhaustive EU legislation can prevent Member

[251] S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', *op. cit.*, p. 470.
[252] Opinion in *Gintec*, note 77, paragraph 31.
[253] See respectively, Directive 94/62/EC (the Waste Packaging Directive), *op. cit*., Directive 97/7/EC (the Distance Selling Directive), *op. cit*., and Directive 85/577/EEC (the Doorstep Selling Directive), *op. cit*.
[254] Indeed, the Court has accepted in numerous cases that Member States can adopt stricter standards than what is provided by a directive based on Article 114 TFEU, where this is explicitly authorised thereunder. Ex. *Buet*, note 41; *Doc Morris,* note 51; *A-Punkt*, note 41; *Gysbrechts*, note 41; *Commission v Germany (Waste Packaging),* note 29 and *Radlberger*, C-309/02, EU:C:2004:799; For discussion see S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', *op. cit.*, p. 470.
[255] *Ibid*.
[256] *Gintec*, note 24, paragraphs 20 – 33 and *Cindu Chemicals*, note 25, paragraphs 41 – 43. See also *Antroposasna & Others*, C-84/06, EU:C:2007:535.

States from retaining general regulatory discretion while at the same time authorising a degree of 'legislation-based discretion'.

64. A closer reading of *Gintec* reveals the Court's acceptance of a more nuanced vision of 'total harmonisation'. By way of background, *Gintec* reviewed the lawfulness of a German prohibition on certain types of advertisements for medicines under the Medicinal Products Code.[257] The Court had been asked, first, to establish whether the Code set 'maximum' standards as regards such matters and, second, whether the German rules were lawful thereunder. In response, the Court confirmed that the Code 'brought about complete harmonisation in that field, since it lists expressly the cases in which Member States are authorised to adopt provisions departing from the rules laid down in the (Code)'.[258] To support this conclusion, the Court referred to the fact that it had been based on Article 114 TFEU. However, it also listed examples of *authorised discretion*, finding that 'where the option of laying down different rules is not given to the Member States expressly, the only conditions which they can place on advertising for medical products are those laid down in the (Code).[259] This understanding of 'complete harmonisation' does not correspond to the traditional definition of total harmonisation outlined above, under which Member States lose *all* regulatory leeway. Rather, it relies on the key distinction between 'regulatory character' and 'regulatory impact' to promote a more nuanced understanding of the Code. Specifically, the latter activates the Exhaustion Rule to oust the possibility to rely on Treaty-based discretion, while also granting a spectrum of national regulatory possibilities its exhaustive framework. The extent of such possibilities was dealt with under the second question of the dispute, which confirmed that Germany could not prohibit third party statements to advertise medicines but could do so with respect to misleading claims relating to recovery and advertisements via prize draws.[260]

3.2.2 Interpreting CIWF

65. A second example of the gap that can arise when the Court's reasoning is assessed from the binary perspective of harmonisation models can be seen in some reactions to *Compassion*

[257] Directive 2001/83/EC on the Community code relating to medicinal products for human use, OJ L. 311, 28 November 2001, pp. 67 – 128 (the Medicinal Products Code).
[258] *Gintec*, note 24, paragraph 20
[259] *Ibid*., paragraph 25. The AG made the same finding, referring to the Code's objectives, text and legal basis to conclude that it 'reveals an exhaustive system, leaving no autonomy to the Member States except where this is expressly allowed'. See Opinion in *Gintec*, note 77, paragraph 39. See also paragraphs 19 and 25 – 29.
[260] *Gintec*, note 24, paragraphs 39 and 52.

in World Farming (CIWF).[261] This case arose when various NGOs relied on Article 36 TFEU to challenge the export of calves from the UK to Member States with lower standards of protection for calves before slaughter. In assessing their claim, however, the Court looked at the Veal Crate Directive,[262] which set the size of the crates for calves before slaughter, subject to temporary national derogations. Article 11 (2) of the directive also allowed Member States 'to apply within their territories stricter provisions for the protection of calves'. Relying on this latter provision, the UK prohibited the veal crate system on its territory but exported calves to countries with lower standards under transitional arrangements. The question was whether an export ban on calves in such circumstances could be justified under Article 36 TFEU. The Court responded in the negative, finding that the directive had instituted 'exhaustively common minimum standards',[263] notwithstanding Article 11 (2) and the temporary derogations. The former did not undermine the exhaustive nature of the directive, since higher standards adopted only apply in the national territory, while the latter was limited in time.[264]

66. Commenting on *CIWF*, Scott[265] and Dougan[266] consider it to be a disappointing exception to their understanding of minimum harmonisation as allowing Member States to legislate subject to the Treaty 'ceiling'. Their perspective stems from the conceptual framework of harmonisation models, where anything short of total harmonisation forms part of a non-exhaustive framework, where Member States can continue to justify national rules by reference to Article 36 TFEU and mandatory requirements. In such circumstances, a grant of discretion that defies this presumption, as in *CIWF*, is seen as exceptional and must be justified by reference, for example, to the wider regulatory context[267] or the desire to avoid controversy, such as determining whether Article 36 measures could have extraterritorial effect.[268] However, it remains within the category of 'minimum harmonisation', and is seen as distinct from measures such as the Cosmetics Directive, which is considered as an example of total harmonisation.[269] In such circumstances, the Court is seen as somehow responsible for the restrictive approach to animal welfare that follows.

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[261] *CIWF*, note 54.
[262] Directive 91/629/EEC, *op. cit*.
[263] *CIWF,* note 54, paragraph 56.
[264] *Ibid*., paragraphs 57 – 63.
[265] J. Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO', *Jean Monnet Working Paper,* No. 03/99, 1999. Available at http://jeanmonnetprogram.org/archive/papers/99/990301.html. Last accessed 5 September 2019.
[266] M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit.*, p. 873 and p. 878.
[267] *Ibid*., p. 878.
[268] J. Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO', *op. cit.*
[269] M. Dougan, 'Minimum Harmonisation and the Internal Market', *op. cit.*, p. 866, footnote 42.

67. If, however, Article 11 (2) is viewed, not as an exception to a more generous understanding of minimum harmonisation, but as an instance of 'legislation-based discretion', a different perspective emerges. On this understanding, the authority to adopt such national standards flows from and is limited by the Veal Crate Directive, not Article 36 TFEU, even if its agricultural context, or the desire to avoid pronouncing on the extraterritoriality of Article 36 TFEU reinforced the Court's final decision.[270] This conclusion is reflected in the Court's reasoning, which first establishes that the directive has an exhaustive regulatory character, which triggers the Exhaustion Rule to oust reliance on Article 36 TFEU. As a second step, the Court assesses the regulatory impact of the directive, that is, what exactly Member States can do within this exhaustive framework. On this, the directive is clear. Member States can adopt stricter standards, but only on their own domestic territory. Any issues commentators have with this more restrictive reality should therefore be directed at the legislator, not the Court.[271]

3.3 Erroneous Court Submissions

68. A persisting concern with the Exhaustion Rule is that it could allow acts of legislation-based discretion to escape review. And as noted above, this concern generally arises because of the failure to acknowledge that EU legislation that triggers the Exhaustion Rule can also grant Member States certain regulatory options, the exercise of which needs to be reviewed. However, Member States and other parties sometimes fuel such claims by explicitly arguing that national acts of discretion, authorised within the framework of an EU legislative act, should enjoy the same presumption of constitutionality as that granted to secondary legislation. As observed in Part II, they seek to rely, strategically, on the Rule to somehow avoid or soften their free movement obligations under the Treaty. This reasoning can be seen in France's submissions in *Inter Huiles*, where it sought to defend national measures on grounds that they

[270] *CIWF*, note 54, paragraphs 41 – 46.

[271] A similar conclusion is directed towards criticism of the Court's finding that the Product Liability Directive, by instituting complete harmonisation, precluded parallel national systems of product liability, even though Article 13 explicitly prevented the directive from affecting 'any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability'. While a number of commentators found this case-law to constitute a scandalous intrusion on national competence, we consider the Court's interpretation to be consistent with how it generally assesses such harmonising measures. In this context, blame should lie with the legislator for failing to properly clarify the scope and limits of the directive, all the more, given that it had been adopted under unanimity. See Part II (Chapter One), point 87 and J. Huet, 'Le scandale de l'harmonisation totale', *Revue des contrats*, no. 3, 2011, pp. 1070 – 1077.

were based on Article 5 of the Waste Oil Directive.[272] As previously discussed,[273] these measures had divided France into geographical zones, with one collector of waste oil per zone – a practice that clearly violated the free movement of goods. However, France argued that its measures were to be considered not in relation to Articles 34 – 36 TFEU, but 'in the context of the directive', given, in particular, that they pursued objectives 'which are similar to those of the Council directive and that the granting of exclusive rights which that legislation provides for is expressly envisaged by Article 5 of the directive.'[274] Germany relied on the same logic in *Commission v Germany (Waste Packaging)*, where it sought to classify the Waste Packaging Directive as instituting 'complete harmonisation' to avoid subjecting its reuse and recycling scheme to an Article 34 – 35 review.[275] Similar submissions were made by Germany in *Bristol-Meyers Squibb*,[276] by Italy in *Commission v Italy (Chocolate Directive)*,[277] by Belgium in *Commission v Belgium (Birds in Captivity)*[278] and by Greece in *Commission v Greece (Ouzo)*.[279]

69. The Court is generally dismissive of such arguments, choosing instead to review the national measure by reference to Articles 34 – 35 TFEU, or the secondary measure, interpreted consistently with the Treaty.[280] However, in some cases, while resolving the case to hand, the Court might fail to tackle underlying misperceptions regarding the Exhaustion Rule, and in particular, to explicitly clarify that the Rule can *never* allow Member States to avoid their free movement obligations under the Treaty. The Court's judgement in *Commission v Germany (Waste Packaging)* serves to illustrate the point.[281] This case arose following a challenge to Germany's reuse and recycling scheme for drink containers on grounds that it infringed the free movement of goods.[282] As just mentioned, Germany, in defending its scheme, claimed *inter alia* that Article 5 of the Waste Packaging Directive,[283] which allowed Member States to

[272] *Inter Huiles,* Case 172/82*,* EU:C:1983:69.
[273] See in particular Part I (Chapter Two), points 155 – 158.
[274] *Inter Huiles,* pp. 561 – 562. See also arguments made at p. 560, first paragraph.
[275] *Commission* v *Germany (Waste Packaging)*, note 29, paragraph 35.
[276] Opinion in *Bristol-Myers Squibb & Others*, Joined cases C-427/93, C-429/93 and C-436/93, EU:C:1995:440, paragraph 96.
[277] *Commission v Italy (Chocolate)*, note 74, paragraph 46.
[278] *Commission v Belgium (Birds in Captivity),* C-100/08, EU:C:2009:537, paragraph 41.
[279] *Commission v Greece (Ouzo)*, C-475/01, EU:C:2004:585, paragraph 14.
[280] See Opinion in *Bristol-Myers Squibb*, note 276, paragraphs 97 *et seq*. See also Opinion in *Commission v France*, C-216/11, EU:C:2012:819; Opinion in *Inter Huiles*, Case 172/82, EU:C:1983:35, p. 571 at paragraph 3 and judgement in *Inter Huiles*, note 272, paragraphs 9 – 12.
[281] *Commission* v *Germany (Waste Packaging)*, note 29, paragraph 35.
[282] See Part II (Chapter Two), points 240 – 241.
[283] Directive 94/62/EC, *op. cit*.

'encourage reuse systems of packaging in conformity with the Treaty', instituted total harmonisation and triggered the Exhaustion Rule. As such, its scheme did not need to be reviewed directly by reference to Articles 34 – 35 TFEU.[284] To support this view, Germany referred to *DaimlerChrysler*,[285] where the Court had found that national measures adopted under Article 4(3)(a)(i) of the first Waste Shipment Regulation (WSR)[286] would be reviewed by reference to the Exhaustion Rule and not Article 35 TFEU. This was so, even though Article 4(3)(a)(i) specifically required such measures, which allowed national objections or prohibitions against waste shipments, to be 'in conformity with the Treaty'.[287] The Court, however, dismissed Germany's attempt to rely on *DaimlerChrysler*, noting that Article 5 simply allowed the Member States to encourage reuse, 'in conformity with the Treaty'. As a result, the German measure was assessed under Article 34 TFEU, where the Court found that it constituted an obstacle to trade.[288]

70. In reaching the above conclusion, the Court correctly distinguished Article 4 (3)(a)(i) WSR, which triggered the Exhaustion Rule, from Article 5 of the Waste Packaging Directive, which did not. In doing so, it noted that the regulatory regime set up under the former ensured respect for the principle of proportionality and the Treaty, without needing to refer directly to Articles 34 – 36 TFEU.[289] Yet, by focusing on the specificities of the WSR, the Court, in our view, also failed to make the more general point that Member States can *never* avoid their Treaty obligations and the Court will *always* retain powers of review, even in the presence of harmonisation. Indeed, far from insisting that reliance on the Exhaustion Rule must always incorporate such limitations, the Court opened its review by simply stating the Exhaustion Rule under its classic formulation,[290] before devoting considerable time to illustrating why Article 5 of the Waste Packaging Directive did not institute total harmonisation. It then reinforced its finding by referring to the statement in Article 5 of the directive that all national measures adopted thereunder must be 'in conformity with the Treaty'. Here, 13 paragraphs after its statement of the classic Exhaustion Rule, the Court distinguished *DaimlerChrysler* – and Article 4 (3)(a)(i) WSR – from the case to hand. In other words, it only referred to the limitations

[284] *Ibid*., paragraphs 37 – 46.
[285] *Ibid.*, paragraph 47.
[286] Council Regulation (EEC) No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L. 030, 06 February 1993 pp. 1 – 28.
[287] *Ibid.*, paragraph 47 – 51.
[288] *Ibid.,* paragraphs 53 – 69 and *Radlberger*, note 254, paragraphs 60 – 73.
[289] *DaimlerChrysler,* note 164. See also Opinion in *DaimlerChrysler,* C-324/99, EU:C:2001:459, paragraphs 46 – 49.
[290] *Ibid.*, paragraph 36. See also *Radlberger*, note 254, paragraph 53.

to the Exhaustion Rule, which should be inherent to *any* application of that Rule, in the context of *DaimlerChrysler* and the WSR, which it ultimately distinguished. In doing so, the Court decoupled these limitations from its statement of that Rule. This could, in turn, wrongfully imply that suspension of Articles 34 – 35 TFEU is solely dependent on the existence of exhaustive harmonisation, without any consideration of whether that EU measure contains the necessary safeguards to prevent violation of the Treaty. In particular, given that EU measures must comply with the Treaty, one might presume that an exhaustively harmonising measure automatically incorporates such safeguards to ensure compatibility with the free movement principles, and that the existence of these safeguards are implicit in a finding of exhaustive harmonisation. In reality however, judicial review of such measures remains necessary, since there is always a risk that Member States will seek to subvert their free movement obligations. In other words, and as emphasised in Part I, the presumption of constitutionality enjoyed by EU measures must always be rebuttable. However, this obligation can sometimes be lost under the ostensibly simple formulation of the Exhaustion Rule, which, as we will see, allows certain misunderstandings to persist.

3.4 Judicial Application of the Exhaustion Rule

71. The Court generally resolves disputes arising in the presence of harmonisation in a balanced and constitutional manner and, to this end, is facilitated by the Exhaustion Rule. However, activation of that Rule can present difficulties, particularly when strategically invoked (or dis-applied) by litigating parties to undermine either the legislator's intention or compliance with the free movement of goods. While the Court usually sees through and dismisses such excesses, this research identifies two instances where problems could arise.

72. The first instance is when the Court correctly identifies and reviews a national act of legislation-based discretion, but fails to disassociate the latter from the constrained definition of one or another harmonisation model. In practice, this leads to a more 'lenient' understanding of 'total harmonisation' and a more 'restrictive' understanding of 'minimum harmonisation'. For example, in the Cosmetics Directive cases, the Court recognised the possibility for unilateral national measures within the exhaustive framework of a 'total harmonisation' measure. However, it cast the Veal Crate Directive as a minimum harmonisation instrument in *CIWF*, even though higher national standards were restricted to domestic production. In reality, each directive triggered the Exhaustion Rule to oust Treaty-based discretion, while also

granting certain regulatory options, – as authorised, defined and limited by the exhaustive legislative framework. Yet the discourse, which does not formally recognise the phenomenon of 'legislation-based discretion', treats them as sitting on the opposite side of the regulatory spectrum: The Cosmetics Directive is considered as an instrument of total harmonisation, while the Veal Crate Directive is seen as instituting minimum harmonisation.[291] A misleading gap thus emerges between the discourse and reality of harmonisation, which contributes to a lack of transparency, misunderstood Court judgements and further litigation.

73. The second, rarer yet more serious, difficulty arises when the 'strategic' arguments of litigating parties succeed, leading the Court to authorise a national discretionary measure without appropriate review. As discussed in Part II (Chapter Two), this might happen when the Court erroneously triggers the Rule, as in *EU Wood Trading*. It also arises when the Court miscategorises legislation-based discretion as being either synonymous with 'Treaty-based discretion' or as constituting an obligation for the Member States to directly implement. In the former scenario, Member States are considered as retaining a degree of discretion corresponding to Article 36 derogations or a mandatory requirement, the exercise of which is then subject to unnecessary review under Articles 34 – 35 TFEU, in contravention of the Exhaustion Rule.[292] The latter arose in *Berger*, where the Court, by failing to recognise that Germany had in fact exercised regulatory discretion, granted the national measure a misplaced presumption of constitutionality with the Treaty.[293] In other cases, the Court correctly recognises national measures as stemming from legislation-based discretion, but fails to scrutinise the balance struck by the regulating Member State.[294]

74. There have always been concerns that Member States could rely on secondary legislation to somehow reinstate barriers to trade. The question, however, is why such arguments continue to potentially undermine the hierarchy of norms following application of the Exhaustion Rule. Indeed, Part I highlight the measures taken by the Court to safeguard against any such risk. In such circumstances, the fact that potentially deviant cases persist points, not to a flaw with the Rule itself. Rather, such cases indicate a wider misunderstanding

[291] See *supra*, notes 109, 265 and 266.
[292] See ex. the 'Cosmetics' and 'Piageme' sagas, discussed in Part I (Chapter Two), section 1.3.2 (Comparing the Analytical Approaches).
[293] Ex. *Berger,* C-636/11, EU:C:2013:227.
[294] Ex. *Gallaher,* note 43 and *Opus Supplies*, C-462/09, EU:C:2011:397. See also *Philip Morris,* C-222/91, EU:C:1993:260, *Grunert,* Case 88/79, EU:C:1980:152, *Zino Davidoff & Others,* Joined Cases C-414/99 to 416/99 and *EU Wood Trading*, C-277/02, EU:C:2004:810.

of the Rule's function, and its relationship with national discretion, as perpetuated under the classic understanding of harmonisation models. In particular, the out-dated framework of the latter prevents the Court, and various market actors, from being systematically alerted to the existence and dangers of legislation-based discretion, leading to the difficulties outlined above.

CONCLUSION OF CHAPTER ONE

75. The EU legislator generally reconciles, and balances, the goals of integration and regulation in a manner that contributes to, or at least does not jeopardise, the establishment and functioning of the internal market. And the Court, when resolving most regulatory disputes over the meaning and validity of this legislation, generally succeeds in respecting both the legislator's intention and primary law. This research has highlighted how the Exhaustion Rule can assist the Court in achieving this goal, insofar as it relates to the free movement of goods.

76. Still, various difficulties can arise with how EU legislation is understood, presented and enforced, both outside and inside the courtroom, including the misrepresentation and misinterpretation of EU legislation and judgements, erroneous Court submissions, un-transparent rulings, and in some cases, a potential normative inversion. This latter danger can be exacerbated when the Exhaustion Rule is triggered, namely because litigating parties often rely on, or seek to discard the ousting of primary law for strategic ends. While often legitimate, such positions can go too far, by seeking to either undermine the legislator's regulatory goals, or avoid necessary review of national trade barrier. Part II highlighted how the Rule should not prevent the Court from recognising, and if necessary, dismissing such positions. There are, however, cases where reliance on the Rule could lead it to privilege the goal of integration over regulation, or *vice versa*, without appropriate justification.

77. Chapter One has argued that the binary vision, perpetuated by harmonisation models, contributes to this risk by deeming a decision over total or minimum harmonisation to definitely determine whether a field is subject to uniform rules, or whether regulatory diversity can persist. What results is a distorted narrative of EU legislation as being solely concerned with pre-empting national competences, whether over internal and/or cross-border matters. This narrative not only ignores the often-protective regulatory function of such legislation. It can also overlook the potential risks posed to the free movement of goods, particularly when EU

legislation grants *legislation-based discretion* to the Member States. This is because the Exhaustion Rule, which ousts Treaty-based discretion, is equated with total harmonisation, an absence of any such discretion and thus, no threat to Article 34 TFEU. More generally, by viewing EU legislation through a binary lens, the Court can present what can be a judicial choice between two potentially legitimate but strategic interpretations of EU law as simply enforcing the legislator's intention, which it presumes as compatible with the Treaty.[295] While such judicial choice is often inevitable, the ambiguity of the internal market, the need for transparency, and the legitimacy of the Court itself require such choices to be recognised and justified as such. Indeed, Part II noted that the Court's interpretation of secondary law can often be criticised, not for making such a choice, but for concealing it, and the values associated therewith, in an 'over-simplified judgement'.[296]

78. This research insists that the Exhaustion Rule, far from contributing to these difficulties, should facilitate the fair, transparent and constitutional resolution of regulatory disputes. For this to happen, however, the nature and impact of EU legislation, as well as its interpretation and enforcement by the Court, needs to be properly understood and described. It is on this basis that Chapter Two suggests a new framework to identify and resolve regulatory disputes that can arise in the presence of internal market legislation.

[295] This is particularly so when the Court carries out a proportionality review of a national measure by reference to the exhaustive legislative regime. See ex. *Clinique*, note 110.
[296] S. Weatherill, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', *op. cit.*, pp. 56 – 57. See also H. Unberath & A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *op. cit.*, and H.-W. Micklitz & N. Reich, 'The Court and the Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *op. cit*., pp. 801 – 802.

CHAPTER TWO – BEYOND THE BINARY VISION

79. Internal market legislation seeks to integrate national product markets and set regulatory standards. The Court's task is to interpret and enforce these aims while ensuring respect for the Treaty, including Articles 34 – 35 TFEU. Key to this endeavour is the way in which the Court identifies and reviews national acts of regulatory discretion adopted in the presence of such EU rules, particularly when they might impact on cross-border trade. As just explained, this task can be obscured by the binary vision of regulation promoted by harmonisation models, which does not give enough weight to the regulatory function of harmonisation and fails to acknowledge that national leeway can exist *within* the exhaustive legislative framework. This can lead to a distorted view of EU internal market regulation, fuel misperceptions about the Exhaustion Rule's function and the relationship between primary and secondary law, and, in some cases, have a substantive impact on Court judgements.

80. This Chapter responds to these difficulties by suggesting a new framework to describe and assess the impact of EU secondary legislation on the internal market for goods (section three). Inspired by some recent Court judgements and the views of certain commentators, this framework proposes a new categorisation of national measures adopted in the presence of EU legislation (section one). It also suggests a more sophisticated procedure to describe and guide judicial review of such national measures by introducing the concept of 'regulatory character', as distinct from the notions of 'regulatory scope' and 'regulatory intensity/impact' (section two). The proposed framework is thus descriptive but with normative value. On the one hand, it rationalises the Court's approach to review and provides a better description of how secondary impacts the internal market for goods. On the other, it can alert the Court, and other parties, to the potential for national discretion *within* an exhaustive regulatory framework, thereby securing against some of the difficulties highlighted above. As a tentative first step away from the traditional understanding of harmonisation, the framework remains incomplete, while also touching on a potentially vast array of issues that need further exploration. It nonetheless provides a fresh starting point to better understand, analyse and reflect the complexity of EU legislation as it interacts with national and primary law.

1. A NEW CATEGORISATION FOR NATIONAL MEASURES

81. The proposed categorisation classifies national measures adopted in the presence of EU legislation in accordance with their normative basis as opposed to the harmonisation model of the secondary rule under which they are adopted. The four categories identified (and which are referred to throughout this research) are: Treaty-based discretion, Treaty-based derogations, direct implementation of a legislative obligation and legislation-based discretion.[297] Each is distinguished according to the norm of reference against which it is reviewed, on the one hand, and the degree of discretion granted to the Member States, on the other. Thus, Treaty-based discretion refers to the possibility for national action based on an Article 36 derogation or a mandatory requirement. Since the existence of such discretion is incompatible with activation of the Rule, national measures adopted on this basis must be reviewed by reference to the Treaty. In contrast, Treaty-based derogations as well as acts of legislation-based discretion and direct implementation persist in the *presence* of exhaustive EU rules. However, each authorises different degrees of national action that are subject to a different process of review.[298]

82. The dividing line between the various categories is not always watertight. Indeed, Member States retain, in reality, a spectrum of regulatory possibilities in the presence of EU legislation, between the '*Ratti'* understanding of total harmonisation and full Treaty-based discretion. In this context, the scope for legislation-based discretion might not differ substantively from the grant of indirect Treaty-based discretion,[299] or, when it is particularly restrictive, from direct implementation.[300] This fluidity is captured by AG Bobek, who states

[297] Dougan suggests a similar distinction between legislation-based discretion and direct implementation. See M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit.*, pp. 619 – 620.

[298] A further potential category of national measure, adopted in the presence of minimum harmonisation, could stem from the exercise of a Member State's own (as opposed to delegated) powers that, while not triggering the free movement provisions, comes within the scope of EU law. Although not explored by the research, Member States must, under the principle of mutual sincere cooperation, ensure that such measures comply with EU law, including general principles of EU law and fundamental rights. For discussion, see F. De Cecco, 'Room to Move? Minimum Harmonisation and Fundamental Rights', *op. cit.*, who considers this question with respect to national regulation of the 'upwardly-flexible area' of a minimum harmonisation directive.

[299] Ex. In *Müller*, AG Tizzano first held that the impugned Austrian measure fell outside the scope of Directive 2000/13/EC (the second Food Labelling Directive), *op. cit.,* and validated the measure by reference to Articles 34 – 36 TFEU. However, he then found that the Austrian measure would still be lawful, even if it fell within the scope of the directive, and was subject to the Exhaustion Rule, given the scope for legislation-based discretion under Article 18 (2) of the directive. *Müller*, C-229/01, EU:C:2002:571, paragraphs 41 *et seq*. Compare also the AG Opinion and judgement in *Denkavit Futtermittel* (respectively C-39/90, EU:C:1991:267 and C-39/90, EU:C:1991:267).

[300] For example, while legislative safeguard clauses grant a degree of national legislative discretion, they are rarely relied upon successfully by the Member States, given the strict conditions that apply to invoke them. Indeed, Member States have often preferred to argue that they retain discretion under Article 36 TFEU, rather than subject their national rules to this mechanism. See *Ratti*, note 10.

that 'the closer a situation is to a clearly defined requirement of EU law, the less discretion there is on the part of the Member State and the more uniformity there will be. Conversely, the further a case moves from a clear and specific rule of EU law, while still being within the scope of EU law, the greater the discretion on the part of the Member States, thus enabling greater diversity'.[301] What is more, the Court can influence the scope for national discretion, either directly, when it considers the lawfulness of a specific national implementing measure, or indirectly, by clarifying the meaning of a particular term. Depending on its specificity, this ruling can then impact on the room left to the national level,[302] and can evolve over time. Indeed, the Court, in response to an increasing number of references, often replaces general or uncertain interpretations with concrete standards, thus transferring a potential instance of legislation-based discretion into the category of 'direct implementation'. [303] Considering such factors, it may not always be easy to establish which category a national measure falls under. Still, by focusing on the *nature* of the national measure, the proposed categorisation can at least accommodate such nuances in a manner not possible under the binary logic of harmonisation.

83. A more realistic reflection of EU legislation thus ensues, leading to improved transparency in understanding, interpreting and enforcing EU law, and more robust protection for the free movement of goods. First, the proposed classification shows how litigating parties might strategically categorise a national trade measure as being based on one or another norm or category, so as to trigger (or not) the Exhaustion Rule. That the Court accepts, or dismisses such arguments can reveal the judicial choices being sometimes made, for example, over the balance between regulation and integration, between uniformity and diversity and regarding the deference afforded to the legislator. What is more, if such choices are made, they must be justified and explained. Second, recognising the category of legislation-based discretion ensures national acts of discretion, adopted within the framework of an exhaustive EU measure, are identified and reviewed. This not only avoids the reinstatement of potential national barriers to trade. By requiring the Court to assess such national measure, for example, under a proportionality test, it, again, highlights the interpretative choices being made. This can, in turn, improve both the transparency and legitimacy of judicial reasoning.

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[301] Opinion in *Spetsializirana prokuratura*, C-310/16, EU:C:2018:623, paragraph 80.
[302] Ex. While Germany interpreted Article 88 (2) of Directive 2001/83/EC, *op, cit*., as providing discretion to ban the advertisement of non-prescription medicines, the Court considered it to institute total harmonisation and exclude any such discretion. See *Doc Morris*, note 51, paragraphs 140 – 144 and *Gintec*, note 24, paragraph 26.
[303] T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction', *op. cit*., pp. 751 – 752. See also *supra*, point 43 and citations.

1.1 Treaty-Based Discretion

84. Treaty-based discretion refers to national regulatory options that persist over cross-border trade in goods when the Exhaustion Rule does not apply. It therefore covers national rules adopted under one of the Article 36 derogations, or by relying on a mandatory requirement, subject to review by reference to Articles 34 – 35 TFEU. While Treaty-based discretion constitutes 'an expression of a power that national authorities retain in the context of their own (not the Community's) regulatory policies',[304] it cannot reserve any matter to the exclusive jurisdiction of the Member States.[305] Treaty-based discretion can be direct or indirect.

85. Direct Treaty-based discretion arises when there is no harmonising measure that is specifically relevant to resolve the dispute. It applies in the presence of partial harmonisation, insofar as the matter falls *outside the regulatory scope* of the harmonising rule.[306] For example, the Medicinal Products Code does not harmonise the classification of what can constitute a medicinal product.[307] Member States therefore retain direct Treaty-based discretion over certain grey-area substances, subject to compliance with Articles 34 – 36 TFEU, and, in particular, the principle of proportionality.[308] Member States also retain direct Treaty-based discretion to pursue an *objective* in relation to a product that is 'external to the field harmonised'[309] and when the exhaustive EU rule has not yet become effective.[310]

86. Indirect Treaty-based discretion applies when the harmonising measures is relevant but not exhaustive, thus, in the presence of optional or minimum harmonisation. In such circumstances, Member States can, respectively, derogate from the harmonised standard or adopt more stringent national rules to regulate a particular public interest, subject to conformity with the Treaty. A typical example of the latter can be seen under Article 7 of the first

[304] F. De Cecco, 'Room to Move? Minimum Harmonisation and Fundamental Rights', *op. cit.*, p. 10.
[305] *Simmenthal*, Case 35/76, EU:C:1976:180, paragraph 14.
[306] See note 91. See also Opinion in *Commission v Austria (Food Labelling)*, note 139, paragraphs 39 – 40.
[307] Directive 2001/83/EC, (the Medicinal Products Code), *op. cit.*
[308] Ex. *Commission v Austria (Food Supplements)*, C-150/00, EU:C:2004:237, paragraphs 58 – 61 and *Commission v Germany (Garlic Capsules)*, C-319/05, EU:C:2007:678, paragraph 37.
[309] *Lidl,* C-132/08, EU:C:2009:281, paragraph 45. See also J. Jans & H. Vedder, *European Environmental Law – After Lisbon, op. cit*., p. 102 and discussion in Part II (Chapter Two), paragraph 211.
[310] This can arise when the transposition date has not expired, as in *Deutsches Milch-Kontor,* C-426/92, EU:C:1994:260; *Monsees*, note 51 and *Essent & Others,* Joined Cases C-105/12 to C-107/12, EU:C:2013:677. It can also arise when the EU institution has not yet adopted the necessary implementing measures, as in *Prantl,* note 150. For discussion, see Part I (Chapter Two), section 2.1.3 (The Relevance of Time).

Misleading Advertising Directive, whereby Member States 'retain more stringent consumer protection measures, in a way that is consistent with the fundamental principle of the free movement of goods'.[311] Similarly, Article 5 of the Waste Packaging Directive grants indirect Treaty-based discretion 'to encourage, in conformity with the Treaty, systems for the reuse of packaging that can be reused in an environmentally sound manner'.[312] The UCPD, by including commercial practices relating to financial services and immovable property within its scope but without subjecting them to a market access clause allows Member States to retain (indirect) Treaty-based discretion over these fields.[313]

87. Member States should, in principle, retain the same scope to adopt higher national standards under direct and indirect Treaty-based discretion. This parity arises because the latter, insofar as it stems from a minimum harmonisation clause, is subject to control by reference to Articles 34 – 35 TFEU. The scope for national action to protect the relevant public interest should therefore correspond to what is allowed under the Treaty exceptions, even if this action is authorised by minimum harmonisation clause. In such circumstances, Articles 34 – 36 TFEU remain relevant as norms of reference for judicial review, and the Exhaustion Rule does not apply. [314] The residual discretion to regulate under minimum and partial harmonisation is therefore grouped under the same category and then subdivided, respectively, under indirect and direct Treaty-based discretion.

88. In assessing the impact of EU minimum standards on more stringent national standards (i.e. indirect Treaty-based discretion), Boeger notes that the Court generally polices the grey area between the legislative 'floor' and Treaty 'ceiling' through a more or less stringent application of the proportionality test, much in the same way as it approaches national measures

[311] Directive 84/450, *op. cit*., interpreted in *Karner,* note 44, paragraph 34. See also *Commission v France (Spare Parts)*, C-23/99, EU:C:2000:500, paragraph 33 in relation to Directive 98/71/EC of the European Parliament and of the Council on the legal protection of designs (OJ L. 289, 28 October 1998, pp. 28–35).
[312] Directive 94/62/EC, *op. cit*. In *Commission v Germany (Waste Packaging)*, note 29, *Radlberger*, note 254 and *Valev Visnapuu*, note 59, national legislation was found to fall within the scope of various non-exhaustive provisions of the directive. As a result, while Articles 5 and 7 encouraged Member States to establish return and reuse systems of packaging, ensuing national schemes were subject to review under Articles 34 – 36 TFEU. See also Article 26 of Directive 2004/18/EC *op. cit.*, which authorised Member States to impose special conditions relating to the performance of a contract, which could include a regional requirement for tenderers to pay staff a minimum wage. *RegioPost*, C-155/14, EU:C:2015:760.
[313] See Article 3 (9) of Directive 2005/29/EC, *op, cit.*, as interpreted in *Citroën Belux*, note 167. Here, the Court found that a Belgian prohibition on combined offers to consumers, where at least one of the components was a financial service, was authorised by both the UCPD and under Article 56 TFEU.
[314] *Supra*, point 15.

in the absence of harmonisation.[315] A similar conclusion emerges in relation to optional and partial harmonisation. Thus, in some cases, the Court imposes a strict review under Articles 34 – 36 TFEU. This can be seen in cases such as *Doc Morris*, where the Court, having established that Member States could adopt more stringent national rules under Article 14 of the Distance Selling Directive, devoted considerable time to establishing first, that a national ban on internet sales of medicines came within the scope of Article 34 TFEU, and second, that it could not be justified under Article 36 TFEU insofar as it applied to non-prescription medicines.[316] In other cases, however, an EU legislative measure, which is non-exhaustive or even not strictly relevant, might legitimately soften the Court's review of a national act of Treaty-based discretion, particularly if it expresses what Maduro refers to as 'the Community majority opinion'.[317] A good example of this influence can be seen in *Van der Veldt*, discussed above, which validated Belgian rules that relied on a non-exhaustive EU standard rule to oppose lawfully manufactured imports that were based on a lower standard. A similar influence can be seen in *Eyssen*, where the Court validated a Dutch measure that prohibited the use of nisin in cheese destined for the domestic market, while authorising its use in cheese for export. The Court first confirmed that the Dutch rule did indeed restrict trade. However, when considering its justification under Article 36 TFEU, it referred to the fact that Directive 64/54 on preservatives in food[318] left the regulation of nisin in Member States hands, which, by implication, meant the exercise of discretionary powers within the limits of the Treaty.[319]

89. A similar influence can be seen when the implementation date of an exhaustive and potentially relevant directive is not yet expired. As noted in Part I (Chapter Two), Member States retain Treaty-based discretion over the matter until this implementation date has passed. However, being under a duty of sincere cooperation, they cannot adopt national rules that would 'compromise seriously the result prescribed by the directive'.[320] While this latter requirement

[315] N. Boeger, 'Minimum Harmonisation, Free Movement and Proportionality', *op. cit.*, section 6.
[316] *Doc Morris*, note 51, paragraphs 64 *et seq*. See also Opinion in *Warsteiner*, C-312/98, EU:C:2000:285, paragraphs 59 – 65.
[317] M. P. Maduro, *We the Court: The European Court of Justice and the European Economic Constitution,* Hart Publishing, 1998, p. 74. Although for a (in the author's view – justified) critique of Maduro's 'majoritarian' thesis, see R. Schütze, *From International to Federal Market: The Changing Structure of European Law*, *op. cit.*, pp. 290 – 300.
[318] Council Directive 64/54/EEC on the approximation of the laws of the Member States concerning the preservatives authorized for use in foodstuffs intended for human consumption, OJ, English Special Edition 1963 – 1964, p. 99.
[319] *Eyssen*, note 91, paragraph 15. See also *Nicholas Schrieber*, Case C-443/02, EU:C:2004:453, *Buet, A-Punkt, Hönig, Aher-Waggon, Gysbrechts,* all cited at note 41 and 45 above.
[320] This assessment generally falls to the national court. See ex. *Inter-Environnement Wallonie*, C-129/96, C:1997:628, paragraph 45.

should not, in theory, reach the level of harmonious interpretation,[321] the legal effects of such directives can still go quite far. In *Monsees*,[322] for example, the Court referred to Directive 95/29/EC (amending the Animal Transport Directive)[323] when invalidating an Austrian animal welfare rule as an unjustified trade barrier, even though its implementation date had not yet expired. In particular, the Court cited the regulatory standard established thereunder to prove that 'measures appropriate to the objective of protecting the health of animals and less restrictive of the free movement of goods were conceivable'.[324] In *Commission v Italy (Chocolate)*, the Court's insistence that Irish and UK chocolate should enjoy free movement could have been implicitly guided by the fact that the second Chocolate Directive,[325] which was adopted but pending at the time, recognised that such chocolate could indeed be called 'chocolate'.[326] Another interesting case is *Essent*, where the Court relied indirectly on the Third Energy Package to validate Dutch measures that implemented the Second Energy Package, even though date to implement the former had not expired at the date of proceedings.[327]

1.2 Treaty-Based Derogations

90. This category refers to the possibility afforded by the Treaty to the Member States to adopt national measures in the presence of harmonisation. Thus, in contrast to Treaty-based discretion, which applies in the absence of harmonisation, Treaty-based derogations explicitly allow national measures to diverge from the harmonised standard. The most relevant provisions for the free movement of goods can be found under Article 114 (4 – 5) TFEU, which allow Member States to derogate from Article 114 directives, and Article 193 TFEU, which states that measures adopted under Article 192 TFEU 'shall not prevent any Member State from maintaining or introducing more stringent protective measures'. As outlined in Part I (Chapter Two), both provisions were first introduced under the SEA to counterbalance the transfer of

[321] P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, *op. cit*., pp. 209 – 211. See also *Adeneler*, C-212/04, EU:C:2006:443, paragraph 115, *Inter-Environnement Wallonie*, note 320 and *Rieser*, C-157/02, EU:C:2004:76, paragraph 66.
[322] *Monsees*, note 51.
[323] Council Directive 95/29/EC amending Directive 91/628/EEC concerning the protection of animals during transport, OJ L. 148, 30 June 1995, pp. 52 – 63.
[324] *Monsees*, note 51, paragraph 30.
[325] Directive 2000/36/EC of the European Parliament and of the Council relating to cocoa and chocolate products intended for human consumption, OJ L. 197, 3 August 2000, pp. 19 – 25.
[326] *Commission v Italy (Chocolate)*, note 74.
[327] *Essent & Others*, note 310. See in particular the Opinion of AG Jääskinen, who states that the unimplemented Third Energy Package benefited from a 'presumption of conformity' with the fundamental freedoms and, while not 'applicable ratione temporis to the case, could not be disregarded'. Opinion in *Essent & Others,* Joined Cases C-105/12 to C-107/12, EU:C:2013:242, paragraphs 69 – 77.

regulatory powers to the Community. Despite initial criticism, both remain in place to this day, even if the Article 114 derogations have been subsequently amended and refined.[328] Indeed, the latter is now subject to obligatory notification requirements, supervisory procedures and deadlines. Article 193 measures must also be notified to the Commission, although according to Jans & Vedder, 'non-notification will not preclude application of the national rules in the national legal order'. [329] National measures that have successfully relied on such constitutional derogations to overturn the Exhaustion Rule are relatively limited.[330]

1.3 Direct Implementation

91. National measures often arise from direct implementation of a non-discretionary EU obligation. These obligations can be negative, such as a prohibition under an exclusivity[331] or market access[332] clause or a black list of substances or practices that must be excluded.[333] They can also be positive, such as a white list of substances to be authorised[334] or an obligatory authorisation procedure.[335]

92. The pre-emptive effect of such obligations generally corresponds to rule or field pre-emption, since national measures going beyond the obligation will be automatically invalidated under the Exhaustion Rule for want of justification. Member States typically stray into this situation when they seek to clarify or extend the EU requirements,[336] as in *Ratti* and *Dim Dip*. The Court's response to such national measures is to rely, implicitly or explicitly, on the Exhaustion Rule to remove the barrier to trade, thereby enforcing the integrative effect of the EU measure. It has repeated this approach across its internal market jurisprudence, whenever an 'additional' national requirement, which has been adopted in a regulated sector, is subject to

[328] I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., Chapter Three.
[329] J. Jans & H. Vedder, *European Environmental Law – After Lisbon, op. cit.*, p. 122.
[330] Ex. N. de Sadeleer, *EU Environmental Law and the Internal Market*, Oxford, Oxford University Press, 2014, pp. 350 – 358 and I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market*, *op. cit*., Chapter Four. See also Part I (Chapter Two), section 2.3.3 (Treaty-Based Derogations).
[331] Ex. Article 4 of Directive 2006/66/EC of the European Parliament and of the Council on batteries and accumulators and waste batteries and accumulators, OJ L. 266, 26 September 2006, pp. 1 – 14.
[332] Ex. Article 6 of Directive 2006/66/EC, *ibid*.
[333] Ex. Annex II of Directive 2011/65/EU of the European Parliament and of the Council of on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L. 174, 1 July 2011, pp. 88–11 and Annex 1 of Directive 2005/29/EC (the UCPD), *op. cit*.
[334] Ex. Annex I of Directive 2002/46/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements, OJ L 183, 12 July 2002, pp. 51 – 57.
[335] Ex., the market authorisation procedure laid down for medicinal products under Directive 2001/83/EC, *op. cit.*
[336] E. Cross, 'Pre-emption of Member State law in the European Economic Community: A framework for analysis', *op. cit*., pp. 463 – 464.

review. These sectors include industrial products regulated under the new approach to harmonisation, [337] food, [338] cosmetics, [339] dangerous substances, [340] automobiles [341] and medicines.[342] An example of the latter can be seen in *Doc Morris* where the Court held that Germany could not ban the advertising of non-prescription medicines for sale by mail order since Member States were pre-empted from restricting advertising activities that were not expressly prohibited by the Medicinal Products Code.[343] The Court's review of CAP legislation is also replete with similar cases, as exemplified in *Commission v Germany (male pigs)*.[344]

93. If a Member State is pre-empted from going beyond the EU requirement, it stands to reason that a national measure correctly implementing such a requirement should be validated. This is all the more, given operation of the Exhaustion Rule, which exempts such measures from being subject to direct scrutiny under Articles 34 – 35 TFEU. In other words, compliant national measures benefit from the same presumption of constitutionality enjoyed by the underlying EU legislative provisions, where they are 'deemed to have complied with the principle of proportionality'.[345] As repeatedly confirmed by the Court, 'a national legislative provision which correctly transposes a Community rule by means of specifically-defined measures does not constitute an obstacle to free movement contrary to (ex.) Article 28 EC'.[346] In such cases, the Court relies on the Exhaustion Rule to enforce the *regulatory* effect of EU legislation, as it promotes the regulatory goals of secondary rules by validating the national rules mechanically adopted thereunder. This point was explicitly made in *Doc Morris*,[347] which also considered the lawfulness of German rules that prohibited the advertising and sale of prescription and non-prescription medicines over the Internet by pharmacies established in other Member States. The national court asked, *inter alia*, whether this prohibition could apply to medicines that had been authorised in the exporting Member State, for the sole reason that

[337] Ex. *Atral*, note 7.
[338] Ex. *Commission v Italy (Pure Chocolate)*, note 6.
[339] *Parfümerie-Fabrik*, C-150/88, EU:C:1989:594. See also *Commission v Italy (Cosmetics)*, C-365/00, EU:C:2002:152.
[340] Ex. *Commission v Denmark (Dangerous Substances),* Case 278/85, EU:C:1987:439.
[341] Ex. *Commission v Belgium (Registration of Vehicles),* C-150/11, EU:C:2012:539.
[342] Ex. *Orthica & Others,* Joined Cases C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370.
[343] *Doc Morris,* note 51, paragraphs 140 – 144.
[344] *Commission v Germany (Male Pigs)*, C-102/96, EU:C:1998:529, discussed at Part I (Chapter One), point 17. See also *Apple and Pear Development Council*, Case 222/82*,* EU:C:1983:370, *Wulro*, Case 130/85, EU:C:1986:260 and *Commission v Belgium (Vegetables and Fruit)*, Case 255/86, EU:C:1988:63.
[345] M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit.*, p. 620.
[346] *Bellamy*, note 86, paragraph 21. See also *Berendse-Koenen,* C-246/98, EU:C:2000:153, paragraphs 24 – 25 and *Schwarzkopf*, C-169/99, EU:C:2001:439.
[347] *Doc Morris*, note 51.

they had not been granted market authorisation in the importing Member State, under the Medicinal Products Code. Validating the prohibition, the Court referred to the fact that Member States were obligated under the Code to submit medicines to the market authorisation procedure before being marketed on their territory. As a result, the German rule could not be characterised as a trade barrier:

> '… a national rule … whereby a Member State discharges its obligations under Directive 65/65 and the Community Code, cannot be characterised as a measure having equivalent effect to a quantitative restriction on imports within the meaning of (ex.) Article 28 EC … Accordingly, (ex.) Articles 28 EC to 30 EC cannot be relied on in order to circumvent the system of national authorisation provided for by Directive 65/65 and the Community Code, which is implemented in national law …' [348]

94. In the same vein, the Court found that the German ban on the advertising of (a) unauthorised medicines and (b) prescription medicines was correctly based on the Code and exempt from being reviewed under the Treaty.[349]

95. Direct implementation can lead to disputes of 'pure interpretation', where the parties accept, often implicitly, the secondary measure as the sole norm of reference but seek an authoritative interpretation of one or more of its provisions. In this type of case, the language used in the EU rule might be indeterminate but it is the Court, and not the Member State, which has the higher authority to decide on its meaning.[350] Such cases can stem from a direct challenge to the national implementation of a particular EU legislative provision.[351] In other cases the Member State, which has directly transposed the EU provision, is not directly challenged. Rather, the dispute arises between private parties that need a definitive interpretation of a particular EU rule,[352] sometimes with no obvious cross-border effect. This latter type of case has become more common with better EU legislative drafting.

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[348] *Ibid*., paragraph 53.
[349] *Ibid*., paragraphs 138 – 139. See also *Novo Nordisk,* C-249/09, EU:C:2011:272, which interpreted the advertising prohibitions in Article 87 (2) of the Medicinal Products Code strictly to prohibit the use of certain quotations taken from specialised medical journals.
[350] A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *Common Market Law Review*, vol. 47, 2010, pp. 361 – 403 at p. 363.
[351] Ex. *Commission v United Kingdom (Dim Dip)*, Case 60/86, EU:C:1988:382, and more recently, *Comtech*, C-568/15, EU:C:2017:154.
[352] Ex. *Innova Vital,* C-19/15, EU:C:2016:563; *Hauptzollamt Hamburg-Jonas*, C-300/05, EU:C:2006:735; *Loterie Nationale*, C-667/15, EU:C:2016:958, *Teekanne*, C-195/14, EU:C:2015:361 and *Unimatic*, C-485/17, EU:C:2018:642.

96. The EU provision that requires interpretation in such cases can sometimes include 'autonomous concepts' or 'open textured norms and standards', such as the notions of 'good faith', 'unfairness', 'professional diligence', 'reasonableness', which require 'autonomous and unitary interpretation by a central authority'. As discussed in relation to certain consumer protection directives, these terms often require interpretation by the Court (and national courts), which must weigh and balance conflicting rights, interests and values.[353] We saw in *Leitner* that this balancing exercise can sometimes result in a definitive interpretation, to be directly implemented by the national level. However, other open concepts such as 'average consumer' are not amenable to a single definitive definition, but require interpretation at national level, and therefore the exercise of national regulatory and judicial discretion.[354] Such discretion is often necessary to ensure the concept's relevance and applicability to different fact case scenarios, with its scope clearly depending on how closely or remotely those facts correspond to the EU rule.[355] Yet discretion is also linked to the wording of the legislative measure, which can, in turn, tie into Member States' wider implementing powers. Indeed, directives, as defined under Article 288 TFEU, are 'binding … as to the result to be achieved, but leave to the national authorities the choice of form and methods'.[356] As a result, a Member State adopts 'within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues'.[357] The Court also accepts that regulations, while having immediate effect, may 'necessitate, for their implementation, the adoption of measures of application by the Member States'.[358] The existence of such national discretion in the presence of harmonisation forms part of the decentralised implementation of EU law and allows the internal market to accommodate differences in national legal and general culture. Its exercise, however, must also remain compatible with EU law, including the free movement of goods, and cannot enjoy the same presumption of constitutionality as applies to national measures of direct implementation. Instead, such national leeway could fall, at least partially, under the category of legislation-based discretion.

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[353] M. Schillig, 'The Interpretation of European Private Law in the light of Market Freedoms and Fundamental Rights', *op. cit*., pp. 286 – 287.
[354] *Supra*, Chapter One, section 3.1 (The Consumer Protection Saga) and citations.
[355] Opinion in *Spetsializirana prokuratura*, note 301, paragraphs 78 – 80.
[356] See ex. *Danske Svineproducenter II*, note 137, paragraph 38 and *Danske Svineproducenter I,* note 137, paragraph 27.
[357] *Danske Svineproducenter I,* note 137, paragraph 29. In *Fleischkontor,* Case 39/70, EU:C:1971:1, the Court acknowledged at p. 58 that national leeway to implement was inherent to the nature of directives, as provided for by Article 288 (3) TFEU. See also *Commission v Italy*, C-456/03, EU:C:1999:314 and *Emmot,* C-208/90*,* EU:C:1991:333, paragraph 18.
[358] *Danske Svineproducenter II*, note 137, paragraphs 39 – 41.

1.4 Legislation-Based Discretion

97. As mentioned throughout this research, legislation-based discretion refers to the defined margin of regulatory manoeuvre granted to Member States by an EU secondary rule, which, by exhaustively regulating the field, triggers the Exhaustion Rule to oust any possibility for Treaty-based discretion. Unlike Treaty-based discretion (which the research associates with minimum harmonisation), this regulatory margin generally involves the exercise of a 'derivative competence', authorised by EU law, as opposed to the exercise of original national legislative powers.[359] It should also, by definition, be less than (or even equal to) what is authorised under Treaty-based discretion, given that secondary rules cannot 'under any circumstances exceed the limits laid down by Article 36'.[360] Still, the existence of national regulatory wriggle room, albeit within the framework of the EU secondary rule, means that Member States are not directly implementing an unambiguous EU legislative obligation, as described above. Nor are they legislating under an individually negotiated derogation from an otherwise harmonised standard. Instead, they can enjoy a spectrum of possibilities, between the absence of any discretion under 'total harmonisation' and the retention of Treaty-based discretion. Categorised within this 'spectrum' is the *de facto* and potentially temporary national margin of manoeuvre that arises following a legislative ambiguity or gap at EU level, whether or not this is intentional.

98. This section first outlines examples of legislation-based discretion, before considering how the Court does and should respond to resulting national measures.

1.4.1 Examples of Legislation-Based Discretion

99. The phenomenon of legislation-based discretion covers a wide spectrum of regulatory possibilities, ranging from the very restrictive, such as safeguard clauses, to options that come close to Treaty-based discretion. The following instances of legislation-based discretion have been identified in relevant EU legislation:

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[359] F. De Cecco, 'Room to Move? Minimum Harmonisation and Fundamental Rights', *op. cit.*, p. 21.

[360] *De Peijper*, Case 104/75, EU:C:1976:67, paragraph 31 and *Commission v Italy (Grapefruit),* C-128/89, EU:C:1990:311, paragraph 17. Having said that, EU legislation can enjoy greater scope to justify trade restrictions (See Part I (Chapter One)), while apparent obstacles to trade may not in fact be so, since a national trade restriction can disappear once introduced throughout the EU, since 'all Member States will then apply the same standard so that goods from one Member State can be imported and sold in all the others. See M. Jarvis, 'Scope: Persons Bound', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union*, *op. cit.*, Chapter Four, pp. 55 – 78, paragraph 4.11. See also *Bauhuis*, Case 46/76, EU:C:1977:6, and General Introduction, section 1.2.1.

- Safeguard clauses allow national safeguard measures to derogate from the harmonised standards, subject to complying with a strict EU procedure set out in the legislation.[361] The possibility to adopt such clauses, which are standard in EU product rules, was confirmed in *Tedeschi* and has been mandated by the Treaty since the SEA. Specifically, Article 114 (10) TFEU provides that harmonisation measures adopted under Article 114 TFEU shall 'include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure'. While allowing some national discretion, the 'safeguard clause' has always formed part of the traditional definition of total harmonisation.[362]

- Exhaustive list of possibilities to derogate from a market access clause. Ex. Article 15(2) of the first Food Labelling Directive, Article 18 (2) of the second Labelling Directive and Article 39 of the Consumer Information Regulation, which allow national derogations from the market access clause for reasons of public health, fraud prevention, intellectual property and prevention of unfair competition;[363] Article 3 (4) of the Electronic Commerce Directive, which allows derogations from the market access clause in Article 3(2) for reasons of public policy, public health, public security and consumer protection;[364] Article 6 (2) of the (first) Pyrotechnic Directive (and Article 4 (2) of its successor[365]) which allows derogations from the market access clause in

[361] Ex. Articles 42 – 43 of the Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys, OJ L. 170, 30 June 2009, pp. 1–37 (Toy Safety Directive).
[362] See Slot's definition of total harmonisation in P. Slot, 'Harmonisation', *op. cit.*, p. 382. One could argue that safeguard clauses do not grant any national discretion since they simply allow Member States to refuse free movement to a good suspected of not complying with the EU standard. At the same time, appreciation of non-compliance could leave room for leeway, which explains the need to subject any such measure to Commission supervision, and ultimately judicial review. See ex. Directive 2009/48/EC, *ibid*. Indeed, some safeguard measures allow Member States to provisionally restrict the free movement of a good that complies with the harmonised standards, if it has evidence that the product constitutes a risk. Ex. Article 23 (1) of Council Directive 79/831/EEC amending Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ L. 259, 15 October 1979, pp. 10 – 28. See also *Denkavit v Minister van Mandbouw,* C-507/99, EU:C:2002:4, *Commission v Germany (Dangerous Substances)*, C-43/90, EU:C:1992:121 and *Staat der Nederlanden v Denkavit*, C-346/09, EU:C:2011:414.
[363] See note 31 for references.
[364] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L. 178, 17 July 2000, pp. 1 – 16. See also Opinion in *Uber Systems Spain*, C-434/15, EU:C:2017:981 and *eDate Advertising*, Joined Cases C-509/09 and C-161/10, EU:C:2011:685, paragraph 59.
[365] Directive 2013/29/EU, *op. cit.*

Article 6 (1) (and Article 4 (1)) on grounds of public order, security, health and safety, or environmental protection.[366]

- Clauses allowing stricter national standards subject to territorial limitations. Ex. Article 11 (2) of the Veal Crate Directive allowed Member States to adopt stricter protections 'within their territories';[367] Article 4 (4) of the first Tobacco Labelling Directive allowed stricter national requirements in labelling tobacco products, subject to a market access clause;[368] Article 5 of the Footwear Labelling Directive[369] allows Member States to require that 'additional textual information … may accompany the information required under the Directive' but subject to a market access clause.

- Clauses that grant Member States flexibility to adopt lower standards. Ex. Article 4(1) of the Fuels Directive, which, when read with Annex II, sets the maximum limit for the FAME content of diesel fuel at 7%. [370]

- Clauses that grant Member States an *option* to act. Ex. Article 4 (2)(b) of the first Waste Shipment Regulation authorised Member States to object to shipments of waste for disposal to and from their territory, which extended, under Article 4 (3)(a)(i), to the possibility to 'prohibit generally or partially or to object systematically to shipments of waste';[371] Articles 88 (3), 89 and 96 (2) of the Medicinal Products Code, which grant Member States options regarding the advertising of medicines and the distribution of free samples;[372] Article 7 (3) of the Cosmetics Directive allowed Member States 'for purposes of prompt and appropriate medical treatment' to require that 'information on substances used in cosmetic products be made available to the competent authority';[373] Article 17 (2) of the Foodcode allows Member States to adopt measures 'as appropriate

[366] Directive 2007/23/EC, *op. cit.*
[367] Directive 91/629/EEC, *op. cit.*, as interpreted in *CIWF*, note 54.
[368] Directive 89/622/EEC, *op. cit.*, as interpreted in *Gallaher*, note 43.
[369] Directive 94/11/EC of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer, OJ L. 100, 19 April 1994, pp. 37 – 41.
[370] Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels, OJ L. 350, 28 December 1998, pp. 58 – 68. It was on this basis that Belgium lawfully set its national biofuels quota at a lower level, that being, at 4% in *Belgische Petroleum Unie*, C-26/11, EU:C:2013:44.
[371] Regulation (EEC) No. 259/93, *op. cit*.
[372] Directive 2001/83/EC, (the Medicinal Products Code), *op. cit.*
[373] Directive 76/768/EEC, *op. cit.*

to the circumstances' to enforce compliance with food law.[374]

- Clauses that impose an *obligation* on Member States to act by relying on ambiguous terminology. The implementation of this obligation may require the exercise of some national discretion, the extent of which will depend, first, on whether the EU measure has defined and/or given guidance with respect to the meaning of the term and second, the extent to which it has been defined by the Court. Ex. Article 6 (3) of the Cosmetics Directive obliges Member States to adopt *all measures necessary* to prevent misleading labels on cosmetics, without specifying when exactly such necessity would arise;[375] Article 5 (2)(b) of the Copyright Directive requires Member States, which implement a private copying exception to the exclusive reproduction rights of rightsholders, to ensure that the latter gets *fair compensation*.[376]

- Clauses that impose an *obligation* on private parties to act by relying on 'autonomous' or 'open' concepts. As above, the extent of leeway granted to the Member States will depend on whether, and the extent, to which the concept has been defined in the EU measure and/or by the Court: Examples can be seen in the context of consumer protection measures, as discussed earlier in relation to the UCPD[377] and UCTD[378]: Thus, under the UCPD, businesses must refrain from adopting unfair commercial practices that would distort the behaviour of the 'average consumer'. Instead, they must engage in 'honest market practices', act in 'good faith' and show the 'standard of special skill and care' that meets the requirement of 'professional diligence'. The UCTD requires businesses to refrain from adopting 'unfair' contract terms and to act in 'good faith' (see Article 3).

- When a Member State is 'exercising discretionary powers which can be described as ancillary or pursuant to the Community secondary legislation: for example the power (and indeed duty) to impose effective, dissuasive and proportionate penalties upon

[374] Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L. 31, 1 February 2002, pp. 1 – 24.
[375] Directive 76/768/EEC, *op. cit.*
[376] Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L. 167, 22 June 2001, pp. 10 – 19 (the Copyright Directive). See *Opus Supplies*, note 294 and *Padawan*, C-467/08, EU:C:2010:620.
[377] Directive 2005/29/EC, *op. cit.*
[378] Directive 93/13/EEC, *op. cit*.

individuals for breaching obligations contained in Community legislative acts'.[379]

- The gap when the EU fails to adopt implementing measures for an otherwise exhaustive EU measure. In many such instances, Member States are deemed to retain Treaty-based discretion.[380] However, in *Pluimveeslachterijen* the Court considered national action to stem from a delegation of Community powers. Having noted that the Council's 'almost total failure to act' to adopt standards with respect to the quality of slaughtered poultry prevented the relevant common organisation of the market (COM) from functioning normally,[381] the Court found that there could not 'in principle be any objection' to the introduction of national measures to this end.[382] However, it also insisted that 'such measures must not be regarded as involving the exercise of the Member State's own powers, but as the fulfilment of the duty to cooperate' under ex. Article 5 EEC. As a result, the measures could only be 'temporary and provisional in nature and must cease to be applied as soon as Community measures are introduced'.[383] The Court also insisted that any such national measures had to comply with the principles of the COM, could not constitute a barrier to imports and would be subject to Commission supervision.[384]

1.4.2 The Court's Response

100. The case-law discussed in relation to the Cosmetics Directive, Food Labelling Directive and certain consumer protection measures highlights how the existence of legislation-based discretion can often trigger uncertainty and litigation. This stands to reason, as parties will generally interpret the scope for discretion to suit their own strategic goals, whether this is to promote or prevent free movement. It is in this context that Member States could seek to somehow avoid the full impact of the Treaty's free movement obligations. The Court must, in response, control the exercise of any resulting discretion, to ensure Treaty compliance.

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[379] M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit.*, p. 619. Ex. *Nunes & de Matos*, C-186/98, EU:C:1999:376, paragraph 10.
[380] Ex. *Prantl*, note 150 and *Nicholas Schrieber*, note 319.
[381] *Pluimveeslachterij Midden-Nederland*, Joined Cases 47/83 and 48/83, EU:C:1984:131, paragraph 21.
[382] *Ibid.*, paragraph 22.
[383] *Ibid.,* paragraph 23.
[384] *Ibid.,* paragraphs 25 – 28. See also *Tasca,* Case 65/75, EU:C:1976:30; *SADAM*, Joined Cases 88-90/75, EU:C:1976:32; *Bussone*, Case 31/78, EU:C:1978:217; *Le Campion,* Case 218/85, EU:C:1986:440 paragraph 13 and *Danisco Sugar*, C-27/96, EU:C:1997:563 paragraph 24.

101. National acts of legislation-based discretion, being subject to the Exhaustion Rule, are distinguished from national acts of Treaty-based discretion, both in terms of the scope for national action and the framework of review.[385] However, such measures are also distinct from directly implementing national measures, since they cannot enjoy the same indirect presumption of constitutionality as is applied to the *grant* of discretion. In other words, *there is a distinction between the legislative clause granting such discretion, which enjoys a presumption of constitutionality*,[386] *from its exercise by the Member State, which should not enjoy any such a presumption*. National acts of legislation-based discretion must instead be reviewed by reference to the (new?) balance achieved by the EU framework, to ensure compliance with EU law and, for our purposes, the free movement of goods.

102. National courts often stand as the first port of call to ensure the law has been applied correctly to a specific fact pattern.[387] The Court, for its part, exercises boundary control to interpret EU law and ensure respect for the Treaty, including free movement. Such judicial input is particularly necessary when a grant of discretion does not include a legislative supervision procedure, as with the open-ended grant of discretion under, for example, Article 6 (2) of the first Cosmetics Directive and Article 5 of the Waste Oil Directive.[388] Increasingly, however, grants of legislation-based discretion are accompanied with a supervision mechanism, such as specific controls and limitations, hitherto reserved for safeguard clauses.[389] This evolution leaves less room for the unbridled exercise of discretion, and thus, litigation. It also shifts control to the EU legislator – and often the Commission, with the Court focusing on whether the procedure was adhered to, rather than assessing the substantive merits of the resulting national rule.[390] By the same token, the progressive interpretation of an 'open concept' might cause the latter to move from an instance of legislation-based discretion to direct implementation.[391] In the interim, however, and potentially thereafter, scope for national discretion can remain, particularly given the intricate link between such concepts and national legal culture. As such, the Court must always retain its powers of review, to ensure compliance with the Treaty, and the free movement of goods.

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[385] See Opinion in *Commission v Austria (Food Labelling),* note 139.
[386] See Part I (Chapter Two).
[387] A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', *op. cit*., p. 364.
[388] See Part I (Chapter Two).
[389] Ex. Article 45 of the Consumer Information Regulation, *op. cit*.; Article 3 (4 – 6) of Directive 2000/31 on Electronic Commerce, *op. cit.*, and Articles 11 and 12 of Regulation (EC) No. 1013/2006 of the European Parliament and of the Council on shipments of waste, OJ L. 190, 12 July 2006, pp. 1 – 98.
[390] Ex. *Lennox,* C-220/01, EU:C:2003:390.
[391] *Supra*, point 34.

103. Some commentators have acknowledged the distinction between the review of national measures based on 'direct implementation', on the one hand and of 'legislation-based discretion', on the other.[392] It is also accepted by the Court, which notes that 'Member States may adopt rules for the application of a regulation if they do not obstruct its direct applicability and do not conceal its Community nature, *provided that they adhere to the parameters laid down under it*'.[393] Indeed, the Court will on this basis assess the proportionality of such measures by reference to the exhaustive legislative framework. As highlighted in Part I (Chapter One), the Court's review can, in this regard, vary between a principle/derogation approach familiar in the absence of harmonisation to treating the integrative and regulatory goals of the EU measure as equal.[394]

104. To this end, it may be useful to consider the pre-emptive effect of legislation-based discretion as corresponding to obstacle pre-emption, whereby the Member States can legislate once they do not undermine the objectives of the EU rule.[395] The Court's role is to conduct an 'obstacle conflict analysis' to ensure that the Member State has indeed remained within these parameters. Inevitably, the intensity of the Court's analysis can vary, depending on various factors, including, *inter alia*, the extent to which the exercise of discretion is subject to a legislative control procedure, as well as factors such as the regulatory goal pursued.[396] However, the key point in such cases is that the Court's assessment is made by reference to the *legislative* framework, as opposed to Articles 34 – 36 TFEU. Mirroring the varied judicial approach just highlighted, the Court's reliance on this legislative standard can produce harsh results for the Member States.[397] However, in other cases, assessing national measures through the lens of 'obstacle conflict analysis' can ensure a 'less restrictive alternative to occupation of

[392] Dougan, for example, notes the distinction between national rules that are 'simply implementing or enforcing clear Community obligations' (direct implementation) and situations where 'the Member State is exercising discretionary powers created or conferred by the Community secondary legislation' (legislation-based discretion). See M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', *op. cit.*, pp, 618 – 620.
[393] *Danske Svineproducenter II*, note 137, paragraph 41 (emphasis added).
[394] Part I (Chapter One), points 100 – 104 and points 118 – 125.
[395] E. Cross, 'Pre-emption of Member State law in the European Economic Community: A framework for analysis', *op. cit*. See discussion in Part I (Chapter One), points 39 – 42.
[396] For discussion on how and why the Court's intensity of review can vary, see Part II (Chapter Two), section 2.2 (Explaining the Court's Approach)
[397] See, R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit.,* p. 217 and 222, who notes that obstacle pre-emption, 'while not as abstract and potent as field pre-emption' can include 'any obstacle that reduces the effectiveness of the Community system' and is therefore 'extremely aggressive towards national measures'. In the context of the CAP, for example, it allowed the Court to strictly apply secondary legislation to the detriment of national competence, which, at times, seemed to almost 'completely – replace the Member States'.

the field pre-emption' (under the traditional understanding of total harmonisation) by allowing national laws to be preserved in appropriate areas.[398] This can be all the more when the Court defers to the legislative balance between regulation and integration, which are treated as two goals of equal weight and which could allow Member States to regulate in a manner that is not necessarily the least restrictive of trade.

105. A concrete example of this latter approach can be seen in *Danske Svineproducenter I*.[399] As previously discussed, this case concerned a challenge to Danish measures for exceeding the requirements of the Animal Transport Directive[400] by setting more precise standards for the height and surface area of compartments to transport pigs beyond eight hours. The Court first acknowledged that Denmark could adopt such measures to facilitate the directive's objectives of protecting animals during transport.[401] However, it also specified that such standards must comply with the directive's objectives of eliminating technical barriers to trade and ensuring the smooth functioning of the internal market, as well as the principle of proportionality. Applying this test to the Danish standards, the Court found that, in the absence of precise EU standards, Member States had 'a clear margin of discretion'. However, while the resulting national provisions met the goal of animal protection, the Court could not ascertain whether they complied with the market integration goals or whether they were proportionate and sent the matter back to the national court for a final ruling. What is interesting for our purposes is that the Court did not classify the Danish measure as trade restriction in need of justification. Rather, it cast the directive's goal of animal protection as equal, if not in priority, to the aim of market integration. Indeed, this perspective allowed Denmark to legitimately argue that its national measure 'attached priority to attaining the objective of protecting animals during transport over the other objectives of Directive 91/628', while 'taking into account, so far as possible, the economic interests involved'.[402] In previous cases, an admission by a Member State that market integration goals were secondary may well have been sufficient to show that the national measures were disproportionate. In this case however, the Court, relying on the logic of the Exhaustion Rule, implied that the national court's appraisal of the Danish rules would take place within the framework of the relevant directive, and in line with the balance

[398] E. Cross, 'Pre-emption of Member State law in the European Economic Community: A framework for analysis', *op. cit*., p. 472.
[399] *Danske Svineproducenter I,* note 137. See also *Opus Supplies*, note 294.
[400] Council Directive 91/628 on the protection of animals during transport, OJ L. 340, 11 December 1991, pp. 17 – 27.
[401] *Danske Svineproducenter I,* note 137, paragraph 29.
[402] *Ibid*., paragraph 41.

achieved thereunder, as opposed to the 'principle – derogation' analysis traditionally associated with Articles 34 – 36 TFEU. Facilitated by the logic of the Exhaustion Rule, the balanced judgement in *Danske Svineproducenter* ensured that the Danish measure was identified and reviewed, while also respecting the balance achieved by the EU legislator between the public interest goal of animal protection and the economic freedoms of the applicant. In other words, it succeeded in enforcing the intention of the legislator while ensuring respect for the Treaty.[403]

106. This nuanced approach to assessing the scope for national discretion is generally mirrored throughout much of the Court's jurisprudence, thereby contributing to the acceptability and stability of the regime. At the same time, the fact that the Court might, under the Exhaustion Rule, defer to the legislative balance between regulation and integration over the constitutional balance is not without controversy, since this could be seen as challenging the hierarchy of norms. Indeed, one might legitimately ask what the dividing line is between the submissions made by Denmark in *Danske Svineproducenter* and the Member State arguments discussed above under 'erroneous Court submissions'. At the very least, however, the Court must take this step, that is, identify and scrutinise *all* acts of legislation-based discretion, so as to protect against abuse of power, ensure transparency and avoid the problems discussed above. This brings us to the second element of our proposed framework, which copper-fastens such judicial oversight by suggesting a conceptual distinction between the regulatory scope, regulatory character and regulatory (intensity)/impact of an EU secondary measure.

2. THE RELEVANCE OF REGULATORY CHARACTER

107. When assessing a national trade rule in the presence of potentially relevant EU legislation, the Court must first see if the Exhaustion Rule applies, before reviewing that national measure by reference to the exhaustive legislative framework. As outlined in Part I,

[403] Of potential relevance to the Court's generous approach was the fact that the Animal Transport Directive was based on ex. Article 43 EEC. One could argue that this legal basis allowed national animal welfare standards to prevail as they did, beyond what would have been possible under an Article 114 directive. Yet this research sees no reason for such a distinction. As outlined in the General Introduction and in Part I, the EU legislator can impose high regulatory standards in such directives, once the 'internal market threshold' is met. And, as with *Danske Svineproducenter*, this balance can then become the benchmark against which to assess the national measure. Indeed, this is what the Court did – or should have done – in *Gallaher* (note 43), *Opus Supplies* (note 294), *Berger* (note 293), and *Van Gennip & Others* (note 116), all of which concerned national measures adopted in the context of directives based *inter alia* on (the predecessors of) Article 114 TFEU. See Part II (Chapter Two).

the initial task of triggering the Exhaustion Rule incorporates two steps, those being to determine, first, whether the national measure comes within the *regulatory scope* of the EU rule and second, whether that EU rule has an exhaustive *regulatory character*. If both questions are answered in the affirmative, the Exhaustion Rule can kick in to suspend (direct) application of Articles 34 – 36 TFEU, although without necessarily resolving the dispute. To the contrary, the Court may need to establish not only the *existence* of pre-emption (ex. that the Exhaustion Rule applies), but also the specific *regulatory impact* of the exhaustive measure, that is, the degree to which Member States can continue to regulate within that regulatory framework.

108. Three potential steps thus apply to determine the lawfulness of a national measure in the presence of secondary legislation – whereby the Court must establish the regulatory scope, character and impact of the latter. Yet the distinction between these steps is not formally recognised under the current understanding of EU regulation, which, by assimilating the concepts of exhaustive regulation and total harmonisation, risks reducing the impact of (exhaustive) legislation to pre-emption of the field. This incomplete picture stems, in part, from the fact that harmonisation models do not distinguish between the regulatory *character* of EU legislation, which determines whether or not the Exhaustion Rule applies, and its specific regulatory impact. This section responds by emphasising the distinction between these two concepts. In doing so, it acknowledges that an (exhaustive) EU regulatory framework can, through its different provisions, provide for degrees of national regulatory discretion, which, when coupled with the proposed categorisation, better reflects the complexity of EU regulation and the Court's approach to review. It might also promote a more realistic appreciation of how EU legislation can and should be implemented.

109. Before outlining the proposed distinction between regulatory character and impact (2.2), this section first recalls the traditional understanding of the relationship between secondary and national law (2.1). It then explores academic and judicial consideration of this distinction (2.3).

2.1 The Traditional View

110. The regulatory scope of an EU measure is clearly distinguished from its regulatory 'intensity'. Referred to by Schütze as the 'two dimensions of EU legislation', the former concerns the field of application of an EU measure, while the latter relates to the relationship between EU and national rules that come within the scope of that act - in other words, whether,

and the extent to which, national measures adopted thereunder are pre-empted, authorised, and subject to review.[404] As a result, the Court, when considering the lawfulness of a national measure, must first ascertain whether it comes within the regulatory scope of potentially relevant EU legislation. If not, that EU legislative act will institute 'partial harmonisation' and Member States will retain direct Treaty-based discretion over the matter. If the EU legislation does cover the matter, the Court must next establish what exactly the Member States can – and cannot – do within its framework, usually by referring to the harmonisation model instituted thereunder. In other words, 'the jurisdictional dimension of *whether* Community legislation has harmonised an issue will typically precede the discussion as to *how* the Community has harmonised it'.[405]

111. This distinction between regulatory scope and regulatory intensity represents an evolution from the Court's original 'conceptualist-federalist' approach to interpretation, which considered Community legislation to pre-empt the field and oust *all* national regulatory discretion, by definition.[406] The main question for the Court at that time was to 'define the scope of the Community's competence. Once this is done, the consequence – i.e. the absence of power for the Member States to deal with the subject-matter included within the Community's competence – automatically follows. In other words, the Community's competence is construed as being necessarily exclusive'.[407] The emergence of different harmonisation models changed this radical perception of Community competences by allowing secondary legislation to coexist with residual national discretion. From the mid-1970s, the Court started responding to these developments by adopting a more pragmatic approach to interpretation, where it no longer equated secondary legislation with pre-emption of *all* national competences. Instead, it interpreted the legislation, often in line with the harmonisation model instituted, to establish its degree of regulatory intensity.[408]

112. As outlined in Chapter One, the framework provided by these harmonisation models casts the relationship between national and secondary legislation as being largely based on 'pre-emption', that is, the degree to which the EU legislative act, adopted in a field of shared

[404] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit.,* pp. 194 – 199.
[405] *Ibid*., p. 194. (Emphasis in original).
[406] See General Introduction, points 16 – 18.
[407] M. Waelbroeck 'The Emergent Doctrine of Community pre-emption', *op. cit.*, p. 551.
[408] *Ibid*.

competences, *precludes* Member States from exercising their regulatory powers.[409] As such, an EU measure will have a greater or lesser degree of regulatory intensity, depending on the extent to which it ousts (Treaty-based) discretion over a particular public interest. As outlined in Part I (Chapter One), this 'intensity' is measured by reference to different pre-emptive effects, known in American law as field pre-emption, rule pre-emption and obstacle pre-emption. For example, Arena suggests that each harmonising model should constitute a 'marker' that would trigger a particular pre-emptive effect. Accordingly, total harmonisation would trigger field pre-emption, with national measures departing from the harmonised standard 'set aside without additional scrutiny'.[410] The 'lesser pre-emptive potential' of minimum harmonisation lies somewhere between rule pre-emption (which pre-empts directly conflicting national measures) and obstacle pre-emption (which pre-empts national measures to the extent that they interfere with the objective of the EU rule) depending on whether higher national standards can apply to imports.[411]

113. As discussed, one difficulty with this perspective is that it views the impact of EU internal market regulation on the Member States solely from a negative perspective, that is, the extent to which Member States are *prevented* from acting. However, such EU legislation also has regulatory value, whether by requiring Member States to directly implement an EU standard, procedure or obligation, or by granting legislation-based discretion. These regulatory obligations and options correspond to and are limited by the various pre-emptive effects, as just outlined. Thus, when a Member State 'directly implements' an EU provision, it will be pre-empted from exceeding what it authorised thereunder (rule or field pre-emption). A Member State that exercises legislation-based discretion will be restricted by the grant of discretion and the exhaustive framework of the EU measure (obstacle pre-emption) and, ultimately, by the Treaty itself. At the same time, as long as the Member State stays within these parameters, its regulatory programme will be authorised – and in some cases presumed compatible with the Treaty. The question considered by the proposed approach is how to ensure this national margin of manoeuvre is correctly identified and reviewed.

[409] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, *op. cit.,* pp. 194 – 199.
[410] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market'*, op. cit*., p. 30.
[411] *Ibid.*, section 5.3.4.

2.2. A New Approach

114. This research responds to this question by introducing the concept of 'regulatory character', as distinct from the notions of regulatory scope and regulatory intensity. It also suggests renaming regulatory 'intensity' as regulatory 'impact', to highlight its potential to facilitate, as well as limit, national regulatory action.

115. As noted in section 2.1, regulatory intensity/impact refers to the substantive effect of EU legislation, measured by the degree to which it pre-empts or authorises national action. The broader concept of regulatory character refers to the regulatory framework established by that legislation.[412] As outlined in Part I, regulatory character is 'exhaustive' when that framework sets up a comprehensive system at EU level, thereby becoming the Court's sole norm of reference to assess a relevant national measure under the Exhaustion Rule. In this regard, and as previously discussed, the presence or absence of a market access guarantee, which ousts all Treaty-based discretion, is often a strong indicator of such regulatory character. If established as being exhaustive, the balance between integration and regulation, hitherto determined by Articles 34 – 36 TFEU, is regulated entirely by secondary legislation, which is, itself, subject to compliance with primary law.[413] Turning to the new categorisation outlined in section one, a national measures adopted *within* this exhaustive framework will either stem from direct implementation or legislation-based discretion. If the lawfulness of that national measure is challenged, the exhaustive regulatory framework of the EU measure should, in principle, provide all the answers to resolve the matter. Where the regulatory character is not comprehensive, the Treaty continues to apply as a direct norm of reference, sometimes alone, sometimes with the help of the relevant secondary rule.[414]

116. It follows from this distinction between regulatory character and regulatory impact that the concept of 'exhaustive regulation', which concerns the former, must be distinguished from the concept of 'total harmonisation', which concerns the latter. We recall that total

[412] See respective discussions by P. Slot, 'Harmonisation', *op. cit*., pp. 388 – 389 and J. Jans & H. Vedder, *European Environmental Law – After Lisbon, op. cit*., p, 104. See also H. Temmink, 'From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection – A Case Law Analysis' *op. cit.*, p. 68.
[413] Ex. Opinion in *Commission v Austria (Food Labelling),* note 139, paragraphs 38 – 46. See also Part I (Chapter One).
[414] Indeed, non-exhaustive or not strictly relevant secondary measures can still influence national behaviour, without imposing an obligation. See ex. *Denkavit Futtermittel,* note 299; *Solgar Vitamin's France*, C-446/08, EU:C:2010:233; *Regiopost*, note 312 and *Noria Distribution*, C-672/15, EU:C:2017:310.

harmonisation ousts all national room for regulatory manoeuvre, leaving Member States to regulate solely by correctly implementing the uniform standards and procedures set at EU level. However, this absolute definition of total harmonisation is incompatible with the fact that EU legislation can have both an exhaustive regulatory character and grant legislation-based discretion to the Member States. As a result, establishing that an EU rule is exhaustive does not automatically strip Member States of all regulatory choice in that field. Nor will not always resolve the question of what exactly they can, and cannot, do in the presence of harmonisation. It simply means that Court, and relevant parties, must turn to EU secondary rule, as opposed to Articles 34 – 36 TFEU, to explore its substantive effect on national regulatory competence.

117. The effect, or regulatory impact, of an EU measure will be influenced by the category under which the national measure falls. On the one hand, national regulatory options should be widest under Treaty-based discretion and most restricted under direct implementation, with legislation-based discretion sitting somewhere in between. On the other hand, the Court should scrutinise a national act of legislation or Treaty-based discretion more carefully than directly implementing national rules, the latter being resolved through pure interpretation of the EU obligation. As highlighted in Part II, these variables underlie the various regulatory disputes before the Court. And while the normative framework of assessment should be inconsequential to the Court's resulting analysis, the fact that the parties are so often in dispute over application of the Treaty indicates a more complex reality.[415] A new three-step framework for review is therefore proposed, based on a distinction between establishing the regulatory scope, character and impact of EU legislation. This framework is explained and illustrated in section 3 below and at Figure 1. First, however, consideration is given to whether, and how, the notion of regulatory character has been looked at elsewhere.

2.3 Academic and Judicial Consideration of 'Regulatory Character'

118. While this research has introduced the term 'regulatory character' to describe the regulatory framework of an EU legislative act, certain commentators, as well as the Court, have already distinguished the regulatory framework of the EU measure from its regulatory impact. It is to such judicial and academic considerations of 'regulatory character' that the research now turns.

[415] Regulatory disputes often arise because parties deem a particular national measure to be based on the source that leads to a more favourable outcome, from their perspective. See ex. Part II (Chapter Two), note 145.

2.3.1 'Regulatory Character' in the Literature

119. Turning first to the academic literature, it was noted earlier that the general discourse on EU internal market regulation, while accepting the distinction between regulatory scope and regulatory intensity/impact, does not acknowledge the intermediate step of establishing regulatory character, and generally treats 'exhaustive regulation' and 'total harmonisation' as synonymous. The resulting binary vision thus fails to recognise the scope for national regulatory action in the presence of harmonisation. Having said this, a number of academics have explored this issue, with some success.

120. For example, in his influential article on 'harmonisation', Slot associates 'exhaustion' with 'pre-emption' and distinguishes both notions from 'harmonisation models'. Accordingly, he submits that the Court must first determine 'whether a directive exhaustively occupies a certain field'. If there is no 'exhaustion', there is no 'pre-emption', and Member States can continue legislating, subject to compliance with the Treaty. If there is exhaustion, the EU measure will 'occupy' or 'pre-empt' the field and provide 'the relevant framework for assessing the compatibility of national legislation with Community law'.[416] Slot suggests that the Court must then move to the second step to assess 'which harmonisation method is embodied in that directive'.[417] Where there is total harmonisation, which is distinct from 'exhaustion', Member States will not be able to derogate from the harmonised standard, except via safeguard measures. In the event of minimum or optional harmonisation, 'national rules may derogate from the norms prescribed in the directive within the permitted boundaries', which can include review by reference to Articles 34 – 36 TFEU.

121. This research considers Slot to correctly distinguish the task of determining the normative framework of assessment in the presence of harmonisation (which the research terms 'regulatory character') from the impact that harmonising measure has on national reserved powers (which the research terms 'regulatory impact'). However, his argument appears to fall short on two grounds. First, his view that exhaustive EU legislation can also institute minimum harmonisation seems to be at odds with the fact that exhaustive legislation triggers the Exhaustion Rule to oust all Treaty-based discretion. Second, by equating 'pre-emption' with

[416] P. Slot, 'Harmonisation', *op. cit.*, pp. 388 – 389.
[417] *Ibid*.

'exhaustion', he seems to misunderstand the former term.[418] As discussed in Part I (Chapter One), pre-emption is not concerned with establishing *whether* EU legislation pre-empts national law but rather *the degree to which* Member States are prevented from adopting national rules. As such, it should not, as argued by Slot, be associated with the (exhaustive) regulatory character of the EU measure, but rather with the third step of our proposed framework, that being the regulatory impact of the EU measure, or a particular legislative provision.

122. Arena clarifies this latter confusion by suggesting that each harmonising model should constitute a 'marker' to trigger a particular pre-emptive effect. In doing so, she promotes a more nuanced understanding of the relationship between harmonisation and national powers.[419] Yet she, in turn, fails to consider the preliminary question of regulatory character, which determines which normative framework will apply to assess national measures adopted in the presence of harmonisation. As a result, she slips back to the binary vision discussed above, where the Exhaustion Rule is considered as relevant only with respect to total harmonisation and an absence of all discretion.

123. Slot's analysis, while not taken up in general discussions about harmonisation, is often reflected in sectoral debates, which adopt a more nuanced appreciation of the Court's case-law. For example, De Vries calls for a more flexible understanding of total harmonisation in relation to consumer protection measures, by distinguishing between the legal framework, which is subject to total harmonisation, and its application, which can accommodate divergent national interpretations.[420] Writing on environmental matters, Temmink notes that it is 'crucial to distinguish the question of *what* subject is addressed in a directive' (regulatory scope) and '*whether* the directive exhaustively regulates the field' (regulatory character), 'from the issue regarding the *reserved powers* of the Member States' (regulatory impact).[421] And Blumann observes that the potential for a national margin of manoeuvre will not undermine the 'complete' character of the harmonising measure, once the residual possibilities are contained within a strict framework.[422]

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[418] For a discussion of pre-emption see Part I (Chapter One), section 1.
[419] A. Arena, 'The Doctrine of Union Preemption in the EU Single Market'*, op. cit*., section 5.3.
[420] A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonisation', *op. cit.*, section 6.
[421] Temmink, 'From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection – A Case Law Analysis', *op. cit*., pp. 68. (Emphasis added).
[422] C. Blumann *et al*, *Introduction au marché intérieur – Libre circulation des marchandises*, *op, cit*., paragraph 415.

124. Jans & Vedder also call for a distinction to be made between 'exhaustive regulation' and 'exhaustive harmonisation'.[423] They argue that a matter either falls outside the material scope of the EU secondary rule, in which case the Treaty applies as the norm of reference, or that it falls within its material scope, in which case 'the European legislative framework in principle given by that directive or regulation is said to be 'exhaustive'', in other words, the Exhaustion Rule kicks in.[424] Once it has been established that a directive (exhaustively) regulates a matter, the *degree* or intensity of harmonisation can be determined i.e. minimum or total harmonisation.[425] By correctly distinguishing between (what we call) the regulatory character and impact of EU measures, Jans & Vedder (like Temmink) acknowledge that a spectrum of regulatory options can exist within the exhaustive regulatory framework. To this end, they cite the Court's assessment of the Veal Crate Directive in *CIWF*, which exhaustively regulated the field while also allowing Member States to adopt stricter domestic measures. Yet, constrained by the framework provided by harmonisation models, they fail to distinguish between Treaty-based discretion and legislation-based discretion. As a result, they consider that the Court should distinguish between (indirect) Treaty-based discretion and legislation-based discretion *after* the Exhaustion Rule has been triggered that the Court. The possibility for a Treaty-based review will be reintroduced if the national measure stems from the former – that is, where national measures can apply to lawfully produced imports.

125. The research agrees with Jans & Vedder (and Slot), insofar as they distinguish the regulatory character of the EU measure (which, when exhaustive, triggers the Exhaustion Rule) from the regulatory impact of its various provisions. Yet by continuing to define 'regulatory impact' by reference to one or another harmonisation model, the authors fail to recognise legislation-based discretion as a distinct source of national regulatory action. Rather, they consider that an exhaustive EU measure can also institute minimum harmonisation, even though the latter can sometimes allow indirect Treaty-based discretion to persist. This not only imposes a layer of confusion, by implying that the Exhaustion Rule should be triggered, and then, if necessary, discarded to reintroduce a direct Treaty review. It also risks falling into the same trap as discussed earlier in relation to *CIWF*, where legislation-based discretion is cast as an exception to be justified, rather than a stand-alone category.

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[423] J. Jans & H. Vedder, *European Environmental Law – After Lisbon, op. cit.*, p.104.
[424] *Ibid*., p. 98.
[425] *Ibid*., p. 104.

126. A further critique of their analysis concerns their suggestion that a matter, which comes within the scope of an EU measure, will *automatically* be subject to an exhaustive regulatory framework.[426] While this observation reflects much of the case-law, other cases confirm that a matter can come within the scope of a directive without being subject to an exhaustive framework,[427] while the Court often establishes both separately in its judgements.[428] Indeed, this distinction was articulated by AG Mengozzi in *Ker-Optika*, who noted that the Exhaustion Rule could not be triggered simply by showing that a matter came within the scope of a directive.[429] Instead, it is 'legitimate to enquire which specific provision in the directive … was deemed to implement the exhaustive harmonisation of domestic legislation', in order to determine whether the Treaty applies as a norm of reference to assess the issue.[430]

2.3.2 'Regulatory Character' at the Court

127. The Court, when resolving regulatory disputes in the presence of harmonisation, sometimes explicitly acknowledges that the regulatory character of an EU measure is distinct from its regulatory impact. For example, in *DaimlerChrysler*, it found that the first Waste Shipment Regulation 'regulated in a harmonised manner' the question of shipments in waste,[431] thereby triggering the Exhaustion Rule to assess the lawfulness of national measures.[432] Similarly, in *CIWF*, the Court deemed the Veal Crate Directive to institute 'exhaustively common minimum standards'.[433] As a result, it reviewed the UK ban on calf exports by exclusive reference to that directive, which limited higher national standards to the domestic territory. In *Lindqvist*, the Court described the Data Protection Directive[434] as 'not limited to minimal harmonisation' but imposing harmonisation which is '*generally* complete' since it sought to 'ensure free movement of personal data while guaranteeing a high level of protection

[426] *Ibid*., p. 98.
[427] *Regiopost*, note 312 (*albeit* in the context of free movement of services). See also P. Rott, "Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*.
[428] *A.G.M-COS.MET*, note 105. See also *Commission v Italy (Sealed Heaters)*, C-112/97, EU:C:1999:168, paragraphs 29 and 32.
[429] Opinion in *Ker-Optika*, C-108/09, EU:C:2010:341, paragraph 47.
[430] *Ibid*. See also Opinion in *Dynamic Medien*, C-244/06, EU:C:2007:515, paragraphs 21 – 23.
[431] *DaimlerChrysler*, note 164, paragraph 42.
[432] *Ibid*., paragraph 43.
[433] *CIWF,* note 54, paragraph 56.
[434]Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L. 281, 23 November 1995, pp. 31 – 50.

for the rights and interests of individuals to whom such data relate.'[435] However, by using the word 'generally', the Court made a distinction with the traditional understanding of total harmonisation, since the directive also granted Member States some margin of manoeuvre. However, it then confirmed that 'such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life.'[436]

128. In many cases, however, the Court contents itself with a *de facto* distinction, where it separates regulatory character from impact in practice, while retaining the language of harmonisation models. In *Gintec*, for example, the Court separated its assessment of the (exhaustive) framework established by the Medicinal Products Code from the regulatory impact of its individual provisions and, in doing so, avoided any assimilation between exhaustive regulation and total harmonisation.[437] This allowed it to reach a balanced assessment, which reflected the Code's dual function, as well as its complex relationship with national regulatory competences. However, to describe the exhaustive regulatory framework of the Code, the Court used the term 'complete harmonisation', which it defined as incorporating legislation-based discretion. A gap thus emerged between the Court's nuanced understanding in practice, and the standard definition of such harmonisation, embraced by the Court in principle.[438] This, in turn, contributed to the narrow interpretation of Article 114 TFEU discussed earlier.

129. This approach reflects that taken by the EU legislator, which often presents legislative acts as instituting total harmonisation, while simultaneously granting legislation-based discretion.[439] The resulting gap is not, as illustrated above, without consequence. To remedy it, the Court should, at the very least, develop more appropriate and consistent terminology, for example, by only using the term 'total harmonisation' to describe an EU measure or provision

[435] *Lindqvist*, C-101/01, EU:C:2003:596, paragraph 96. (Emphasis added).
[436] *Ibid*., paragraph 97.
[437] *Gintec*, note 24. See also *supra*, point 35.
[438] Indeed, the AG explicitly endorsed this understanding, as he defined the concept as granting 'no leeway at all for the national legislature'. See Opinion in *Gintec*, note 77, paragraph 22. The Opinion in *Van Gennip*, note 203, also reveals a gap between the AG's language of 'total harmonisation' and his acceptance of legislation-based discretion in practice.
[439] Ex. The Consumer Rights Directive (Directive 2011/83/EU, *op. cit.*) fully harmonises consumer information and the right of withdrawal in distance and off-premises contracts' (recital 5) and confirms at Article 4 that 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. However, Article 4 also specifies that restrictions on national scope for action will not apply if *'otherwise provided for in this Directive'*. (Emphasis added). In other words, the 'exhaustive' nature of the directive can coexist with a degree national leeway, as defined by that directive.

that ousts *all* national discretion to regulate. It should then rely on the term 'exhaustive regulation' or 'regulated in an exhaustive manner' when the EU measure ousts Treaty-based discretion but allows leeway for Member States to act within that regulatory framework. Had it done so in *Gintec*, this judgement would have constituted authority for the more accurate and palatable presumption, which is that Article 114 directives should, in principle, have an exhaustive regulatory character that triggers the Exhaustion Rule to oust *Treaty*-based discretion, without denying the possibility for more restricted forms of national leeway. This presumption can be rebutted if the directive grants Member States indirect Treaty-based discretion to adopt stringent national rules. Recalling the Commission's consumer protection strategy, one wonders if the programme would have been more warmly received had it been sold as such, rather than relying on the controversial language of total harmonisation.

3. A NEW FRAMEWORK FOR REVIEW

130. The Court's varied 'Exhaustion Rule' case-law largely succeeds in reflecting the legislator's intention, as interpreted in accordance with legitimate judicial discretion and primary law. Legislative ambiguities and other regulatory disputes are, in this context, often resolved via a contextual and teleological approach, where the Court assesses the relevant EU measures 'taking into account not only their wording but also the context in which they occur and the objectives of the rules of which they form part',[440] which can include the 'general scheme and purpose', origins and legal basis, as well as other external factors.[441] This case-by-case analysis, which is generally facilitated – or at least not jeopardised – by the Exhaustion Rule, ensures respect for the principles of institutional balance and legality. Still, reliance on the Rule can, in some cases, engender difficulties, attributed, at least in part, to the binary logic of harmonisation models. As discussed above, this logic provides that national discretion is either harmonised out of existence or allowed to persist under the Treaty.

131. This perspective could, somewhat ironically, threaten the integrative effect of EU legislation. The phenomenon of legislation-based discretion can constitute a particular challenge in this regard, as it allows discretionary national trade rules to escape direct review

[440] *UNIC*, C-95/14, EU:C:2015:492, paragraph 35. See also *ATRAL,* note 7, paragraph 44, *Amsterdam Bulb,* Case 50/76, EU:C:1977:13, paragraph 9.
[441] For presentation of the Court's approach to triggering the Exhaustion Rule and assessing national measures thereunder, see Part I (Chapter Two), section 2.1.2 (Triggering the Exhaustion Rule) and Part II (Chapter Two), section 2.2 (Explaining the Court's Approach).

under Articles 34 – 36 TFEU. While any risk posed by a national measure to the free movement of goods should be ironed out via an assessment by reference to the EU legislative framework, the Court might, in some cases, fail to recognise that discretion was exercised, or that a review is necessary. This research argues, however, that such risks are not inherent to the Exhaustion Rule itself, which can ensure compatibility between secondary and primary law. The problem, rather, is with a wider misunderstanding of the Rule's function, and in particular, its relationship with national discretion.

132. It is against this backdrop that the new framework introduces two novel elements to describe and assess EU product rules, as they interact with other levels of regulation. First, a new categorisation for national measures, adopted in the presence of EU legislation, promotes a more rounded appreciation of internal market legislation by classifying national action based on its *normative source* (primary or secondary law) and *scope for discretion*, as opposed to whether such action has been restricted. This focus embraces the dual function of EU regulation, which can downgrade, maintain or upgrade national standards, as well as pre-empting and/or facilitating national regulatory programmes.[442] By specifically identifying the category of legislation-based discretion, it also acknowledges that national regulatory discretion can persist - regardless of the harmonisation model purportedly adopted and notwithstanding operation of the Exhaustion Rule. And in identifying such discretion, it also alerts the Court to the need for its exercise to be reviewed. This latter goal is reinforced by the second element of the framework, which identifies the regulatory character as a distinct feature of an EU measure, thereby decoupling the exercise of national discretion from its exhaustive nature and, in the context of free movement, application of the Exhaustion Rule.

133. As a tentative first step away from the traditional understanding of harmonisation, the resulting framework for review could appear abstract and incomplete. It also touches on a vast array of issues that need further exploration, such as the relationship between EU constitutional and private law, the appropriate balance between integration and regulation, how to share power between the EU and Member States and the potential applicability of the framework beyond the free movement of goods. Yet it should nonetheless provide a fresh starting point to better

[442] EU legislation will thus provoke different responses from Member States, depending on their regulatory goals. This might involve classifying national measures as implementing the EU standard, to avoid application of Articles 34 – 35 TFEU, or arguing that the Treaty still applies as a norm of reference. Member States may also insist on a more protective or liberal interpretation of the EU legislative provision. See Part II, Chapter Two, point 145.

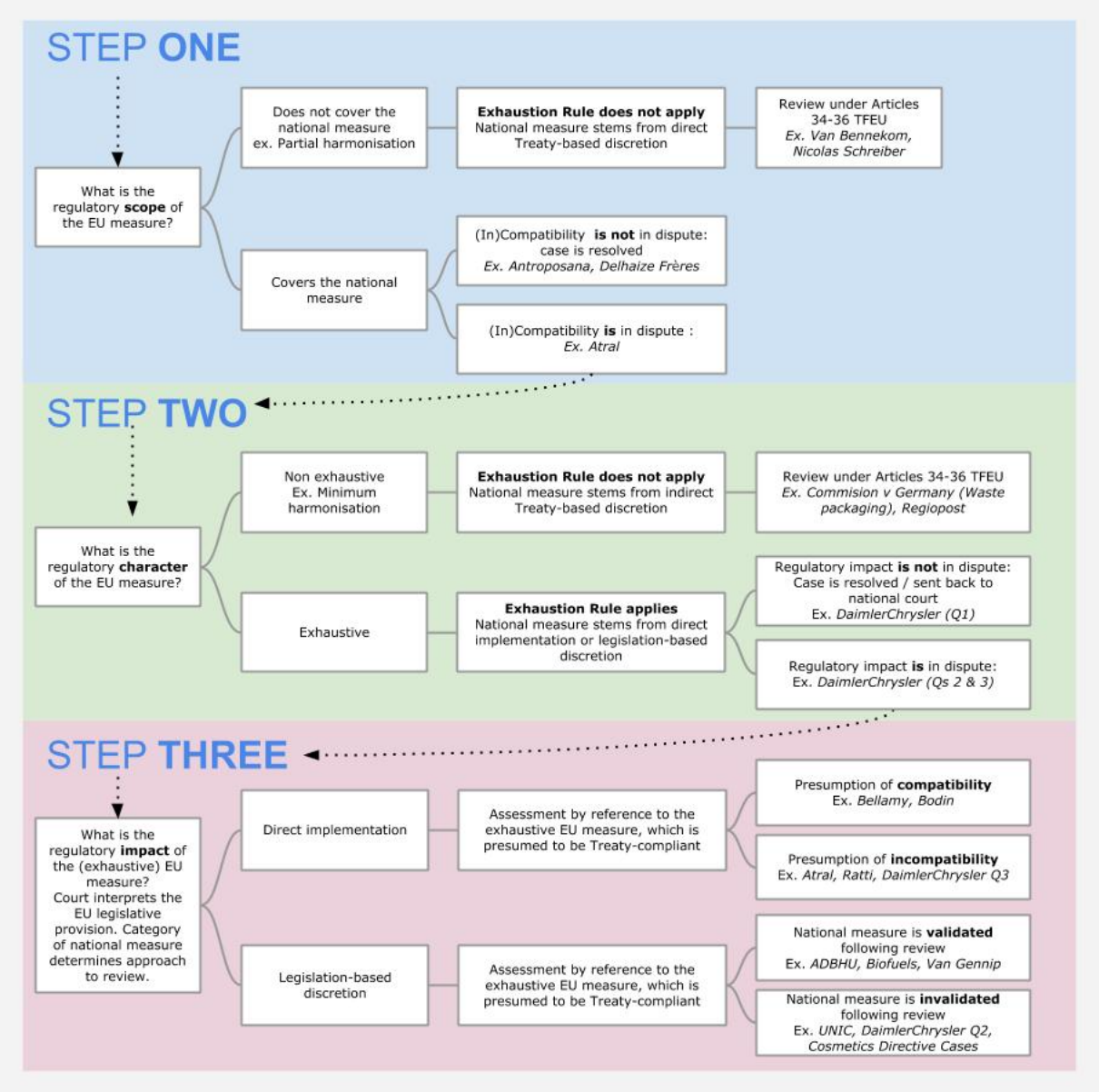
understand, analyse and reflect the complexity of EU legislation as it interacts with national and primary law, while also explaining – and guiding – the Court's approach to resolving regulatory disputes. With these aims in mind, this section first explains how the framework generally operates in practice (3.1) before looking at the successional yet distinct nature of its three analytical steps (3.2).

3.1 The New Framework in Practice

134. The new framework, illustrated at *Figure 1*, builds on sections 2.1 and 2.2 to impose a three-step approach to review, corresponding to the distinction between the regulatory scope, regulatory character and regulatory impact of relevant EU legislation. It also replaces the language of harmonisation models with a new categorisation for national product rules that can be adopted outside and within the EU legislative framework. Finally, in addition to the steps laid down in *Figure 1*, the Court must also exercise boundary control to ensure that secondary and national legislation comply with EU law, whether or not the Exhaustion Rule applies.[443] As such, national action that falls outside the scope of an exhaustive secondary measure but within the scope of EU law must comply with Articles 34 – 36 TFEU and EU law more generally. By the same token, secondary legislation, and any national action taken thereunder, must also comply with EU law. Neither the adoption of an exhaustive regulatory framework, nor the application of the Exhaustion Rule, can allow Member States to avoid their obligations.

[443] An alternative version of the graphic depicted at Figure 1 could note in the right-hand margin that the Court must exercise boundary control by reference to EU law.

FIGURE I


STEP ONE
What is the regulatory scope of the EU measure?
Does not cover the national measure ex. Partial harmonisation
Exhaustion Rule does not apply National measure stems from direct Treaty-based discretion
Review under Articles 34-36 TFEU Ex. Van Bennekom, Nicolas Schreiber
Covers the national measure
(In)Compatibility is not in dispute: case is resolved Ex. Antroposana, Delhaize Frères
(In)Compatibility is in dispute : Ex. Atral
STEP TWO
What is the regulatory character of the EU measure?
Non exhaustive Ex. Minimum harmonisation
Exhaustion Rule does not apply National measure stems from indirect Treaty-based discretion
Review under Articles 34-36 TFEU Ex. Commision v Germany (Waste packaging), Regiopost
Exhaustive
Exhaustion Rule applies National measure stems from direct implementation or legislation-based discretion
Regulatory impact is not in dispute: Case is resolved / sent back to national court Ex. DaimlerChrysler (Q1)
Regulatory impact is in dispute: Ex. DaimlerChrysler (Qs 2 & 3)
STEP THREE
What is the regulatory impact of the (exhaustive) EU measure? Court interprets the EU legislative provision. Category of national measure determines approach to review.
Direct implementation
Assessment by reference to the exhaustive EU measure, which is presumed to be Treaty-compliant
Presumption of compatibility Ex. Bellamy, Bodin
Presumption of incompatibility Ex. Atral, Ratti, DaimlerChrysler Q3
Legislation-based discretion
Assessment by reference to the exhaustive EU measure, which is presumed to be Treaty-compliant
National measure is validated following review Ex. ADBHU, Biofuels, Van Gennip
National measure is invalidated following review Ex. UNIC, DaimlerChrysler Q2, Cosmetics Directive Cases

135. In an archetypal case, the Court, when called upon to assess the lawfulness of a national measure purportedly adopted in the presence of EU legislation, must, as a first step, establish whether that measure falls within the *regulatory scope* of the legislative act. If it does not, the national (cross-border) measure will stem from direct *Treaty-based discretion* (ex. partial harmonisation) and must be reviewed by reference to Articles 34 – 36 TFEU, either by the Court or the national court. In *Van Bennekom,* for example, the Court confirmed that the regulation of certain vitamins fell outside the scope of the 1965 Medicinal Products Directive and remained within the competences of the Member States, subject to Treaty compliance.[444] If the matter does fall within the regulatory scope of the EU measure, and depending on the questions asked, the Court might sometimes settle the dispute. In *Antroposana*, for example, the parties were solely concerned with establishing whether anthroposophic medicines fell within the scope of the Medicinal Products Code, since this would determine which authorisation procedure would apply – and whether that procedure would be subject to review under Articles 34 – 36 TFEU.[445] In other words, once the question of regulatory scope was determined, the (in)compatibility of the national measure was no longer in doubt. The Court's affirmation that the Code did indeed cover the medicines at issue automatically confirmed that the harmonised authorisation procedure (presumed compatible with the Treaty) would apply.[446]

136. In other cases, however, an affirmative finding in relation to regulatory scope will not resolve the matter and the Court should move to step two, where it examines the *regulatory character* of the EU measure. If that regulatory character is *non-exhaustive*, *indirect Treaty-based discretion* will persist under minimum harmonisation, and the national measure will be subject to an Article 34 – 36 TFEU review. In *Commission v Germany (Waste Packaging),* for example, the German reuse and recycling scheme fell within the scope of the Waste Packaging Directive, since it was based on Article 5. However, Article 5 did not have an exhaustive character since it only *encouraged* Member States to adopt environmentally friendly systems of packaging. As a result, the measure was assessed under Article 34 – 36 TFEU, and found to restrict the free movement of goods.[447]

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[444] *Van Bennekom*, note 91. See also *di Pinto*, C-361/89, EU:C:1991:118 and further citations at note 91.
[445] *Antroposasna & Others*, note 256. See also the AG Opinion in the same case, at EU:C:2007:301 and *Commission v Germany (Garlic Capsules)*, note 308.
[446] *Ibid*., paragraph 35 (AG paragraph 31).
[447] *Commission v Germany (Waste Packaging),* note 29, paragraph 53 – 69. A similar Treaty-based assessment was carried out in *Radlberger*, note 254 and *Valev Visnapuu*, note 59. For the same approach in relation to the free movement of services, see *RegioPost*, note 312, paragraphs 67 – 77 and *Citroën Belux*, note 167.

137. A different approach to review will apply, however, if the regulatory character is *exhaustive*. As discussed, the Exhaustion Rule will kick in in such cases to exclude Articles 34 – 36 TFEU as direct norms of review, and the national measure will stem from either from *direct implementation* or *legislation-based discretion*. Similar to step one, determining the category of the national measure may sometimes suffice to resolve the dispute. For example, in responding to the first question in *DaimlerChrysler*, the Court was simply asked whether the German ban on waste shipment was a national act of Treaty-based or legislation-based discretion. Its response confirmed the latter, on grounds that the (first) WSR[448] had exhaustively regulated the field, thereby triggering the Exhaustion Rule.[449] Since the national court had confirmed the compatibility of the German export ban with the WSR,[450] no further assessment was required by the Court. In other cases, however, the Court must turn to step three to specifically determine the lawfulness of the national rule by assessing the *regulatory impact* of the EU measure. Concretely, this step requires the Court to interpret the EU measure and, where necessary, determine the compatibility of the relevant national measure (or refer to the national court for final determination). It can, as such, correspond to what was referred to in Part I (Chapter One) as the 'pre-emption analysis'.

138. Where the national measure has directly implemented the EU legislative provision, its compatibility/incompatibility will be presumed. Thus, in *Bellamy*, the fact that the Belgian measure had correctly transposed Article 2 (1)(a)(iii) of the first Food Labelling Directive was sufficient to confirm its compatibility.[451] In *Atral*, the Belgian prior approval procedure for alarm systems was immediately excluded for breaching the market access guarantee for products conforming to the harmonised essential requirements.[452] Where the national measure is based on legislation-based discretion, it should be subjected to an additional review by reference to the exhaustive regulatory framework. The Court will often find, on this basis, that the national measure was a disproportionate trade restriction – as with its review of national measures based on Article 6 (3) of the Cosmetics Directive, and Article 15 (2) of the first Food Labelling Directive.[453] However, the Court might also deem the national act of discretion to

[448] Regulation (EEC) No. 259/93 (Waste Shipment Regulation), *op. cit.*
[449] *DaimlerChrysler,* note 164, paragraphs 42 – 43.
[450] Of potential relevance was the fact that the Court had, in an earlier case, established that Regulation (EEC) No. 259/93 complied with primary law. See *European Parliament v Council (Waste Shipment)*, C-187/93, EU:C:1994:265 and discussion in Part I (Chapter Two), point 229.
[451] *Bellamy*, note 86, paragraph 21.
[452] *Atral*, note 7.
[453] *Supra*, point 31.

have stayed within the parameters of the exhaustive legislation. In *ADBHU*,[454] for example, it confirmed the lawfulness of a French prohibition on burning waste oils, adopted within the framework of the Waste Oil Directive.[455] In a further category of cases, the Court refers to the national court for final determination.[456]

3.2 Three Successional but Distinct Steps

139. The three steps that comprise the proposed framework follow one after the other and are successional. This means that the Court will only assess regulatory character (step two) if the matter falls within the regulatory scope of the EU measure (step one). By the same token, it will only consider the regulatory impact of a legislative provision under the Exhaustion Rule (step three) if that provision is, or forms part of, an exhaustive framework. At the same time, the distinct nature of each step must be recognised for an accurate picture of EU regulation and avoid the difficulties discussed earlier.

140. Whether the Court assesses one or another step often reflects the national court's (or Commission's) questions, as (generally) prompted by the disputing parties. This sometimes results in the Court engaging with all three steps. In *Atral*, for example, it first established the relevance of the directive in question (step one: regulatory scope) and whether it could constitute the sole norm of reference for review (step two: regulatory character) before interpreting the relevant legislative provisions to determine their impact on national powers (step three: regulatory impact). However, if the parties only disagree over one or another feature of the EU measure, the Court may only have to consider one or two of the steps, but not all three. This can arise when parties accept that the EU measure is exhaustive (step two), but dispute its regulatory scope (step one), and, as a result, the category into which the national measure falls.[457] This type of dispute is relatively frequent in the presence of harmonisation, as Member States try to avoid the pre-emptive effects of an EU measure that clearly institutes an

[454] *ADBHU,* Case 240/83, EU:C:1985:59. See also *Müller*, note 138, *Belgische Petroleum Unie*, note 370 and *Van Gennip*, note 116.
[455] Council Directive 75/439/EEC on the disposal of waste oils, OJ. L. 194, 25 July 1975, pp. 23 – 25.
[456] Ex. *Danske Svineproducenter I*, note 137 and *Estée Lauder*, note 111.
[457] Ex. In *Commission v Poland (Right-Hand Steering)*, C-639/11, EU:C:2014:173, paragraph 33, the Court noted that 'the main point of disagreement between the parties (was) whether the position of the driver's seat of a vehicle is included in the harmonised framework … or whether it does not come within that harmonisation.' See also *Wulro*, note 344, paragraphs 9 and 10. Here, the Netherlands defends its national markings on eggs and egg packaging as an act of *Treaty-based discretion*, since Community rules did cover the conditions in which hens were kept.

exhaustive regulatory regime,[458] for example, through the extensive nature of its provisions,[459] by containing a specific harmonisation clause,[460] and/or being subject to a Court ruling confirming as much. In *Commission v Germany (Garlic Capsules)*[461] and *EU Wood Trading*,[462] for instance, the parties were solely concerned with establishing the scope of, respectively, the Medicinal Products Code[463] and the WSR, since the exhaustive regulatory character of both acts had already been established in earlier cases.[464] A similar emphasis can be seen in the case-law concerning national implementation of the UCPD, which the Court established early on as instituting an exhaustive regulatory regime.[465] In such cases, one party – typically the regulator – often claims that the measure stems from Treaty-based discretion, while the other argues that it is subject to the Exhaustion Rule.

141. In other cases, the Court is only asked to confirm the *regulatory character* of the EU legislation (step two), as seen in *DaimlerChrysler*, while in a further category, parties implicitly accept that the matter falls within the *regulatory scope* of an *exhaustive* EU measure (steps one and two) but dispute how a particular provision should be interpreted. The Court can, in this latter type of case, presume that the Exhaustion Rule applies and focus on step three, that is, interpreting the EU rule and, where necessary, reviewing the national measure thereunder.[466] This type of case might arise when the Court is called upon to interpret an open and/or autonomous EU concept.[467]

142. The fact that the courts, and disputing parties, do not explicitly distinguish between the regulatory scope, character and/or impact of an EU measure also signals the overlapping functions of these various elements. For example, the more specific EU legislation is in

[458] See ex. the implementation and interpretation of Directive 85/374/EEC, (the Product Liability Directive), *op. cit*., as discussed in note 271.
[459] Ex. *Commission v Germany (Animal Feed)*, Case 28/84, EU:C:1985:386.
[460] Ex. Article 22 of Directive 2008/48 on Credit Agreements, OJ L. 133, 22 May 2008, pp. 66 – 92 and Article 4 of Directive 2011/83/EU (the Consumer Rights Directive), *op. cit.*
[461] *Commission v Germany (Garlic Capsules)*, note 308.
[462] *EU Wood Trading*, note 294.
[463] Directive 2001/83/EC, (the Medicinal Products Code), *op. cit.*
[464]Respectively, *Orthica & Others,* note 342 and *DaimlerChrysler*, note 164. Similarly, the Court's reliance on the Exhaustion Rule to validate the national rule in *Berendse-Koenen* C-246/98, EU:C:2000:153 as correctly implementing the EU standard flowed naturally from its earlier ruling in *Albers & Others* C-425/97, EU:C:1999:243, where it confirmed that a Member State did not have to notify technical regulations stemming from obligations arising under a directive.
[465] In this regard, A. Garde considers that 'the most effective way to protect consumers may be to argue that the measures in question fall outside rather than within the scope of the UCP Directive'. A. Garde, 'The Unfair Commercial Practices Directive', *op. cit*., p. 146.
[466] Ex. *Teekanne*, note 352.
[467] Ex. *Leitner*, note 136.

delineating its *regulatory scope*, the more likely it is to have an *exhaustive regulatory character*, with matters falling within its purview automatically subject to the Exhaustion Rule. Indeed, Jans & Vedder suggest on this basis that where a national standard 'falls within the sphere of application of a directive, then the European legislative framework in principle given by that directive or regulation is said to be 'exhaustive''.[468] Similar observations apply to the relationship between *regulatory character* and *regulatory impact*, which coincide when an EU measure pre-empts the field. This can be illustrated by looking at the Court's judgements in *Dim Dip* and *Wulro*. As previously discussed, the former case found that the directive, having exhaustively listed the light signalling devices for cars, pre-empted a UK requirement for cars to include dim dip lighting. In the latter, a Dutch obligation for traders to mark eggs according to their origin was expressly prohibited. As a result, neither Member State could justify its 'additional' national requirement, which was automatically struck down for going beyond the Community stipulations.[469] Using the language of our proposed framework, the relevant directives had an exhaustive regulatory character (step two), which regulated matters falling within their regulatory scope (step one) through direct implementation (step three). However, the Court did not consider the distinct nature of steps two and three but merged its assessment of each element. Accordingly, the entire legislative act was deemed to have an exhaustive regulatory character (step two) and all provisions thereunder (but for the safeguard clause) imposed direct implementation (step three).

143. This merging of steps two and three explains the traditional understanding of total harmonisation, where any 'additional' national measure coming within the scope of the EU rule is automatically considered unlawful, even in the absence of direct conflict. One need only recall the *Ratti* judgement, which precluded any national condition that was 'more restrictive … more detailed or in any way different' from those of the directive.[470] This merging can also explain how minimum harmonisation directives might impose, at times significant, regulatory constraints on the Member States. Mirroring its approach to total harmonisation, the Court can rely on the same legislative provision(s) in the minimum harmonisation measure to assess regulatory character (which is exhaustive) and impact (which removes all national discretion

[468] See Jans & Vedder, *European Environmental Law – After Lisbon*, *op. cit.,* p. 98.
[469] A slew of cases has followed in the same vein. See Part II.
[470] *Ratti,* note 10, paragraph 27.

under direct implementation).[471] The fact that another provision in the act allows the adoption of higher national standards is irrelevant to this specific assessment.[472]

144. There is nothing inherently wrong with an approach to review that combines two (or three) of the steps into one assessment. Indeed, it is, in many cases, warranted in the interests of judicial economy. What the framework hopes to avoid, however, is any *presumption* of such coincidence, that is, that an affirmative finding in relation to the regulatory scope of an EU measure will activate the Exhaustion Rule by definition, or that an exhaustive regulatory regime automatically implies total harmonisation. Indeed, many of the difficulties outlined earlier arose exactly because such a presumption was wrongfully made. For example, Germany's claim in *Commission v Germany (Waste Packaging)* that its national measure could avoid review by reference to Articles 34 – 35 TFEU was based on an erroneous assimilation between regulatory scope and character. The Court's failure in *EU Wood Trading* to consider the impugned national measure as an act of Treaty-based discretion stemmed from a similar error. In reality, however, a matter can be *within* the regulatory scope of an EU measure without being *automatically* subject to an exhaustive regulatory framework.[473] As a result, the Court might first establish the (generally) exhaustive nature of the EU legislation before assessing regulatory scope.[474] Or it can take the opposite approach – that is, first establish that the matter falls within the scope of the directive, before determining the question of regulatory character.[475]

145. In the same vein, a misplaced assimilation between regulatory character and impact can explain why certain directives, and Court judgements, could be misrepresented or misinterpreted, and why the Court sometimes fails to recognise and/or review acts of legislation-based discretion. Specifically, and as outlined above, this assimilation could conceal the possibility for national discretion to persist in the presence of an exhaustive EU measure. As we have seen, however, the *mere fact* of exhaustion does not *automatically* determine the question of regulatory impact, or the lawfulness of a national measure adopted thereunder. This

[471] See *supra*, point 34.
[472] See P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *op. cit*., pp. 1111 – 1112, who notes at p. 1112 that 'the minimum harmonisation clause (in Directive 84/450) does not appear to make a difference where the ground for action 'misleading advertising' is concerned'.
[473] See note 414.
[474] Ex. *A.G.M-COS.MET*, note 105, where the Court first established the exhaustive character of the Machinery Directive before finding that the official's statements, which constituted an obstacle to movement, fell within its scope. See also *Commission v Italy (Sealed Heaters)*, note 428, paragraphs 29 and 32.
[475] *Commission v Germany (Waste Packaging)*, note 29 and *Regiopost*, note 312.

nuance is important when that measure is based on legislation-based discretion, since the Court must conduct an additional review to determine the question of compatibility.

146. Two interlinked observations regarding the Court's interpretation and enforcement of EU legislation emerge from these clarifications. First, a determination of regulatory scope and character can apply to an entire scheme[476] or legislative act,[477] a section of that act[478] or a selected number of legislative provisions.[479] Similarly, the Court's assessment of regulatory impact and the categorisation of the national measure can cover the entire act, or be based on one or several provisions.[480] Second, when the Court relies on the same norm(s) to establish (exhaustive) regulatory character, on the one hand, and regulatory scope, on the other, the Exhaustion Rule will apply to assess *all national measures* adopted within the relevant field of application.[481] However, when the Court relies on a *different* set of norms to establish regulatory scope and character, it leaves space for different degrees of harmonisation to coexist within the same legislative framework. For example, in *Commission v Germany (Waste Packaging)*, the Court first determined that the impugned German rule fell within the regulatory scope of the Waste Packaging Directive. It then established that the regulatory character of Article 5, upon which the national rule was based, was *non-exhaustive*, unlike Articles 9 and 18 of the same directive, which triggered the Exhaustion Rule.[482] As such, the directive could impose different degrees of harmonisation, or in the language of the proposed framework, allow for different categories of national measures.

147. Similarly, when the Court relies *on the same provisions* to establish an (exhaustive) regulatory character and the question of regulatory impact, that provision will institute total harmonisation (or direct implementation) and oust all national discretion – as in *Ratti*. However, when the Court assesses the questions of regulatory character and regulatory impact by reference to two *different* sets of provisions, the EU legislative framework may not be one of

[476] The Court often relies, to this end, on a series of measures. Ex. *National Farmers' Union*, C-241/01, EU:C:2002:604; *Belgische Petroleum Unie*, note 370; *Commission v Germany (Animal Feed)*, note 459.
[477] Ex. Directive 76/768/EEC, *op. cit.*, interpreted in *Clinique*, note 110; *Estée Lauder*, note 111 and *Linhart & Biffl*, note 112 and the Court's interpretation of new approach directives, Part II (Chapter One), points 32 – 35.
[478] Ex. Directive 2001/83/EC*, op. cit*., as interpreted in *Gintec*, note 24.
[479] Ex. Directive 2001/29/EC, *op. cit.*, as interpreted in *Padawan*, note 376, paragraphs 102 *et seq*.
[480] Ex. *Gintec*, note 24 and *Monsanto Technology,* C-428/08, EU:C:2010:402, paragraphs 51 – 63.
[481] In such cases, the only way for Member States to avoid the Exhaustion Rule and rely on Treaty-based (or other) discretion is to argue that the matter falls outside the scope of the relevant directive. See ex. case-law relating to Directive 2005/29/EC (the UCPD).
[482] Ex. Directive 94/62/EC, *op. cit*., as interpreted in *Commission v Denmark (Waste Packaging),* note 29 and *Commission v Germany (Waste Packaging)*, note 29.

total harmonisation. Rather it may have an exhaustive regulatory character that, while becoming the sole norm of reference, authorises national acts of legislation-based discretion, reviewable by reference to its regulatory framework. This approach is illustrated in *Gallaher*, where the Court recognised that the Tobacco Labelling Directive[483] harmonised the labelling of tobacco products with 'common rules (that) were not always identical in nature'.[484] As such, while the directive had an exhaustive regulatory character, which triggered the Exhaustion Rule to oust Treaty-based discretion, individual provisions granted Member States legislation-based discretion to 'adapt the labelling of tobacco products to the requirements of public health protection.'[485] Similarly, in *Gintec*, the Court first established that Titles VIII and VIIIa of the Medicinal Products Code had an exhaustive regulatory character, before assessing the (varied) regulatory impact of different legislative provisions.[486]

148. This latter case shows how the proposed framework could apply to (apparently) internal situations, not only to highlight potentials risk to free movement, but also to ensure a more coherent and transparent review. The facts of this case, which are detailed in Part II (Chapter One), reveal no obvious cross-border element to the dispute: A German company (Gintec) was being challenged by a German consumer protection organisation for having violated national advertising rules regarding non-prescription medicines. As such, the Exhaustion Rule did not (at least explicitly) apply. Yet the Court's approach could still be depicted in the proposed framework by replacing the sentence 'Exhaustion Rule applies' (in Step 2) with '*Exhaustive Regulatory Framework* applies'. Accordingly, the Court first determined that the Medicinal Products Code, had an *exhaustive regulatory character* and should serve as its sole norm of reference to assess the impugned national measure (Step 2). It then considered the *regulatory impact* of the Code's various legislative provisions, which instituted both direct implementation and legislation-based discretion, and assessed the national measures on this basis (Step 3). In applying both steps, the Court must also exercise boundary control to ensure compliance with EU law. This includes consistently interpreting the secondary measure with primary law and ensuring that national discretion is exercised in line with the general principles of EU law.

[483] Directive 89/622/EEC, *op. cit*.
[484] *Gallaher*, note 43, paragraph 11.
[485] *Ibid.*, paragraph 14.
[486] *Gintec*, note 24. See also Court's assessment of the UCPD, discussed *supra*, section 3.1. (The New Framework in Practice).

CONCLUSION OF CHAPTER TWO

149. Part III (Chapter Two) presented a new framework to describe the impact of internal market legislation on the regulatory landscape and guide the resolution of related regulatory disputes. Taking the inadequacies of harmonisation models as a starting point, the framework introduces a new categorisation of national measures adopted in the presence of EU legislation and distinguishes the concept of 'regulatory character' from the notions of 'regulatory scope' and 'regulatory intensity/impact' via a three-step approach to review. Together, these elements can lead to a better understanding of such legislation and rationalise the Court's teleological (and contextual) approach to interpretation. This, in turn, can enhance the transparency of how the Court resolves regulatory disputes and provide a better framework to describe, assess and guide its judgements.

150. For example, by moving away from the language of 'total harmonisation', the new categorisation provides a more nuanced and realistic vision of the relationship between secondary and national law. In particular, it accepts that exhaustive internal market rules can both oust Treaty-based discretion and authorise a degree of legislation-based discretion. This can, in turn, avoid difficulties such as the misrepresentation of consumer protection legislation and misunderstandings regarding the nature of Article 114 TFEU. By regrouping under 'legislation-based discretion' the 'thin' conception of minimum harmonisation (ex. Article 11 (2) of the Veal Crate Directive) with the scope for national discretion under 'exhaustive' legislation (ex. Article 6 (2) of the Cosmetics Directive), the new categorisation also ensures a better understanding of the Court's approach to interpreting and enforcing EU legislation, and, where necessary, redirects criticism from its case-law to the legislator.

151. The proposed framework can also improve how EU legislation is presented and assessed in the courtroom, in terms of party submissions and Court judgement. As regards the former, the new categorisation, by allowing space for different 'harmonisation models' to coexist under an EU act, helps avoid the confusion that can follow from associating the latter with one particular model.[487] It also draws attention to the strategic element of regulatory disputes, where parties argue that a particular national measure is based on the source of EU law that leads to a more favourable outcome.[488] Highlighting such strategic goals can then cast light on the Court's

[487] Such confusion can be observed in national implementation of the Waste Packaging Directive, *op. cit.*, which in fact instituted two different models of harmonisation. See *Commission v Germany (Waste Packaging)*, note 29.
[488] See Part II (Chapter Two), point 145.

interpretative choices, which, by supporting one party over another, may favour integration over regulation, pre-emption over diversity, or *vice versa*.[489] It also shows whether the Court's intensity of review, and degree of deference to the legislator, varies, depending on whether its norm of reference is based on the integration/regulation balance achieved by the Treaty, the EU legislator, or a mix of both. Finally, and as just mentioned, the new framework allows the Court to assess whether the Exhaustion Rule applies, as distinct from the question of whether, and the extent to which, Member States retain regulatory discretion. It is thus alerted to the possibility that discretion has been exercised, and must be reviewed. Indeed, had such an approach been taken in cases such as *Berger*, *EU Wood Trading*, *Gallaher* and *Opus Supplies*, concerns regarding compliance with the free movement of goods could have been allayed, whether or not the end result was the same.

[489] *Ibid*.

CONCLUSION OF PART III

152. EU internal market regulation, even when classified as 'minimum harmonisation', can have a forceful impact on national regulatory competence, thanks to the principles of pre-emption and primacy. Yet such legislation can also allow for regulatory options at national level, via Treaty-based or legislation-based discretion, or, more generally, by only partially harmonising the field. While ensuring more inclusive decision-making and respecting regulatory diversity, the exercise of such discretion cannot undermine the integrative goal of internal market legislation, or the free movement of goods. The Court will, against this backdrop, carry out a 'pre-emption analysis' of EU legislation, which can lead it to validate compliant national rules, oust conflicting rules or refer back to the national court. Depending on whether the Member State has, or not, exercised (authorised) discretion, this conclusion may be immediate, or preceded by a review by reference to Articles 34 – 36 TFEU or the (exhaustive) legislative framework, as the case may be.

153. The research has highlighted how the Exhaustion Rule can assist the Court in carrying out this task in a manner that is fair, reasoned and responsive, and that respects the hierarchy of norms. Yet application of the Rule can also engender confusion, inconsistencies, and sometimes a risk that certain acts of national discretion could escape appropriate review. We argue, however, that such problems are not inherent to the Rule itself. Rather, they stem from the systemic confusion between the regulatory character of EU legislation (which activates – or not – the Exhaustion Rule) and its regulatory impact, as perpetuated by reliance on harmonisation models to understand the relationship between secondary and national law.

154. At the heart of this confusion is an out-dated binary vision of regulation, which considers national regulatory discretion to be either ousted by a harmonising rule (i.e. total harmonisation) or allowed to persist under the negative integration regime, because a certain element has not been harmonised (i.e. minimum or partial harmonisation). This vision, which wrongly amalgamates the principles of primacy and pre-emption, is problematic for a number of reasons. In particular, by considering all regulatory discretion to flow directly from the Treaty, it presumes that the ousting of Treaty-based discretion will remove *any* scope for national regulatory discretion. This implies that a decision over total or minimum harmonisation will definitely determine whether a particular field is subject to uniform rules, or whether regulatory

diversity can persist. It also leads the Exhaustion Rule, which ousts Treaty-based discretion, to being erroneously equated with total harmonisation.

155. In reality, however, the EU's regulatory programme is more nuanced than such a vision would suggest, as certain provisions in minimum harmonisation rules limit the scope for national action, while 'total harmonisation' measures can have varied pre-emptive effects on national competence. Added to mix is the unsettled and evolving nature of the internal market, the legislator's reliance on ambiguous terminology and the fact that legislation often applies to novel or unforeseen circumstances. When regulatory disputes arise, the Court must respond to this reality, for example, by confirming the pre-emptive effect of minimum harmonisation, or authorising a national act of discretion under 'total harmonisation'. It often relies on the Exhaustion Rule to this end, by recognising, and ensuring the review of, national acts of 'legislation-based discretion' by exclusive reference to the exhaustive legislative standard. In doing so, the Court determines the scope for national action, not by the model of harmonisation, but, rather, the specific 'regulatory intensity' or 'regulatory impact' of the relevant (EU) legislative provision(s) – the interpretation of which can change over time.

156. A gap thus emerges between the discourse and reality of internal market regulation, leading to a misinterpretation of certain Court judgements and, in some cases, a concern that the original justification for the particular harmonisation model is being undermined. This disconnect also underlies misunderstandings regarding the function of the Exhaustion Rule, as reinforced by the Court's own confused terminology and failure, at times, to adequately explain the purpose and limitations of the Rule. Indeed, while generally respecting the complexity of EU legislation, the Court's approach to resolving disputes in the presence of EU internal market rules can be implicit, *ad hoc* and dependent on how questions are framed to it. Chapter One highlights the problems that can ensue, including, *in extremis*, a threat the hierarchy of norms. Relying on harmonisation models to understand the impact of secondary law could also have wider ramifications on how the process of European integration is perceived. In particular, by presenting harmonisation as removing all national regulatory leeway, these models could ignore the regulatory function of EU legislation, while also undermining the Member States' role in building the regulatory regime for the free movement of goods. This not only risks an unwarranted presumption in favour of total harmonisation/field pre-emption. By focusing on the extent to which harmonisation limits national regulation, it also reinforces a misplaced vision of such harmonisation (and application of the Exhaustion Rule) as being in conflict with

national regulation and engendering lower standards. In reality, while internal market rules do restrict regulatory diversity, they also institute complex, diverse and collaborative systems that can justify national regulatory programmes – as illustrated by an increasing tendency for the national and EU regulator to jointly defend high EU standards.

157. The understanding of EU internal market legislation, and its relationship with national law, has evolved considerably since the early days, with national competence only being ousted if there is a regulatory conflict, and regulatory diversity representing a normative choice – not just a situation to be tolerated until (total) harmonisation is achieved. However, this research has illustrated a need to evolve further – this time, from the out-dated binary vision provided by traditional harmonisation models to a more nuanced appreciation of how secondary and national law interact. Chapter Two therefore proposes a new framework to describe and assess this relationship, via a new categorisation for national measures, and by separating the question of whether the Exhaustion Rule applies from the exercise and review of national regulatory discretion. This not only contributes to a more realistic narrative of EU regulation, and its relationship with national law. By enhancing the rigour and transparency of how the Court interprets EU rules, it can reinforce the legitimacy of the judicial balance struck between enforcing the legislator's intention, and respecting the hierarchy of norms.

CONCLUSION

1. The process of EU (market) integration is intrinsically bound up with the question of how to distribute power,[1] with Member States continually seeking to preserve autonomy in the face of the expanding and deepening reach of EU law. Resulting tensions have often been related to the 'who' of decision-making and specifically whether, and the extent to which, competence *is* or *should* be transferred to the EU level.[2] Yet the question of 'how' such competence is or should be *exercised* must also be addressed,[3] all the more as there seems to be 'no nucleus of sovereignty that the Member States can invoke as such against the Community'.[4] It is in this context that the unitary state can be juxtaposed against the federalist system, with the Court and Commission (traditionally) pushing for centralisation 'based on a unitary concept of uniformity and total harmonisation', while the Member States (and Council) 'assert the federal principle, and sentiment, of diversity'.[5]

2. This latter conception of EU-Member State relations can resonate when considering the internal market for goods: On the one hand, the Treaties, as interpreted by the Court (and as amended with national consent), transfer significant decision-making powers to the EU, whether through negative or positive integration. Reinforced by the overarching objective of establishing an internal market, this capacity favours a centralising dynamic, as trade barriers are removed (ex. via Articles 34 – 35 TFEU) and disparities replaced with common standards (ex. via Article 114 TFEU). Yet the legal regime also accepts national regulatory *diversity* to maintain 'high(er)' national standards and preserve national control. This latter requirement is

[1] A. Azoulai, 'Introduction: The Question of Competence', in L. Azoulai (ed.) *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, pp. 1 – 16, at p. 1.
[2] This debate was particularly relevant prior to the Lisbon Treaty, which, for the first time, set out categories of EU competence under Title 1 TFEU. See P. Craig, 'Competence: Clarity, Conferral, Containment and Consideration, *European Law Review*, vol. 29, no. 3, 2004, pp. 323 – 344. See also A. Azoulai, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law', *European Journal of Legal Studies*, vol. 4, no. 2, 2011, pp. 192 – 219.
[3] Millet makes this distinction between the 'who' and 'how' of EU competences in F-X Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An approach to Federalism as Constitutionalism', in L. Azoulai (ed.) *The Question of Competence in the European Union*, *op. cit.*, pp. 252 – 275.
[4] K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', *American Journal of Comparative Law*, vol. 38, no 2, 1990, pp. 205 – 263 at p. 220. See also F-X Millet, *ibid.*, p. 259.
[5] J. Weiler, 'The Community System: The Dual Character of Supranationalism', *Yearbook of European Law*, 1981, vol. 1, no. 1, pp. 267–306 at pp. 293 – 294. See also Millet, who notes that while the concept of federalism remains blurred, difficult to grasp, overused and often misused, its (supposedly) 'common and unchallengeable thread ... is about striking a fair balance between unity and diversity'. F-X Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An approach to Federalism as Constitutionalism', *op. cit.*, pp. 266 – 267.

grounded in the general principles of attributed competences, subsidiarity and proportionality and, specifically, through provisions such as Article 36 TFEU, Article 114 (4 – 5) TFEU and Article 193 TFEU. Scope for national control also exists indirectly through the Council, which (co)decides whether to legislate, what common standards to set and the extent to which national competence should be ousted. Finally, Member States can enjoy *de facto* discretion when implementing and enforcing EU secondary law at national level.

3. A cooperative federal arrangement thus emerges with respect to the internal market for goods, with the EU and Member States working together 'as complementary parts in a shared legal sphere'.[6] Yet regulatory disputes can still arise in the presence of EU legislation, as parties disagree over the existence and extent of national regulatory options, and whether such options have been exercised in accordance with EU law. The Court, in its response, must remain mindful that trade disparities can undermine the internal market for goods, while national discretion could be misused to (re)impose a trade restriction. All acts of national discretion must therefore be reviewed to ensure compliance with *inter alia* free movement. It is against this backdrop that this research explored the Court's interpretation and enforcement of EU product rules, namely by analysing its reliance on, or exclusion of, the Exhaustion Rule. To recall, the Rule provides that 'exhaustive' EU legislation should act as the Court's sole norm of reference to resolve a regulatory dispute, to the exclusion of Articles 34 – 36 TFEU.

4. Part I initiated the research by investigating the meaning and foundations of the Exhaustion Rule, and by tracing its use and development since the 1970s. Part II then presented and analysed relevant case-law, while Part III sought to explain and remedy some inconsistences and gaps in the discourse and case-law. A general picture was drawn of a Rule with two elements, or 'legs', which facilitates dispute resolution by balancing the 'centralising' principle of pre-emption with a presumption that secondary legislation respects the free movement of goods. As a result, while Member States cannot avoid their free movement obligations, they can defend national rules by reference to an EU standard to which they have contributed and which is viewed with deference by the Court. There is, in other words, an alignment under the Exhaustion Rule between the dynamics of Exit and Voice, with the Court exercising boundary control to ensure compliance with primary law. This observation led the research to cast the Rule as the Court's 'constitutional compass' in distributing power in the

[6] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, Oxford, Oxford University Press, 2009, p. 346 and at Chapter 4.

presence of EU product legislation, as it ensures respect for both the legislator's intention (and the principle of institutional balance), and the free movement of goods.

5. For the Exhaustion Rule to enjoy such a status, however, the Court should develop a more complete and transparent understanding of secondary legislation. In particular, it should explicitly and systematically acknowledge that EU legislation can accommodate a more complex vertical distribution of power than what is often assumed. Such complexity includes the possibility for national regulatory options to exist *within* the exhaustive legislative framework under 'legislation-based discretion'. What is more, exercise of this discretion must be reviewed by reference to the EU framework under the Exhaustion Rule. Parts II and III catalogued the difficulties that can arise when such discretion is miscategorised, overlooked or not reviewed, including, *in extremis*, a threat to the free movement of goods. Part III also linked such problems to reliance on 'harmonisation models' to understand the relationship between secondary and national legislation. Specifically, by considering national discretion to be either ousted by total harmonisation or allowed to persist under minimum or partial harmonisation, such models erroneously equate activation of the Exhaustion Rule with an absence of *any* discretion. The possibility for Member States to enjoy a margin of regulatory manoeuvre can therefore be concealed, and the integrity of the Exhaustion Rule undermined. More generally, reliance on harmonisation models can result in a distorted narrative of EU legislation as being solely concerned with pre-empting national competences, thus ignoring its protective regulatory function. To remedy such difficulties, the research suggested replacing the outdated binary vision of 'harmonisation models' with a new framework to describe and assess the impact of secondary legislation. This framework acknowledges that national regulatory discretion, and constraints, can exist, regardless of the harmonisation model purportedly adopted and notwithstanding operation of the Exhaustion Rule. In identifying such discretion, the framework alerts the Court to the need for its exercise to be reviewed. Provided the Court carries out this assessment, it can rely on the Exhaustion Rule to resolve regulatory disputes in a transparent, rational and Treaty-compliant manner.

6. The research thus comes full circle by reinforcing the introductory vision of the free movement of goods as a success story. Specifically, it identifies the Exhaustion Rule as encouraging respectful coexistence between the Member States and EU, and between national, secondary and primary law. Key to this equilibrium is the existence of a genuine and effective regulatory capacity at EU level. The EU legislator (and its inner Voice) can, in this context,

express regulatory preferences and distribute power, while Member States can accept the principle of free movement, even if they sometimes disagree with its legal effects. What follows is a stable, Treaty-compliant regulatory system to protect and promote the free movement of goods.

7. We conclude by suggesting how our findings could point the way to future research. In this regard, Part III already noted that the proposed framework could apply to assess EU regulation of the other fundamental freedoms and of the approximation of national laws more generally. The Exhaustion Rule itself can also be invoked beyond the free movement of goods to fields such as the free movement of workers,[7] establishment,[8] services,[9] capital[10] and EU citizens.[11] At the same time, the Court's approach is not always systematic or consistent – echoing, perhaps, its early hesitant approach to applying the Exhaustion Rule in the context of the free movement of goods. Indeed, the Court only recently adopted the Rule's logic to assess the status and rights of inactive EU citizens,[12] while it remains generally absent from the free movement of workers regime. Such absence acknowledges that workers' rights require robust protection, yet could also reveal the fragility of these rights. The latter observation deserves some additional, *albeit* preliminary, commentary.[13]

8. Understood in its 'deferential' dimension, the presumption of constitutionality enjoyed by EU product rules seems not to apply to legislation governing the free movement of workers, or at least not to the same extent. To the contrary, the Court has often extended workers' rights beyond what has been explicitly foreseen thereunder.[14] At the same time, Member States seem to enjoy less scope to unilaterally derogate from Article 45 TFEU *in the absence* of

[7] Article 45 TFEU. Ex. *Humbel*, C-263/86, EU:C:1988:451, paragraphs 22 – 25.
[8] Article 49 TFEU. Ex. *Wilson*, C-506/04, EU:C:2006:587, paragraphs 65 – 70 and *Enel*, C-242/10, EU:C:2011:861, paragraph 34.
[9] Article 56 TFEU. Ex. *Enel*, *ibid*., *Citroën Belux*, C-265/12, EU:C:2013:498, paragraph 31 and *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 63.
[10] Article 63 TFEU. Ex. *Chmielewski*, C-255/14, EU:C:2015:475.
[11] Articles 18 and 20 TFEU. Ex. *Dano*, C-333/13, EU:C:2014:2358, paragraph 62.
[12] *Ibid*. For discussion, see Part I (Chapter One), points 55 – 58.
[13] For an elaboration of these ideas, see E. Ni Chaoimh, 'What's Wrong with the Legal Regime Governing the Free Movement of Workers', in H. Mercenier, E. Ni Chaoimh, L. Damay & G. Delledonne (eds.), *La libre circulation sous pression. Régulation et dérégulation des mobilités dans l'Union européenne,* Bruxelles, Bruylant, 2018, pp. 71 – 87.
[14] Ex. *Diatta,* Case 267/83, EU:C:1985:67; *Reed,* Case 59/85, EU:C:1986:157; *Metock*, C-127/08, EU:C:2008:449 ; *Saint Prix,* C-507/12, EU:C:2014:2007, paragraphs 31 – 32 and *Ogieriakhi,* C-244/13, EU:C:2014:2068.

harmonisation when compared to the free movement of goods,[15] while the EU's inherent constitutional asymmetry between 'policies promoting market efficiencies' and 'policies promoting social protection and equality' prevents the EU legislator from filling regulatory gaps resulting from the negative integration process.[16] Finally, creation of an EU social dimension is practically and politically constrained by the diversity of European welfare states.[17] In contrast to our assessment of the free movement of goods therefore, the legal regime seems to remove practically all national and EU regulatory discretion over the access of EU workers to host Member States, and the rights they subsequently enjoy. Using the language of Hirschman,[18] Member States have limited legislative Voice to compensate for the foreclosure of their possibilities to Exit from obligations imposed by EU law.

9. Judicial protection of workers' rights is justified both legally, under the hierarchy of norms, and morally, given their human dimension. Yet by privileging the Court's perspective, this approach could also limit scope for political debate and legislative manoeuvre, and trigger a build-up of unresolvable tensions. This risk is all the more given that the EU workers' regime appears as an exception to the theoretical and practical incompatibility observed between large-scale immigration, on the one hand, and equal access to the welfare state, on the other.[19] This 'incompatibility' was contained for many years,[20] as Member States – often through unanimity in the Council – granted a legislative mandate to the Court's broad interpretation of Article 45

[15] This statement needs further analysis. For a summary of relevant case-law concerning the free movement of workers, see C. Barnard, *The Substantive Law of the EU – The Four Freedoms,* Oxford, Oxford University Press, Fourth Edition, 2013, pp. 239 – 269.

[16] F. W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Journal of Common Market Studies*, vol. 40, no. 4, 2002, pp. 645-670 at p. 645. See also B. De Witte, 'Welfare Integration through EU Law: The Overall Picture in Light of the Lisbon Treaty' and C. Joerges, 'A Renaissance of the European Economic Constitution?' in U. Neergaard, R. Nielsen & L. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, Copenhagen, Djøf Publishing, 2009 (respectively, pp. 53 – 94 at pp. 55 – 57, and pp. 29 – 52 at p. 42); J. Pelkmans, 'Economic Approaches of the Internal Market', *Bruges European Economic Research,* Paper no. 13, April 2008; E. Spaventa, *Free Movement of Persons in the European Union – Barriers to Movement in their Constitutional Context*, Kluwer Law International, 2007, p. 87 and W. Streeck, 'Neo-Voluntarism: A New European Social Policy Regime', in F. Snyder (ed.), *Constitutional Dimensions of European* Integration, The Netherlands, Kluwer Law International, 1996, pp. 229 – 277 at p. 259.

[17] F. W. Scharpf, *ibid*., p. 650.

[18] A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organisations and States,* Cambridge, MA, Harvard University Press, 1970.

[19] M. Ruhs, *EU Migration and Welfare Benefits: Is Unrestricted Labour immigration Compatible with an Inclusive Welfare State?*, Paper presented at 23rd International Conference of Europeanists, April 2016, p. 4. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625486. Last accessed 1 October 2019. See, more generally, M. Ruhs, *The Price of Rights: Regulating International Labour Migration,* Princeton and Oxford, Princeton University Press, 2013.

[20] See C. Joerges, 'A Renaissance of the European Economic Constitution?', *op. cit.,* who notes at p. 36 that Member States did not, in the early years, perceive the problem of constitutional asymmetry as 'as a major threat to the balance achieved (between the economic and social) at national level', because of the institutional strength of the 'Masters of the Treaty' and 'the preservation of social policy competences at national level'.

TFEU,[21] while national welfare states remained insulated under the principle of host country control[22] and residual movement in practice.[23] A generous regime for the free movement of workers could therefore persist, with EU workers and their families enjoying near unrestricted and equal access to national labour markets and welfare states.[24]

10. This balance has, however, been progressively undermined over the last number of years by two opposing trends. First, Member States are finding more cause to challenge the free movement of people, and of workers, as the migration crisis, Eastern European enlargement and recession has diminished acceptance of migration flows in certain Member States.[25] Second, the Treaty's EU citizenship provisions have reinforced the free movement of workers both normatively and substantively,[26] which has reduced the possibilities for a political response to the changing environment.[27] In this context, Member States and the EU legislature can face significant difficulties in resetting the traditional balance achieved in relation to the free movement of workers,[28] even where the EU has the necessary competence.[29] As noted rather presciently by Guild *et al*., **'**A Member State, which no longer wishes to comply with the right of (workers) of the Union to move, reside and exercise economic activities anywhere in the Union … beyond the very limited scope which is permitted by the (Citizens) Directive at the moment has no option but to consider withdrawal from the EU'.[30]

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[21] N. Nic Shuibhne, 'The Third Age of EU Citizenship Directive 2004/38 in the Case Law of the Court of Justice', in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, pp. 331 – 362 at p. 334. See also C. Barnard, *The Substantive Law of the EU – The Four Freedoms, op. cit*., p. 238 and M. Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship', in H-W. Micklitz & B. De Witte (eds.), *The European Court of Justice and the Autonomy of the Member States,* Cambridge-Antwerp-Portland, Intersentia, 2012, pp. 113 – 147.
[22] J. Pelkmans, 'Economic Approaches of the Internal Market' *op. cit.*, p. 25.
[23] C. Barnard, *The Substantive Law of the EU – The Four Freedoms, op. cit.,* p. 272 and M. Ruhs, *EU Migration and Welfare Benefits*', *op. cit.*, p. 6.
[24] C. Barnard, *ibid*., pp. 239 – 269.
[25] M. Ruhs, *EU Migration and Welfare Benefits*', *op. cit.*
[26] Ex. *Metock*, note 14. For discussion of this trend, see E. Spaventa, *Free Movement of Persons in the European Union – Barriers to Movement in their Constitutional Context*, *op. cit*., chapters 3 and 7.
[27] E. Spaventa, *ibid*.
[28] Indeed, while the UK sought to reinforce possibilities to unilaterally regulate the market access and rights of EU workers in the run up to the Brexit referendum, the Settlement it reached with the EU was criticised as having questionable legality. See 'A New Settlement for the United Kingdom within the EU', *Extract of the conclusions of the European Council of 18-19 February 2016,* OJ, C. 69/1, 23 February 2016, pp. 1 – 16. For analysis, see J. Shaw, 'Where Does the UK Belong?', in H. Verschueren (ed.), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong,* Antwerp – Cambridge, Intersentia, 2016, pp. 301 – 316.
[29] Similar challenges can arise in the context of the free movement of services and establishment. See ex. the difficulty in formulating a legislative response to *Laval*, C-341/05, EU:C:2007:809 and *Viking Line,* C-438/05, EU:C:2007:772.
[30] E. Guild, S. Peers & J. Tomkin, *The EU Citizenship Directive: A Commentary*, Oxford, Oxford University Press, 2014, p. 11.

11. Whether – and the extent to which – the Brexit referendum can be explained by reference to the open EU workers regime is a sensitive, controversial and complex question not addressed in these pages. What is clear, however, is that the legislator does not have the same capacity or political will to regulate this field when compared to the free movement of goods. And even when EU legislation is adopted, it does not appear to enjoy the level of deference accorded by the Court to product rules under the Exhaustion Rule. As a consequence, and in further divergence with the free movement of goods, the legal framework governing EU workers can struggle to absorb and resolve certain political tensions. The question is whether and how this gap could manifest itself in the future, and how the legislator and Court will respond: Will there be a political attempt to limit workers' rights and/or market access? And if so, would the Court mirror its turnaround regarding the rights of inactive EU citizens and defer to such political choices via the Exhaustion Rule? Or could it continue to protect workers by relying directly on primary law? Either way, the Exhaustion Rule, insofar as it distributes power in the presence of secondary legislation, could provide a further paradigm within which to assess the points of convergence (and divergence) between the various fundamental freedoms.

12. Over 70 years after it came into being, the European Union is still trying to define itself and establish its legitimacy. A key element of this quest is to establish an appropriate balance between the powers that be. We certainly did not give a final answer to this question but, hopefully, managed to move the debate in the right direction without getting lost (or losing our reader) along the way. Is this not the point of a compass?

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LIST OF ABBREVIATIONS

AG	Advocate General
BSE	Bovine spongiform encephalopathy
CAP	Common Agricultural Policy
CJEU	The Court of the Justice of the European Union
COM	Common Organisation of the Market
Court	Court of Justice (which is a constituent court of the CJEU)
EC	European Community
EEC	European Economic Community
EU	European Union
GMO	Genetically Modified Organisms
IP	Intellectual Property
IPR	Intellectual Property Rights
MEEQR	Measure having Equivalent Effect to a Quantitative Restriction
NAH	New Approach to Harmonisation
NLF	New Legislative Framework
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercials Practices Directive
UCTD	Unfair Contract Terms Directive
WSR	Waste Shipment Regulation

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