UPPSALA
UNIVERSITET

Department of Law
Autumn Term 2016

Master's Thesis in European Union Law
30 ECTS

Exploring the Outer Limits of Article 114 TFEU – towards a general power?

An analysis of non-market objectives and "measures having as their object the establishment and functioning of the internal market"

Author: Malin Wållgren
Supervisor: Senior Lecturer Vladimir Bastidas

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Abbreviations

AG	Advocate General
CJEU	The European Court of Justice
EC Treaty	The Treaty Establishing the European Community
EEC	The European Economic Community
EU	The European Union
Member State	Member State of the European Union
TEU	The Treaty on the European Union
TFEU	The Treaty on the Functioning of the European Union
The Commission	The European Commission
The Council	The European Council
The Parliament	The European Parliament
The Union	The European Union
WHO	The World Health Organization

1 Introduction

1.1 Background and introduction to the topic

The European Union (EU) has during the last 40 years with high speed transformed from a coal and steel community to the most advanced supranational collaboration in the world.[1] One of the main objectives for the Union is the realisation of a single internal market. The internal market shall according to Article 26 in the Treaty on the Functioning of the European Union (TFEU) comprise an *"area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"*. The broad provisions for the free movements in primary legislation are the core of the internal market. Together with detailed secondary legislation the EU legislator lays out the path for a successful realisation of integration and trade between the Member States.

The focus in this thesis is on the approximation of laws in secondary legislation, and how such legislation can affect the free movement of goods and services within the Union due to product requirements and prohibition on marketing. A lot of products on the EU market is subject to harmonised rules in addition to the general principles of free movement. The most important legal basis for harmonised measures relating to the internal market, and the article in the limelight for the purpose of this thesis, is Article 114 TFEU. Using Article 114 TFEU, the EU legislator can adopt measures for the approximation of laws in the Member States which have as their objective the establishment and functioning of the internal market. The use of Article 114 TFEU as a legal basis is however not an action without controversy. For the last two decades the provision has been accused of being an expanding legal basis. With an expanding legal basis there is a risk that the EU legislator oversteps their competence and that the definition of measures having as their object the establishment and functioning of the internal market erodes. There have been several cases where measures adopted under Article 114 TFEU are challenged in the Court of Justice of the European Union (CJEU) since the measures in question are considered not to fulfil the objectives on the establishment and functioning of the internal market that Article 114 TFEU requires. The

[1] Catherine Barnard, The Substantive Law of the EU (OUP 2013), page 15.

EU legislator has in some cases used the most far reaching option available and adopted secondary legislation consisting of provisions that prohibit products from being put on the EU market at all, raising questions on how the elimination of an entire market for a product corresponds to the goal of a single market.[2] With the goal of making the markets of 28[3] Member States of the Union to function as one – there need to be compromises when the harmonised measures are constructed. Already in the preamble of the Treaty on the European Union (TEU) one can find the aim of a balance between the economic and social dimension of the Union. Taking into account both market and non-market objectives the preamble is stating that the high contracting parties are;

"determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.".

With one foot in the constitutional law of the EU and one foot in the balance between the economic and social dimension of the EU - the thesis in the following examines the compromises of law and the policy when secondary legislation is adopted under Article 114 TFEU with the aim to shed light on the expanding nature of the provision and measures having as their object the establishment and functioning of the internal market.

[2] In the words of the CJEU, Article 114 TFEU can be used for measures for approximation even when they provisionally or definitively are prohibiting the marketing of a product or products. See eg. Case C-434/02 *Arnold André GmbH & Co. KG v Landrat des Kreises Herford* ECLI:EU:C:2004:800, para 30 as well as the more recent Case C-358/14 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2016:323, para 38 and Case C-547/14 *Philip Morris Brands and others* ECLI:EU:C:2016:325, para 64.

[3] The United Kingdom voted the summer of 2016 to leave the EU. As this thesis is written they are however in practise still considered a Member State. This thesis will therefor consistently refer to the 28 Member States of the EU.

1.2 Purpose and research questions

This thesis has its starting-point in the balance between different objectives affecting the possibility for products to be put on the EU market. The EU was built on an economic foundation, but to fulfil the economic aims for the Union one must be responsive to other interests than purely economic objectives - even when they affect market access for products due to new and stricter requirements. The thesis examines the challenges arising when products are prohibited from being released on the EU market with focus on how strict product requirements and prohibition of sale corresponds with the goal of a single market. A total prohibition of certain products harmonises the differences between the Member States legislation concerning that product, but the relevant market for those products are then abolished. By highlighting the tensions between market and non-market objectives in Article 114 TFEU this thesis examines the limits of competence within the article and if there is a contraposition between a total prohibition of a product on the EU market and the establishment and functioning of the internal market - with the free movement at its core. By a reconstruction of the role Article 114 TFEU has played from the early case law until today the scope of "measures having as their object the functioning and establishment of the internal market" will be evaluated.

The CJEU has repeatedly held that it is not enough with mere disparities in the Member States legislation for Article 114 TFEU to apply.[4] This condition, together with the ones expressly written and later interpreted by the CJEU in Article 114 TFEU, provides a first determination of the scope of Article 114 TFEU. However, the CJEU has been reluctant to provide with deeper insight on the conditions that needs to me met and where the outer limits of Article 114 TFEU is and should be set. In theory, Article 114 TFEU does not give a general competence to regulate the internal market, but this conclusion is – as we will see from the case law examined – not always the case in practise.[5] The case

[4] See especially "*Tobacco Advertising I";* Case C-376/98 *Germany v European parliament and Council* ECLI:EU:C:2000:544, where a directive was successfully challenged since it in parts was considered not to facilitate trade.

[5] This criticism can especially be seen after the case Swedish Match, Case C-210/*03 Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* EU:C:2004:802, where the EU legislator held a prohibition on chewing tobacco to be put on the EU market valid with Article 114 TFEU as legal basis.

law from CJEU shows several measures predominantly aiming for the fulfilment of non-market objectives that is held valid with Article 114 TFEU as a legal basis, providing for interesting insight on the future scope of Article 114 TFEU.[6]

Against this background the thesis seeks to explore if Article 114 TFEU is expanding towards being a general legal basis for the regulation of the internal market, contrary to the competence conferred to the EU legislator. The following questions will be answered:

- *Can and should Article 114 TFEU give the EU legislator a general competence to regulate the internal market?*

For the purpose of answering this question the following questions will be examined throughout the thesis:

- *What objectives falls inside the concept of "measures having as their object the establishment and functioning of the internal market" in Article 114 TFEU?*

- *To what extent can non-market objectives be decisive for measures adopted with Article 114 TFEU?*

- *How do outright product bans correspond to the objectives within Article 114 TFEU?*

1.3 Delimitations

The thesis will be limited to measures regulating the free movement of goods adopted under Article 114 TFEU, when the measures prohibits products from entering the EU market and flow freely cross border the Member States. Comparison with other areas of EU law will occur where this is appropriate to highlight the scope and balance between market and non-market objectives in Article 114 TFEU. Since the focus is on product requirement from an EU market perspective, requirements for market entry for products coming from third countries falls outside the scope of this thesis. The case

[6] The issue was first raised in *Tobacco Advertising I* (n 4) on the validity of measures strictly regulating advertising for tobacco.

studies have been chosen to illustrate what makes a non-market objective so essential for the establishment and functioning of the internal market that it can be used as a justification for an outright ban of a product in secondary legislation. The case law from CJEU on Article 114 TFEU covers various fields, from financial regulation to animal welfare. For the purpose of this thesis, where focus is on measures outright banning or strictly regulating certain products, public health is of special importance. Public health is expressly mentioned as a counter objective in Article 114 TFEU[7] and is one of the most commonly occurring objective to be subject to challenges in the CJEU with regard to the article. Inter alia because the EU legislator do not have an express competence to regulate in the field of public health and Article 114 TFEU therefor could serve as an alternate way of legislating in the name of policy.[8] The measures of interest for this thesis is legislative acts, as the thesis focus on the compliance of such acts with market integration when measures serve two fold purposes.

Article 114 TFEU has long been seen as only targeting approximation of national rules, but the CJEU has gradually created room for other institutional arrangements under Article 114 TFEU such as the creation of agencies.[9] This thesis however is limited to the measures of approximation of laws under Article 114 TFEU. Thus, the developed use of Article 114 TFEU for the creation of a new form of agencies in the field of financial regulation falls outside the scope of this thesis.

1.4 Method and sources

The method for the thesis is legal EU method with the purpose of examining the constitutional law of the EU and the internal market law. The topic is distinguished from domestic law. The thesis evaluates EU law through a legal dogmatic method in order to deduct the current status for the application and interpretation of Article 114 TFEU when measures serves two fold purposes. With a legal dogmatic method, traditional

[7] See Article 114(3) TFEU.
[8] Cf. Article 168 TFEU precluding harmonisation in the field of public health.
[9] See Pieter Van Cleynenbreugel, 'Meroni Circumvented? Article 114 TFEU and EU regulatory agencies' [2014] 21 MJ 1 page 68 and Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* ECLI:EU:C:2006:279, para 44.

legal sources are analysed.[10] One of the differences from Swedish law when using a legal dogmatic method in EU law is the, in general, absence of preparatory work as a primary source.[11] The thesis will be based on analysis of traditional legal sources such as EU primary law in the form of the Treaties and the Charter as well as secondary legislation in forms of directives and regulations. The jurisprudence from CJEU will be subject to detailed analysis, since the case law is of great importance on how to interpret the Treaties. The judges of the CJEU traditionally takes on a more active approach for the developing of the law than what is the case in domestic Swedish courts. Of extensive use will further be relevant doctrine and legal articles from professionals and academics in the field.

When studying EU law, the law must be interpreted and applied in accordance with the legal method the CJEU has developed. The CJEU shall in accordance with Article 19 TEU *"ensure that in the interpretation and application of the Treaties the law is observed.*" In the early case *Les Verts*[12] it was demonstrated that the CJEU must fill the gaps in the legislation that, without action by CJEU, *"would lead to a result contrary both to the spirit of the Treaty […] and to its system."*[13] It should be noted that the Treaties do not contain any further guidance of the methods of interpretation that the CJEU must follow. Even though classical methods of interpretation such as literal, contextual and teleological are the foundation for interpretation the CJEU may choose to attach different attention to the importance of the method chosen, where teleological method of interpretation has been analysed to play a special important role.[14]

Due to the nature of the topic - in EU law the policy and the law can be argued to be deeper connected than in domestic law - there will be elements of legal policy argumentation when discussing the desirability of a narrow or a wide interpretation and

[10] See Nils Jareborg, 'Rättsdogmatik som vetenskap' [2004] SvJT 2004:1, page 8.
[11] Cf. Koen Lenaerts and José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' [2013] EUI Working Paper AEL 2013/9, page 47, stating that their importance is increasing, notably in interpretation of highly technical legislation.
[12] Case C-190/84 *Parti écologiste "Les Verts" v European Parliament* ECLI:EU:C:1988:94.
[13] Ibid, para 25.
[14] Cf. *Lenaerts and Gutiérrez-Fons* (n 11), pages 4 and 47, providing for guidance on the CJEU's methods of interpretation.

application of Article 114 TFEU. A personal view on the matter will be provided. However, it is important that when examining the case law from CJEU in terms of intra or ultra vires[15], this terms must be separated from a commentators' personal view on the matter. Different interpretation can be both applauded and criticised – but still be well within the competence of the institution.[16] It is in the sections providing for outlook of what the interpretation and application should be, and where the limits of competence is unclear, that personal views will be provided. The thesis aims to analyse how a written formula in primary law are interpreted and applied through secondary legislation and case law. The legal dogmatic method allows the writer to analyse the legal sources with perspective outside valid law, to find new and/or better solutions.[17] Relevant doctrine and articles will here play an especially important role to call in the ongoing debate on the extent of application of Article 114 TFEU in a *de lege lata* as well as *de lege ferenda* perspective.

1.5 Definitions and terminology

This thesis is written in the area of EU law, which is the legal scholar governing all rules between the EU's Member States stemming from the EU institutions and the Member States themselves. More specifically this thesis is written in the area of EU internal market law. EU internal market law constitutes the legal and regulatory framework for the realisation of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.[18] The terms single, common and internal market are used as synonyms in this thesis. Reference to the term internal market will however be the one that most common occur, with the single market being a goal for the internal market to realise.[19] The numbering of the provisions in the Treaties will correspond to the numbering introduced by the Lisbon Treaty in 2009 for the benefit of consistency. For the same

[15] Intra or ultra vires are terms often used when discussing the competence of EU institutions, where intra vires is when action is in accordance with law and ultra vires is when action is considered to be unlawful.
[16] Cf. Paul Craig, 'The CJEU and Ultra Vires Action: A Conceptual Analysis' [2011] C.M.L.Rev. 48, page 395.
[17] *Jareborg* (n 10), page 4.
[18] See eg. Article 26 TFEU.
[19] See *Barnard* (n 1), page 12 for a description of the terms single, common and internal market as 'largely synonymous'.

reason reference will be made to “the Union” even for time periods where it was named “the Community”, and refer to “CJEU” even for case law before the latest name shift.

Throughout this thesis reference is made to market and non-market objectives in EU internal market law. Non-market objectives are used as a general term for objectives relating to political, social and cultural choices. Contrary, market-objectives are used as a general term for objectives of purely economic nature such as profit maximisation for commercial undertakings and/or the Member States. The thesis will further explore the concept of non-market objectives as part of market-objectives. Even though the terms will be used with distinction for the clarity of the thesis, the author recognises that non-market objectives as well can serve economic interest, hence the room for discussion on the contraposition or correspondent nature of market and non-market objectives.

1.6 Content and structure

The thesis is divided in six sections. The subject, its central questions and aim were introduced previous in this chapter, chapter one. In chapter two an introduction to the concept and limits of harmonisation for the establishment and functioning of the internal market is presented. Focus in chapter two is on the legal framework governing the possibility to set harmonised measures. Questions on competence and general principles of EU law will be examined, together with different techniques of harmonisation and their benefits and disadvantages for the realisation of a single market. This chapter of theory is a prerequisite to understand the academic debate surrounding the interpretation and application of Article 114 TFEU that is discussed in later chapters. In chapter three the theoretical framework for the application of Article 114 TFEU is presented in an historical and up to date context. When chapter two lays out the framework for why the EU can harmonise, chapter three focuses on how this is done. Chapter three will rely on the Treaty provisions read in conjunction with doctrine, but also on case law - even though the latter will be further examined in the upcoming chapter. In chapter four the practical application of Article 114 TFEU in areas were market-objectives meet non-market objectives is explored. This is made through case studies in policy fields where the extent of application of Article 114 TFEU have been disputed, mainly public health legislation but a broad range of cases will be cited to

understand the CJEU's reasoning. Building on previous chapters, the aim of chapter five is to make a future outlook on the application of Article 114 TFEU. The main idea of this chapter is to evaluate the desirable scope of Article 114 TFEU with special regard to the concept of measures having as their object the establishment and functioning of the internal market, turning to different views in the academic debate and the case law on to what extent non-market objectives can be decisive for legislation enacted with Article 114 TFEU as legal basis. Focus in this chapter is the possibilities and risks in areas of law and policy, where the EU legislator in theory lack competence, to be legislated "through the back door" with Article 114 TFEU. The thesis here turns back to the case studies as well as de lege ferenda reasoning on where the limits to what objectives that can be taken into account goes and should go for measures with Article 114 TFEU as legal basis. Finally, in chapter six, remarks and concluding comments will tie the knot for the introductory question and questions that arose along the way this thesis was written.

2 Setting the scene: competence and conditions for harmonisation

2.1 The goal of a single market – the need for harmonisation

In 1957, the European Economic Community (EEC) set the task of creating a common market with free movement and the four freedoms at its core.[20] With the aim of increasing economic prosperity and contributing to *"an ever closer union among the peoples of Europe"*, the Treaty of Rome introduced the concept of the common market intended to eliminate barriers to trade.[21] The internal market project is at the heart of Europe's internal market. A single market does not only abolish internal barriers to trade, but also opens up the market for economies of scale as well as for more efficient allocation of resources.[22] The formula for the internal market as we know it today has its starting-point with the 1986 Single European Act. The Single European Act included the objective of the internal market in the European Community Treaty (EC Treaty), defining it as it can be read still today as *"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*."[23]

The development of the EU is dependent on cooperation and compromises between the Member States in legal, economic and political areas. The need for cooperation and compromises has affected legislation aiming to contribute to the goal of a single market within the Union. In theory the Treaty provisions should have been enough to secure successful regulatory competition for products and production in the Member States, but in reality these broad provisions are not enough. According to *Barnard,* there would be market failure if the Treaty provisions were the only regulation for the internal market. The Treaty provisions lack detail and necessary conditions for the competition to function. Further, the Treaty provisions allow for extended opportunities to derogate from the prohibitions laid out.[24] The extended opportunities for derogation stems directly from the Treaty provisions, but also from the case law on mandatory

[20] See eg. Article 3 TEU and Article 26 TFEU on the goal of an internal market. See also Articles 34, 45, 56 and 63 TFEU for the freedoms of goods, workers, services and capital.
[21] Mariusz Maciejewski, Fact Sheet on the European Union [2016] <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.1.html> Accessed September 27, 2016.
[22] *Barnard* (n 1), page 3.
[23] Ibid, page 634 f.
[24] Ibid, page 633.

requirements developed by the CJEU.[25] For the establishment and functioning of the internal market it is thus a necessity that it is possible to enact harmonised legislation. With harmonisation EU legislation have the possibility to contribute to the establishment and functioning of the internal market and at the same time take into account for public interests. Such a combination of objectives can be seen as a pre requisite for a sustainable internal market. With harmonised standards, goods can move freely, and serve as an important complement to the provisions on free movement.[26] However, there are sensitivities involved both politically, and legally. Harmonisation is far reaching since it replaces national standards with a common EU standard, even in situations when a national standard is compatible with EU law from the start.[27] The sensitivities when the Member States have to give up their national standards for a common EU standard give rise to questions such as what powers the EU legislator have in different fields, what it takes for national standards to be replaced and what and whom should work as an inspiration for the chosen common standard. The Member States of the EU have different legal traditions and what level of protection certain public interests have in law are different from one Member State to another. Due to the primacy of EU law, once legislation has been harmonised Member States can no longer amend it or replace the harmonised legislation with national rules. The political implications of harmonisation make it important that the EU legislator acts within its competence. Disputes often arise on the choice of correct legal basis, concerning if the legislation in question are fulfilling the objectives laid out in the legal basis and if the EU legislator are staying within the competence conferred in the specific legal field.[28] The possibility to set harmonised standards can be seen as a prerequisite for the internal market to function since it mitigates those national differences which pose a threat to the internal market – but due to Member States being forced to give up national standards, it is not a concept without controversy. Hence the turmoil surrounding the scope of Article 114 TFEU.[29]

[25] See eg. Article 36 TFEU and the Cassis de Dijon formula on mandatory requirements, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:4.
[26] Eg. *Barnard* (n 1), page 633.
[27] Koen Lenaerts and Piet Van Nuffel, European Union Law (Sweet & Maxwell 2011), page 292.
[28] Ibid, page 296.
[29] *Barnard* (n 1), page 633.

2.2 The competence: EU power and Member States sovereignty

To understand the limits to what objectives that can be decisive for harmonisation, one must understand the competences of the EU legislator. To know the competence is to know the boundaries of objectives that can be taken into account when harmonising. The importance of competence stems from the ancient concept of state sovereignty. The Member States of the EU remain independent sovereign nations, but in the EU Member States are pooling their sovereignty by delegating certain decision making to the EU institutions. Specific Treaty provisions empowers the Union to bring divergent national laws together and to reduce negative effects on market participants concerned when the competitive position is affected, or if it can lead to irregularities amongst consumers. The specific Treaty provisions gives the EU legislation competence to approximate the Member States legislation, even though national laws may be completely compatible with EU law.[30] If there is secondary legislation in an area of law, the secondary legislation, providing more detailed legislation, prevails over the more general provisions in primary legislation. However, for the secondary legislation to be valid it must be in line with the competence and conditions in the legal basis. To identify the legal basis is therefor of importance for the limits of the secondary legislation in question. When an action of annulment case reaches the CJEU, the CJEU often finds itself in a position where the objectives in the legal basis must be compared with the secondary legislation to determine if the EU legislator were competent to legislate in the actual field, or if the competence still relies with the Member States.[31]

When discussing if the EU institutions are acting intra or ultra vires in relation to the extent of what objectives can be taken into account in secondary legislation, one must always have the principle of conferral in mind. According to this fundamental principle, laid down in Article 5 TEU, the EU can only act within the limits of the competences that the Member States have conferred upon the Union in the Treaties.[32] The list of competences can be found in Articles 2 to 6 in TEU, and these are the competences that

[30] *Lenaerts and Van Nuffel* (n 27), page 292.
[31] Cf. *Tobacco Advertising I* (n 4) Further examined in chapter 4.1 below.
[32] See Articles 2-6 TFEU for the defined competences.

the Union have assigned by the principle of conferral.[33] For the realisation of the internal market, the Union shall share the competence with the Member States. The shared powers are the most common ones and means that both the Member States and the EU can legislate in the field, unlike the exclusive competence that hinders action from the Member States since the EU has got exclusive competence to legislate in the field. Due to the primacy of EU law certain areas of law can even in shared areas become exclusive in practise, since a Member State cannot make legislation contradicting already existing EU legislation. The area of law once legislated by EU is pre-empted and thus the Member States can no longer act.[34] The legitimacy of the EU legislator is thus rooted in the Treaties and competence is a matter of constitutional principle. There is no discretion in the identification of competence, but once such a competence has been identified there can be discretion in the scope of that competence depending on the legal basis at hand. Curiosa of interest in the discussion of competence and sovereignty is the development of this co-relation described by the CJEU[35]: The CJEU have gone from describing this co-relation as "*(…) the Member States have limited their sovereign rights, albeit within limited fields*."[36] to "*the States have limited their sovereign rights, in ever wider fields*."[37] Despite wider limitations of sovereignty, the need to identify the competence is still at the very essence of EU legislation, and in the words of *Weatherill;* "*It is certainly not for the EU legislator to adjust those limits for reasons of political convenienc*e."[38]

2.3 The importance of a correct legal basis

When co-reading the list of competences with the aims and objectives in Article 2 and 3 TEU a paradox can be found since the objectives that the Union shall achieve as an "*area of freedom, security and justice*" are beyond the competence expressly conferred. The EU legislator cannot automatically act justifying the action as being part of an objective

[33] See Articles 4-5 TEU.
[34] See Case 22/70 *Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1971:32.
[35] Cf. Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' [2011] German Law Journal Vol. 12 No. 03, pages 827-864.
[36] Case C-6/64 *Flaminio Costa v E.N.E.L* ECLI:EU:C:1964:66.
[37] Opinion 1/91 *Draft Treaty on the establishment of a European Economic Area 1991* ECLI:EU:C:1991:490.
[38] *Weatherill* (n 35), page 848.

of the Union. Even when the EU legislator are determined that power to act exists, the exercise of the power needs to be justified.[39] The Union and EU legislator do not have any *Kompetenz-kompetenz*, meaning that the EU legislator cannot give itself legislative competence, but can only act within the powers conferred from the Member States. To justify the power from the EU in a certain area, general or policy, one must find the legal basis for this exercise of power. The legal basis gives the Union the necessary competence to adopts legally binding acts within the assigned policy areas. The choice of legal basis is important every time the EU want to take action. Every proposal from the Commission need to have a legal basis in the Treaties, and the legal basis is also important for knowing the scope of the competence at hand. The legal basis decides what EU can do in a specific field, what kinds of objectives the EU can achieve and what objectives that can be decisive for new legislation.[40]

There are a vast amount of legal basis covering all fields of Union law, and depending on the field of law and policy interests within the legal basis there can be different legislative procedure. The choice of legal basis can be decisive for the power gain between the Member States and EU institutions depending on which procedure that applies, since the involvement of the Parliament and the construction of voting can be ones' side advantage but another sides disadvantage. With an ordinary legislative procedure, legislation can only be passed if there is a qualified majority in the Council and Parliament. With special legislative procedure, there is no need for qualified majority in the Council but there could be other safety mechanisms such as requirement of unanimity voting.[41] It is not always clear how to determine the correct legal basis for a measure as it is common with legislation serving various objectives. However, the choice must be based on objective factors such as the aim and the content of the measure. According to the case law from the CJEU there should first be a centre of gravity reasoning, and if it is not possible to find a centre for what objective weighs more, then there can in certain exceptional circumstances be a combination of legal bases.[42]

[39] See Article 5 TEU.
[40] See *Lenaerts and Van Nuffel* (n 27), pages 292 and 298.
[41] See Article 289 TFEU for the different legislative procedures.
[42] See eg. "Investment in Energy Infrastructure", Case C-490/10 *European Parliament v Council of the European Union* ECLI:EU:C:2012:525, para 46.

The choice of legal basis is a constitutional issue and can never be about the preference of the institutions. If a measure serves a twofold purpose or that it has a twofold component and one of them is identified as the dominant one, whereas the other is merely incidental, that measure must be based on a single legal basis corresponding to the main or predominant purpose of the measure.[43] For example, the EU legislator cannot legislate measures solely aiming for public health with Article 114 TFEU as a legal basis if the measure does not contribute to the establishment and functioning of the internal market. However, as long as a measure can be seen as contributing to the internal market objectives, the CJEU has settled that it is acting intra vires for the EU legislator even when public health is decisive for the choices made within that measure.[44] Of relevance for this thesis is how the EU legislator have been accused of legislating with incorrect legal basis to serve objectives widening the application of the legal basis beyond the scope and competence, as well as the CJEU interpreting such provisions beyond what is felt to be warranted.[45] Of special note should be the competence on public health. Even though public health is an objective of the Union expressly provided for in a number of provisions in the Treaties, but the EU legislator are prohibited from harmonising in this area.[46] In Article 168(5) TFEU it is stated that;

"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure […] may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States."

The exclusion of harmonisation in the field of public health is of importance for the further discussion on to what extent Article 114 TFEU can be the legal basis for

[43] Ibid, para 45.
[44] Cf. "*Tobacco Advertising II*"; Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union* ECLI:EU:C:2006:772, *Poland v European Parliament and Council* (n 2) *and Philip Morris* (n 2).
[45] Cf. *Craig* (n 16), page 408.
[46] See eg. Articles 9 and 168(1) TFEU.

objectives serving purposes outside traditional market-objectives. Since the EU in theory should not be able to harmonise in the field of public health, but public health still must be taken into account in all EU action, it is uncertain to what extent public health can permeate EU legislation adopted under Article 114 TFEU without the EU legislator acting ultra vires.

2.4 General principles limiting the competence of the EU legislator

Once the EU legislator is competent it is in essence free to regulate the product at issue as it seems fit. However, there are some additional restrictions for the EU legislator beyond that there need to be existence of competence and that the conditions in the chosen legal basis must be fulfilled. There are general principles of EU law which permeate all action from the EU institutions where the competences are shared.[47] This restriction is relevant when the content of a measure is assessed even though the measure itself has passed the conditions in the legal basis. Of special importance is the previous discussed principle of conferral together with the principle of proportionality, principle of subsidiarity and the fundamental rights as enshrined in the Charter. In Article 5(1) TEU it is stated that *"the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality*." In Article 6(1) TEU it is further stated that *"the Union recognises the rights, freedoms and principles set out in the Charter (…) which shall have the same legal value as the Treaties*." The different principles limiting EU action can be divided in principles limiting the *existence* and principles limiting the *exercise* of competence. The principle of conferral is limiting the existence of EU competence.[48] The institutions of the EU can thus not expand a legal basis beyond competence conferred. For a legal basis with a wide scope as Article 114 TFEU this can create conflict of competence depending on personal preferences on the scope of the EU competence in a certain field that affect – or may affect – the internal market. The Treaty is however clear, for competence to exist it must be conferred. Once competence exist, the exercise of this competence is limited by the principle of subsidiarity. The EU shall only exercise its competence in so far at the objectives of the proposed action cannot be sufficiently

[47] *Lenaerts and Van Nuffel* (n 27), page 112.
[48] See Article 5(2) TEU.

achieved by the Member States. The principle of subsidiarity thus functions as a filter between EU competence and the possibility to exercise that competence, limiting the action to measures better achieved at Union level. The principle was introduced since there was a worry in some Member States that they were going to be caught by EU measures restricting the Member States to frame their own policies, with the effect of loss of national sovereignty.[49] A further limit to the exercise of power is the principle of proportionality that permeates all EU and Member State action. The principle of proportionality requires a balance between the means used and the aim or result reached.[50] The CJEU often rule on the principle of proportionality as it is often invoked as a reason for judicial review for a measure. In accordance with the case law from the CJEU, the proportionality principle means that the EU institutions in their actions to safeguard the legitimate goals that are enshrined in the legislation at hand are fulfilled and that the EU institutions cannot go further than what is necessary to obtain these goals.[51]

2.5 The concept of harmonisation – different techniques

Harmonisation is not only realised by approximation of national legislation with a common legislative act on Union level. There is a distinction made between positive and negative harmonisation, which are two different forms of integration methods on how to attain market harmonisation. With positive integration, national norms are approximated with legislative acts such as directives and regulations with express legal basis in the Treaties. Negative integration is an indirect approximation of national norms with the case law from CJEU at heart.[52] This form of integration also functions as harmonisation since it is causing a deregulatory effect on the Member States when the CJEU are interpreting and developing the law.[53] The power to harmonise through

[49] See Article 5(3) TEU and *Lenaerts and Van Nuffel* (n 27), page 131.
[50] Ibid, page 141 and Article 5(4) TEU. See also subpara 1 in Article 5(3) TEU.
[51] The principle of proportionality can take different forms, for a strict assessment see eg. Case C-170/04 *Klas Rosengren and Others v Riksåklagaren* ECLI:EU:C:2007:313 and for a more lenient approach see Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* ECLI:EU:C:2008:85.
[52] See Article 19(1) TEU for the institutions constituting the European Judiciary.
[53] See Isidora Maletić, The Law and Policy of Harmonisation in Europe´s Internal Market (Edward Elgar Publishing 2013), page 1. For enlightening case law on how the CJEU has contributed to integration by a low threshold for when a quantitative restriction on trade is at hand, see Case C- 8/74 *Procerur du Roi v Dassonville* ECLI:EU:C:1974:82, para 5 where the criteria ”indirect, factual or potential hinder to trade in the Union” was first set.

positive integration is thus the power to adopt legislative acts and the possibility to supplement them by non-legislative acts. How and to what extent the EU legislator can and should regulate certain areas of law can differ from minimum harmonisation to full harmonisation. Full harmonisation offers the most far-reaching method of the approaches available, aiming for predictability and coherence between the Member States legislation it replaces diverse national provisions with one common EU standard. The trend in Article 114 TFEU is set for exhaustive harmonisation, giving less room for the preservation of regulatory autonomy and experimentation.[54] However, there is no exclusion for minimum harmonisation.[55]

To set common standards for the 28 Member States is a difficult balancing task. The balance between combining a standard that enables free movement and competition but still respects national systems and public opinion can take years to negotiate. Fully harmonised directives have been adopted especially in the field of goods. The directives always consist of two clauses, one free movement clause and one exclusivity clause to secure the goods to move freely between Member States.[56] With legislation providing for a free movement clause, the Member States are prevented from enforcing a higher standard than what is offered in the area of law that is governed. When an area has been fully harmonised, the possibility for the Member States to invoke derogations and mandatory requirements is limited. The negotiation process is hence of outmost importance as it enables the Member States to work for that important objectives is taken into account. The need for smooth functioning and effectiveness when negotiating new secondary legislation in combination with the far reaching consequences for Member States once full harmonisation is enacted, makes it important that the conditions in the legal basis is surrounded by a clear set of tools for interpretation and application of the existence and exercise of competence for the EU legislator within the legal basis.

[54] *Maletic* (n 53), page 175.
[55] *Barnard* (n 1), page 600.
[56] Ibid, page 658 f.

3 Harmonisation and the application of Article 114 TFEU in theory

3.1 The historical context and need for a new legal basis

The realisation of a single market long struggled with the issue on how to get things done, since the legal bases provided required unanimous voting.[57] The answer came in 1986, with the Single European Act. With this act a new legal basis that did not require unanimous voting was created, namely Article 100a in the Treaty establishing the European Economic Community (EEC Treaty) serving as a general legal basis for the attainment of the single market with qualified majority voting. This was the beginning for what we know today as Article 114 TFEU. Article 114 TFEU is serving as the main legal basis for acts aiming to the establishment and functioning of the internal market, and is functioning with an ordinary legislative procedure.[58]

The legal framework to realise the internal market has thus long been in place. Today's debate has primary focus on the effectiveness and impact of EU regulation, something that has been called the *management* of the internal market and the *partnership* between EU institutions and national authorities.[59] It is thus not the existence of competence in the field of internal market that causes most trouble, but the exercise of this competence. Already in the early 90's the CJEU referred to the predecessor to Article 114 TFEU as the principal legal basis for the internal market.[60] Article 114 TFEU is, at least if saluting extensive legislative integration, a success story and is, as mentioned above, today serving as the most important legal basis for measures relating to the internal market. AG Jacobs catches the broad nature of Article 114 TFEU as follows; *"the deployment of Article 114 FEU generally leads to community legislation touching the most diverse areas of national law."*[61] With the wide interpretation in addition offered by CJEU, Article 114 TFEU is a centralised paradigm of market harmonisation.[62]

[57] The equivalent of today's Articles 115 and 352 TFEU.
[58] *Barnard* (n 1), page 634 f.
[59] *Maciejewski* (n 21), Accessed September 27, 2016.
[60] Case C-350/92 *Kingdom of Spain v Council of the European Union* ECLI:EU:C:1995:237 para 35.
[61] See Case C-350/92 *Kingdom of Spain v Council of the European Union* ECLI:EU:C:1995:64, Opinion of AG Jacobs, para 26 and *Maletic* (n 53), page 2.
[62] *Maletic* (n 53), page 38.

3.2 Article 114(1) TFEU; the establishment and functioning of the internal market

When turning to the application and interpretation of Article 114 TFEU it is paragraph one that is in centre for the purpose of this thesis. In Article 114(1) TFEU it is stated that:

"Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, 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."

Already from the wording in Article 114(1) TFEU there are several conditions for its use recognised. *"Save where otherwise provided in the Treaties"* refers to that Article 114 TFEU is a general legal basis where resort can be made when no other specific legal basis applies.[63] That Article 114 TFEU is a general legal basis does however not mean that it gives the EU legislator a general competence to regulate the internal market. When reading further, approximation of laws with Article 114 TFEU as a legal basis is read to only be possible where the measure has as an object the establishment or functioning of the internal market. The provision is broad, greatly due to the reference to Article 26 TFEU, making the scope of Article 114 TFEU to cover the achievements laid out there, such as the broad definition of the internal market as an; *"area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*". Regardless of the broad nature of the conditions in Article 114 TFEU and the broad nature of the objectives referred to therein, Article 114 TFEU serves as a general basis for powers for approximation of legislation[64], it does not constitute a general power on the EU to regulate the internal market.[65] It is not enough that mere finding of disparities between national legislation can be found to be able to recourse to Article 114 TFEU as a legal basis, this is regardless that these

[63] *Barnard* (n 1), page 634 and Case C-533/03 *Commission of the European Communities v Council of the European Union* ECLI:EU:C:2006:64, para 45.
[64] Legislation is for the purpose of this thesis, even though approximation can be done through other measures.
[65] *Lenaerts and Van Nuffel* (n 27), page 298.

disparities can affect the internal market. The distinction is important in this thesis, since the lack of general power in relation to the broad nature of Article 114 TFEU give rise to conflict of interest concerning what the legitimate objectives within Article 114 TFEU are. This conflict is deeply connected to the question of competence, as it is not always predictable to what extent Article 114 TFEU can be the basis for measures pre dominantly serving non-market objectives. Commentators have expressed concern for the *"apparent trend towards extending the use of the internal market Treaty legal basis, Article 114 TFEU, to matters beyond what we believe to be within its scope"*.[66] However, the lack of clarity has been discussed to occur already in the assessment on the EU legislators scope of competence for the purpose of the article and not only for the application and interpretation of the conditions therein. It is a difficult task to without subjectivity examine when the constitutional limits for recourse to Article 114 TFEU are met. In the words of Craig; *"the legitimate ambit of Article 114 TFEU has never been easy to discern."*[67]

3.2.1 The case law as guiding light for objectives within Article 114 TFEU

Due to the broad nature of Article 114 TFEU, it is necessary to turn to the case law from CJEU for interpretation of the conditions therein. The settled case law from CJEU concerning recourse to Article 114 TFEU gives a number of conditions that needs to be fulfilled when a contested measures validity is dependent on that Article 114 TFEU is the correct legal basis. As previous mentioned, there must be differences between Member States provisions, but a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 114 TFEU. The differences between Member States provisions should be such as to obstruct the fundamental freedoms and thus has a direct effect on the establishment and functioning of the internal market.[68] It

[66] Response by the General Council of the Bar of England and Wales to the Government's synoptic review of the balance of competences as between the EU and the UK in the area of the Internal Market 'Response to Internal Market Synoptic review, Article 114 TFEU – an expanding legal basis?' [2013] <http://www.barcouncil.org.uk/media/207724/bar_council_of_ew_internal_market_synoptic_review_-__the_expansion_of_Article_114_legal_basis.pdf> Accessed October 12, 2016.

[67] *Craig* (n 16).

[68] *Tobacco Advertising I* (n 4), paras 84 and 95, *Arnold André* (n 2), para 30, *Tobacco Advertising II* (n 44), para 37, *Swedish Match* (n 5), para 29, Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco "BAT"* EU:C:2002:741, paras 59 and 60 and Case C-58/08 *Vodafone and Others* EU:C:2010:321, para 32.

is also possible for the EU legislator to take action with measures aiming to prevent the emergence of future obstacles to trade, resulting from differences in the way national laws have developed. The emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[69] There is also a verification from the CJEU whether the distortion of competition which the measure purports to eliminate is appreciable. To not demand that distortion of competition needs to be appreciable would be action contrary to the principle of conferral.[70] The appreciable demand was first requested in *Tobacco Advertising I*[71], and the criteria has been used only concerning distortion of competition and not for the criteria that there need to be obstacles to trade. Since distortion of competition is not expressly mentioned in Article 114 TFEU, the use of the appreciable criteria can be seen as a safety mechanism for the article not to be used for general regulation of the internal market.

The lack of appreciable criteria for obstacles to trade is however not due to the lack of attempt of parties challenging the validity of measures under Article 114 TFEU to invoke it. There has been argumentation for that even obstacles to trade must be appreciable for Article 114 TFEU to apply. So far, such attempts have been unsuccessful.[72] Measures for prevention of distortion is not either a criterion that needs to be met in the wording of Article 114 TFEU. For this reason, the CJEU generally stops its assessment once an obstacle to trade has been found to legitimise the use of Article 114 TFEU, not continuing to the assessment on distortion of competition. Hence, once established an obstacle to trade, there is no necessity to prove distortions of competition.[73] The concept of measures that has as their object the "establishment and functioning of the internal market" is thus not a concept without limitations, but the limitations are broad and there is need for an individual examination of the objectives and effects of the measure at hand.

[69] *BAT* (n 68), para 61, *Arnold André* (n 2), para 31, *Swedish Match* (n 5) para 30, *Tobacco Advertising II* (n 44), para 38 and *Vodafone and Others* (n 68), para 33.
[70] See eg. Kathleen Gutman, The Constitutional Foundations of European Contract Law: A Comparative Analysis (OUP 2013), page 329 and *Tobacco Advertising I* (n 4), para 107.
[71] *Tobacco Advertising I* (n 4).
[72] Ibid, paras 29-31. In the case Germany argued for that the appreciable condition should also apply to obstacles to trade, a reason the CJEU did not follow.
[73] Eg. *BAT* (n 68), para 60.

When it comes to what objectives that can be taken into account within Article 114 TFEU the CJEU has stated that; provided that the conditions for recourse to Article 114 TFEU are fulfilled, the EU legislator cannot be prevented from relying on that legal basis on the ground that an interest such as public health protection is a decisive factor in the choices to be made.[74] In *British American Tobacco "BAT"*[75] the CJEU stated that*;*

"progress in scientific knowledge is not (…) the only ground on which the EU legislature can decide to adapt EU legislation since it must, in exercising the discretion it possesses in this area, also take into account other considerations, such as the increased importance given to the social and political aspects of the anti-smoking campaign".[76]

A statement that by academics have been seen as clearly suggesting that the case law developed so far on Article 114 TFEU may be extended by analogy beyond tobacco to justify EU action in areas of other harmful lifestyle choices.[77] The CJEU has also referred to the wording in Article 114 TFEU on *"measures for the approximation*" to highlight the broad nature of the Article, meaning the intentions of the authors of the Treaty to confer discretion to the EU legislator.[78] Article 114 TFEU refers directly to a certain discretion for the EU legislator, but this is limited to *"particular in fields with complex technical features."* The interpretation by the CJEU is however showing a development to a wide discretion for the EU legislator also in other complex policy areas.[79]

3.2.2 A need for purely economic nature?

In a traditional sense a measure having as their object the establishment and functioning of the internal market is a concept connected to the facilitation of trade and economic prosperity. However, the CJEU has clearly neglected that measures need to be of economic nature or contributing to trade to be vital for the internal market. In

[74] Ibid, para 62, *Arnold André* (n 2), paras 32-33, *Swedish Match* (n 5), paras 31-32 and *Tobacco Advertising I* (n 4), paras 39-40.
[75] *BAT* (n 68), para 60.
[76] Ibid, para 80.
[77] Alberto Alemanno and Amandine Garde, 'The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets' [2013] C.M.L.Rev. 50, pages 1745-1786.
[78] See eg. *Tobacco Advertising II* (n 44), para. 42 and Case C-270/12 *United Kingdom* v *Parliament and Council* EU:C:2014:18, para 102.
[79] Eg. *Swedish Match* (n 5).

Lindquist[80] a person had violated Swedish data protection laws stemming from Union law. In the case it was held that referring to various persons on an internet page and identifying them either by name or by other means constituted processing of personal data by automatic means within the meaning of Union law. The directive in question, on data protection[81], was enacted with what is now Article 114 TFEU and the question arose on the connection of the case with the internal market, since the circumstances of the case lacked economic or trade promotion nature. Lindquist had posted on the non-profit sectors of a church's website, which the criminal proceeding covered, and was not acting in any economic gain. According to CJEU the existence of economic gain is not decisive for the applicability of Article 114 TFEU. It is not necessary that all the provisions in a directive are linked to the internal market as long as the conditions in Article 114 TFEU are fulfilled when the directive is adopted. A reasoning later recognised in *Tobacco Advertising II*[82] where a tobacco advertising directive was ruled valid by the CJEU even though various provisions were serving twofold purposes.[83] There have been further attempts to annul measures adopted with Article 114 TFEU due to certain provisions not contributing to trade. The CJEU has however not followed this line of argumentation, standing by that all the provisions in a measure does not need to contribute to trade. A justification for the broad discretion to validate provisions even when not serving market objectives has further been that such provisions can be necessary to mitigate the possibilities to circumvent prohibitions laid out.[84]

3.3 The underlying rationale – economic integration and welfare protection

It is not only in the interpretation of measures already enacted with Article 114 TFEU where discussion of the need, or no need, for an economic nature can be found. To analyse the underlying rationale of the article one can first turn to the wording itself. The first impression examining the wording in Article 114(1) is that of economic integration. The wording allows for a variety of measures to be adopted. When

[80] Case C-101/01 *Criminal proceedings against Bodil Lindqvist* ECLI:EU:C:2003:596.
[81] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ 1995 L 281, p. 31.
[82] *Tobacco Advertising II* (n 44).
[83] Cf. *Lindqvist* (n 80), paras 39-40 and *Tobacco Advertising II* (n 44).
[84] See eg. in the recent case *Philip Morris* (n 2), para 131.

measures are aimed at products, it is easy to connect harmonised standards on product requirement to an internal market effect. There is always a risk that national products are liable to limit cross border trade within the Union when traders are forced to adapt their products depending on the legislation in the Member States.[85] However, academics have also used the broad wording of Article 114(1) TFEU in comparison with Article 114(3) TFEU to show that the overall scope of the article may not be restricted to economic or internal market interest alone. In Article 114(3) it is expressly referred to a high level of protection for public health. That non-market objectives can be decisive for legislation enacted under Article 114 TFEU is not per se contrary to market integration. There is a difference depending on what the approach of the measure is. For example, a solely preventive measure that seeks non-market objectives would have it hard to meet the conditions in Article 114 TFEU, even if it would be a public health measure having a mainstreaming clause in Article 114(3).[86] But since Article 168(5) precludes public health harmonisation, the measures adopted under Article 114 TFEU needs something more than a general preventive legislation. If the measure has substance control, with product centred rules, it can be argued to belong to Article 114 TFEU since it helps products to flow freely with common standards, even if these standards seek to improve public health.[87]

According to *Kosta*[88], legislation can favour non-market objectives and even restrict trade but still be correctly based on Article 114 TFEU. The explanation for this can be found inter alia in the co relation between positive and negative integration. When a measure for harmonisation is adopted, different interests are always weighed. This is the same procedure that goes for the positive integration in free movement law, where the head rules on free movement corresponds to the derogations. This balancing can be suggested to be the same for the EU legislator as it is for the CJEU. *Kosta* even suggests that the EU legislator have more scope of discretion, since it is not bound by the structure provided in the free movement provisions where the economic-objectives is

[85] *Alemanno* (n 77), page 161 and *BAT* (n 68), para 64.
[86] This is irrespective of that Article 114(3) is mirroring the public health provision in Article 168 TFEU on that a high level of public health should permeate all EU action.
[87] *Alemanno* (n 77), page 159.
[88] Vasiliki Kosta, Fundamental Rights in EU Internal Market Legislation (Hart Publishing 2015).

the head rule, and first after a finding of a breach of a free movement there an assessment of if a derogation is applicable that favour non-market objectives.[89] As an example is *Alliance for Natural Health*, where equal weight seems to be given for public health and economic reasoning.[90] However, the case was not so far reaching since it did not ban a final product to enter the market, but solely banned certain ingredients in a product with possibilities for manufacturers to change the ingredients. With an analogy of this reasoning, it has even been discussed that non-market objectives not expressly mentioned in Article 114 TFEU, such as fundamental rights, after a balancing act can fall within Article 114 TFEU. This expansion has been suggested even if the measure disfavours trade. As there is no express mentioning of fundamental rights in Article 114 TFEU, and no express article for fundamental rights as Article 168 TFEU for public health, such an expansion is unlikely to follow the underlying rationale of Article 114 TFEU. *Weatherill*[91] does not agree with the extensive suggestions for Article 114 TFEU but targets the expanding nature of Article 114 TFEU in a more negative manner. He presents a stricter view on the underlying rationale that should be market integration, where guidance in relation to market-objectives is needed for the interpretation of measures having as their object the establishment and functioning of the internal market. The general principles cannot as such expand the EU legislator competence and give rise to *kompetenz-kompetenz,* even though it can be seen as an interesting suggestion that the EU legislator could link a competence on the basis of argumentation on the principles on which the Union is founded, among them fundamental rights.[92]

The division of competence is as discussed not clear when it comes to Article 114 TFEU. We know that there need to be more than disparities between Member States legislation for Article 114 TFEU to apply, and we know that it is in theory not a general power for the EU legislator to adopt measures only with reference to the internal market. However, there is a wide margin of discretion. But regardless the functional character

[89] *Kosta (n 88)*, pages 23-24.
[90] Joined cases C-154/04 and C-155/04 *Alliance of Natural Health and Others* ECLI:EU:C:2005:199, Opinion of AG Geelhoed.
[91] *Weatherill* (n 35).
[92] Cf. *Kosta (n 88)*, page 25.

of Article 114 TFEU, and regardless the wide discretion, there is no general power.[93] To open up Article 114 TFEU to objectives by linking them to values upon which the Union is founded also opens up for it to be a general legal basis expanding the competence far from the rationale of the article. That being said, there is a general reference to certain non-market objectives in Article 114 TFEU and there are values upon which the Union is founded which should permeate all action from the EU legislator. Welfare protection is thus not in itself an objective for adopting measures with Article 114 TFEU, but it is a part of it.

3.4 Outright bans and market integration

Previous discussions have focused on what objectives can be taken into account within Article 114 TFEU. Taking it a step further it is of vital interest for this thesis to see how these objectives are forming legislation and provisions – and especially how product bans corresponds to the underlying rationale of Article 114 TFEU. At first sight such a ban could be described as odd due to the market making rationale of the internal market. To eliminate the entire market for a product is difficult to combine with the free movements that is referred to in Article 114(1).[94] However, as we have seen it is not only market making rationale that is of importance for the purpose of Article 114 TFEU. Regardless of the various objectives possible to take into account, it is still the most far reaching form of approximation under Article 114 TFEU when there is a measure enacted that bans a product to entry the market at all. *Barnard* discusses that the wider range of measures allowed under Article 114 TFEU, even prohibiting the marketing of products, might *"appear to fly in the face of a single market in goods"*.[95] Some academics do not agree but finds that product bans could be part of a greater good for the internal market. However, it must be bared in mind the personal agenda for what interests are considered to be within the competence of the EU legislator and hence in the scope of Article 114 TFEU. Advocates of extensive application of non-market objectives in internal market law finds arguments for their cause, as well as more cautious academics

[93] Ibid.
[94] Cf. *Barnard* (n 1) and *Alemanno* (n 77), page 167.
[95] Catherine Barnard, Competence Review: the internal market [2013], page 30 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf> Accessed November 12, 2016.

in this regard do. *Alemanno* discusses that even though it could seem odd with product bans within Article 114 TFEU, there is no contradiction per se between product bans and the internal market.[96] This view is further supported by *AG Jacobs*, explaining that product bans is a way for the internal market measures to achieve its ultimate goal, that being a single market.[97] *Weatherill* on his hand explains the correlation between product bans and the internal market almost as a necessary evil. A ban on certain products can facilitate free movement of the class of products to which the banned products belongs.[98] *Alemanno* follows a similar line of argumentation, describing that many products can be replaced, and to determine the market effect of the ban one must see if there is a common quality for the banned and the unbanned product. If there is a combination of bans and restrictions this could be accepted for the sake of a wider initiative aimed at regulating certain classes of products and certain bans of class members can thus be permissible under Article 114 TFEU.[99]

When concluding that the underlying rationale of Article 114 TFEU both take into account market and non-market objectives, the issue on product bans is no longer an issue when the ban all in all facilitate trade within that product category. However, there is still no certainty where the limits for non-market objectives within Article 114 TFEU goes, and this uncertainty opens up to discussion and suggestions expanding the scope of Article 114 TFEU beyond the competence of the EU legislator in a certain field. As the concept of the internal market is broad, the legal basis would in practise be unlimited if the conditions in Article 114 TFEU allows non-market objectives to per se contribute to the internal market. A comparison can be made with the prohibitions on quantitative restrictions on the free movements of goods where there are strict requirements of what measures the Member States can take regarding product requirement and the marketing of products.[100] A reasonable conclusion is that the same strict requirements should be set for the EU legislator. Considering that market integration is the

[96] *Alemanno* (n 77), page 168.
[97] Case C-187/93 *European Parliament v Council of the European Union* ECLI:EU:C:1994:265, Opinion of AG Jacobs, para 44.
[98] *Weatherill* (n 35), page 837.
[99] *Alemanno* (n 77), page 168.
[100] See eg Article 28 TFEU.

predominant objective for the internal market it should not be enough that a product ban eliminates previous different product requirements in the Member States. This reasoning further corresponds to the settled criteria that it is not enough with mere disparities between Member States legislation for recourse to Article 114 TFEU. For a total ban of a product to be considered a measure that object to the establishment and functioning of the internal market there need to be a counterbalance that other products in that product class are enabled to flow freely. There should further be an assessment that the other products within this product class should not be able to flow freely without the ban due to development of disparities for products within that product class in the Member States. For the sake of free movement, it would not be sustainable that an outright ban on products are legitimised only through the fact that the product in question are regulated differently in the Member States. For the ban to be proportional it must at least be adjustments aiming to that products that already exist on the market can flow freely.

An alternative is also product bans by reason not relating to the internal market, for example that a policy or public interest reason prevails over the negative impact on trade. Such reasoning would traditionally not fit under Article 114 TFEU but belongs to other sector specific legal bases. However, in the following chapter case law will be examined that opens up for the view that product bans even could be legitimised with Article 114 TFEU both for reason of market and non-market objectives.

4 A practical outlook: case studies on the application of Article 114 TFEU

4.1 The early years: public health and Article 114 TFEU

In Article 114(3) it can be read that;

"The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective."

When reading Article 114 TFEU together with the competence for public health in Article 168 TFEU[101], that is excluding harmonisation, there is a contradiction in competence. However, this contradiction is not absolute and depends on the view on how the EU legislator should handle measures serving twofold purposes both on constitutional and policy level. As learned from the previous chapter, it is not always clear what threshold should be set for determining when a measure predominantly pursues market-objectives and when it predominantly pursues non-market objectives. In the following case studies these questions are addressed with special regard to public health.

4.1.1 Tobacco Advertising I: the cautious beginning

In the well-known case *Tobacco Advertising I*[102] a directive targeting tobacco advertising, enacted under Article 114 TFEU, was successfully challenged and annulled.[103] The case provided for interesting insight on the scope of Article 114 TFEU, exploring the outer limits of the article as Germany brought an action of annulment claiming that the directive had been enacted ultra vires, outside the competence, of the EU legislator. Germany argued successfully that Article 114 TFEU had been used as a legal basis for a directive not fulfilling the conditions on the need for the provisions to object to the establishment and functioning of the internal market. The directive in question

[101] The provision solely pursuing public health objectives where harmonisation is excluded.
[102] *Tobacco Advertising I* (n 4).
[103] Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products OJ 1992 L 213.

prohibited all advertising for tobacco products and sponsoring, a prohibition aiming more for the protection of public health than for the improvement of the internal market according to Germany. The case thus set the objective of public health against the freedom to promote tobacco, prompting the CJEU to assess if the directive was correctly enacted under Article 114 TFEU or if it was public health legislation in disguise. The CJEU made a thorough investigation on in which circumstances recourse to Article 114 TFEU is possible. The measure in question must *genuinely* intend to improve the conditions for the establishment and functioning of the internal market, and actually have that *effect*.[104] Once this is settled, the measure must further contribute to the elimination of *likely obstacles* to the exercise of fundamental freedoms, or where legislation contributes to the removal of *appreciable distortions* of competition which are *likely to arise* from the diverse national rules.[105] Germany was concerned that the EU legislator had regulated in a policy area where they explicit lack competence and where there is an absence of a legal basis. A measure cannot be based on Article 114 TFEU solely for regulating public health issues, since public health as such is a supportive[106] power where harmonisation is excluded.[107]

The Commission however held that the directive was about the functioning of the internal markets, since it replaced diverse national rules with a common standard. If there is no regulation on EU level, the Member States will have their own rules impeding the development of a single market. The Commission continued to argue that there is a risk that Member States, without a common standard, have different conditions for market access. Such different conditions for market access, inter alia product requirements, can affect the internal market negatively, as for example by creating comparative advantages and situations where magazines need to change their advertising for tobacco when crossing borders. Even though Article 168 TFEU expressly precludes harmonisation, the Commission was of the opinion that since all proposals from the Commission must take as a base a high level of protection, there is support in

[104] *Tobacco Advertising I* (n 4), paras 83-84.
[105] *Barnard* (n 1), page 638.
[106] That a power is supportive means that the Member State have exclusive competence in the field. The Union can provide for support and co-ordination, but not harmonisation. See Article 6 TFEU.
[107] See Article 168 TFEU.

the Treaty text itself that provisions can aim at the protection of human health and still be enacted with Article 114 TFEU.[108]

The CJEU reasoned as follows from the perspective of free movement for press products; for the criteria on distortion on competition, the CJEU recalled that the distortion need to be significant for Article 114 TFEU to apply. This can be the case when rules between Member States on for example sponsorship is different, making big events such as Formula 1 to go to another country that offers better rules. That the CJEU reasoned from the perspective of ensuring the free movement of press products, but this did not mean that everything in the directive was claimed invalid.[109] The CJEU accepted the strict regulation for the advertisement of tobacco products in magazines and newspapers, since diverse national rules in this field of business could be tied to a likely emergence of diverse national rules. However, the CJEU in its ruling took a more cautious approach and annulled the directive as it in various part did not have enough of a connection with the internal market. All the EU institution had supported the directive, but the opinion of Germany prevailed. It is further implied through the judgment that the directive, when lacking link with the internal market, constituted of parts where the EU legislator had acted outside its competence. There was not enough of a link between the directive and the establishment or functioning of the internal market. Disparities in Member States legislation are not enough for recourse to Article 114 TFEU, there must be obstacles in the present or the future that pose a real threat to the internal market and the Commission had not shown this in the case. All in all, the directive went too far, regulating areas that did not sufficient object to the establishment and functioning of the internal market. The Directive prohibited advertising on posters, parasols, ashtrays and other products used by hotels, restaurant and cafés. Such products have less connection to intra state trade and to put strict product requirement could not be shown to facilitate trade. By academics, such requirement has rather been discussed as being a way to smuggle measures of public health policy into the Official Journal.[110]

[108] See eg. Articles 114(3), 168(1) and 9 TFEU.
[109] All provisions in the directive were examined, but even though some of the provisions fell inside the scope of Article 114 TFEU the directive was decided to be annulled and replaced as a whole.
[110] For further elaboration of this criticism see *Weatherill* (n 35), page 829.

Tobacco Advertising I provided much needed guidance on the, even if now broadened, scope of the conditions in Article 114 TFEU. The case was clear cut on circumvention because of policy agenda where the CJEU stated that: *"another article of the Treaty could not be used as a legal basis in order to circumvent the express derogation of harmonisation laid down in Article 168(5) TFEU."*[111] To use Article 114 TFEU for such a policy agenda where there is no real link to the internal market would be to expand Article 114 TFEU towards a general legal basis. In the words of CJEU, such expansion would be "a *breach of the express wording in the Treaty and incompatible with the principle of conferral in Article 5(1) TEU*."[112]

After the annulment, the directive was later replaced in its entirety with new and reworked provisions.[113] Germany once against – this time unsuccessfully – brought an action for annulment in the case known to be *Tobacco Advertising II.* In *Tobacco Advertising II* the directive had been reworked to fulfil the conditions in Article 114 TFEU as interpreted by the CJEU in *Tobacco Advertising I*.[114] However, *Tobacco Advertising I* offered a much more cautious approach on the scope of Article 114 TFEU than in *Tobacco Advertising II*.[115] The explanation can be found both in the development of the provisions in the new directive, making it less intrusive for the advertisement business but also in the development of the case law from CJEU. As for the directive, one important difference between the content was that in the renewed tobacco advertising directive there was a free movement clause. A free movement clause guarantees that when products or services comply with the secondary legislation, Member States shall not prohibit or restrict the free movement of those products or services.[116] The former, annulled, directive did not only lack such a clause but also contained a safeguard clause that could affect trade even for measures complying with the directive. The annulled directive further did not preclude Member States from laying down such stricter

[111] *Tobacco Advertising I* (n 4), para 79.
[112] Ibid, para 83.
[113] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 2003 L 152.
[114] *Tobacco Advertising II* (n 44).
[115] *Tobacco Advertising I* (n 4) and *Tobacco Advertising II* (n 44).
[116] See Article 8 in Directive 2003/33/EC (n 113).

requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.[117] In the academic debate the addition of a free movement clause and removing of the safe guard clause have been suggested to be one of the main reasons for why the renewed directive in opposite of its foregoer was claimed valid by CJEU.[118]

4.1.2 British American Tobacco

The years to come after *Tobacco Advertising I*[119] brought several cases to the CJEU on the scope of Article 114 TFEU. One of the first well-known cases was *BAT*[120] where the validity of *Directive 2001/37*[121] was upheld despite the view of British American Tobacco and Imperial Tobacco claiming that the directive, primary aiming for the protection of public health, had been wrongfully adopted on the basis of Article 114 TFEU.

Before turning to the CJEU's ruling recall to the opinion by AG Geelhoed provides for interesting insight on the scope of Article 114 TFEU. The opinion by AG Geelhoed has by academics been described as *"spelling out clear in BAT what the conditions in Article 114(1) TFEU means."*[122] According to AG Geelhoed the issue boils down to that if and when a potential barrier to trade arises the Union must be in a position to act, and Article 114 TFEU has the opportunity to give this power. AG Geelhoed further reasoned that when determining such power, there is no conclusive significance to whether the barrier to trade, once found, also is the principal reason for action. This finding does not either change by the fact that there are specific powers under the Treaty within defined policy areas.[123] The view by AG Geelhoed finds support already in earlier case law from the

[117] See Article 5 in Directive 98/43/EC (n 103).
[118] See eg. *Gutman* (n 70), page 332 f.
[119] *Tobacco Advertising I* (n 4).
[120] *BAT* (n 68).
[121] Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products OJ 2001 L 194.
[122] *Kosta* (n 88), page 22.
[123] Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* ECLI:EU:C:2002:476, Opinion of Ag Geelhoed, paras 100-101.

CJEU, such as the judgment in *Biotechnology*[124], concerning the promotion of research and genetic engineering with the basis of Article 114 TFEU. In the case the CJEU made it clear that recourse to Article 114 TFEU is legitimised in a wide range of fields as long as the effect of the measure is that the conditions in Article 114 TFEU are fulfilled.[125] Hence, if a public health measure object to the establishment and functioning of the internal market recourse to Article 114 TFEU is justified. Such extensive view on Article 114 TFEU can be controversial if used as a way for the Union to extend their competences in policy areas involving national sensitivities. The Treaties have expressly precluded the power to harmonise in policy areas where influence from the Union not is desired. Once legislation has been harmonised, the Member States in practice lose the possibility to amend and replace national rules covered due to the primacy of Union law.[126] It is thus of vast importance that Article 114 TFEU not is used to circumvent the limitations of powers set out in the Treaties. Connected to this, AG Geelhoed continues in his reasoning and identifies that even if there is power under Article 114 TFEU, the exercise of this power is not unlimited. Even if a barrier to trade is found, the CJEU may assess whether the EU legislator has exercised the powers conferred to it, and not beyond. In the words of AG Geelhoed;

"This assessment will in every case involve the question of the extent to which the measure is in fact intended to safeguard a public interest recognised by Community law. The court will accordingly examine whether the intervention of the legislature in a given case is genuinely appropriate for contributing to the removal of the barrier to trade. Possible misuse of the powers conferred by the Treaty may also be addressed, as can the other principles of law mentioned by the High Court in the questions which it has submitted. The principles of law are dealt with below in the present opinion."[127]

It is thus not enough with merely a barrier to trade for the Union to find competence within Article 114 TFEU. A measure must object to the establishment and functioning of the internal market and it must also be genuinely appropriate for contributing to the

[124] Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* ECLI:EU:C:2001:523.
[125] Ibid, paras 27-28.
[126] *Lenaerts and Van Nuffel* (n 27), page 296.
[127] *BAT* (n 123), Opinion of AG Geelhoed, paras 100-101.

removal of the barrier to trade. The CJEU did after reasoning dismiss the applicants claims and held that Article 114 TFEU constituted a valid legal basis for the directive. The CJEU thus relaxed the requirement on positive effects on trade, and aimed for a more effect based analysis on if the measure genuinely intended to improve the conditions for the establishment and functioning of the internal market.[128]

4.1.3 Swedish Match and Arnold André: an expansion to outright bans

As learned from previous chapters, once the EU legislator have competence, it is in essence free to regulate the product at issue as it seems fit. Such regulation can aim for the fulfilment of other objectives than the internal market as long as the measure object to the establishment and functioning of the internal market. In *Swedish Match*[129] and *Arnold André*[130], The CJEU took yet another step of widening the scope of Article 114 TFEU. For the purpose of Article 114 TFEU, the CJEU found that product requirements can constitute everything from full liberalisation on the market, to an outright ban. In *Swedish Match*[131] the manufacturer of a traditional Swedish tobacco product for oral use, "snus", wanted to get access and place the product on the United Kingdom market. In the similar proceeding *Arnold André*[132] a company wished to import "snus" and put it on the German market. Due to a directive[133] transposed in national legislation, both companies were hindered of putting "snus" on the market since the directive contained a prohibition on the marketing of tobacco products for oral use in the Member States. Asking for a preliminary ruling before English and German courts the companies claimed that the directive breached Union law, inter alia because the directive wrongly had been enacted with Article 114 TFEU as a legal basis.

In *Swedish Match*, the CJEU in essence split the analysis in two. First examining whether the conditions in Article 114 TFEU are fulfilled for the measure as a whole and once this was determined, an analysis of the content of the measure at hand. For the first part of

[128] *BAT* (n 68).
[129] *Swedish Match* (n 5).
[130] *Arnold André* (n 2).
[131] *Swedish Match* (n 5).
[132] *Arnold André* (n 2).
[133] *Directive 2001/37/EC* (n 121).

the analysis it is as learned from previous case law enough that diverse legislation between the Member States is identified, and that this diversion results in an actual or potential obstacle to trade or an appreciable distortion of competition. As long as these conditions are fulfilled the measure is decided, with the restrictions of general principles of Union law, to object to the establishment and functioning of the internal market, and the EU legislator is then free to take appropriate measures regardless how sensitive the issue. For the first part of the analysis the CJEU reasoned that when there are obstacles to trade because the Member States have taken, or are about to take, divergent measures regarding a product, such as different level of protection for public health, these divergent measures prevent the products from moving freely. When such a risk is identified, it is hence justifiable that the EU legislator intervenes. Once the EU legislator are considered to have competence to regulate the issue there is a broad discretion for the measure chosen. For the "snus" this could mean everything from an outright ban, a full liberalisation or an over regulation. There are however some limitations even when a measure has been decided to fall inside the scope of Article 114 TFEU. According to Article 114(3) the measure must take as a base a high level of protection concerning health, safety, environmental protection and consumer protection. For a product such as "snus" this restriction is of less importance since the outright ban inter alia stems from public health concerns on the use of tobacco products. Further restrictions are the general principles of EU law, as proportionality, subsidiarity and fundamental rights. It seems however that once a measure falls within the scope of Article 114 TFEU, the restrictions hardly have any bite. As seen in *Meyhui*[134] the prohibition of quantitative restrictions and of all measures having equivalent effect in theory not only applies to national measures, but also measures adopted by the EU institutions. In practise however, this is not a limitation that affects the validity of a measure due to a broad margin of policy discretion.[135]

When *Swedish Match* and *Arnold André* reached the CJEU, the case law on the validity of measures serving two-fold objectives with Article 114 TFEU as legal basis still glanced back at the successful action for annulment in *Tobacco Advertising I.* The CJEU has

[134] Case C-51/93 *Meyhui NV v Schott Zwiesel Glaswerke AG* ECLI:EU:C:1994:312, para 11.
[135] *Swedish Match* (n 5), para 48.

however, as seen in for example *Swedish Match* and *Arnold André*, opted for a more generous approach on the discretion for the EU legislator on how banning a product corresponds to the aim of a single market. AG Geelhoed admitted concerns for banning market entry in *Arnold André*, discussing that when a product is banned on the EU market, the existence of a lawful market for those products becomes impossible.[136] The total ban of a product is something else than in *Tobacco Advertising I* and *II*, it is a more direct and far reaching method for pursuing public health objectives. *Barnard* points out that, the ordinary for the EU legislator would be to set minimum standards to enable goods to flow freely, not to proceed with an unconditional EU wide ban.[137] AG Geelhoed again provides for interesting reasoning on this matter, arguing that an EU wide ban of "snus" outside of Sweden is inside the scope of Article 114 TFEU due to the character of the article, that is described as a functional competence. When exercising a functional competence, the ultimate or predominant objectives that the measure is pursuing is not of vital interest. What is of interest is whether a measure is appropriate to facilitate trade and thus serve the establishment and functioning of the internal market.[138] An approach recognised by the CJEU in *Swedish Match* as well as in the earlier case *BAT*.[139]

4.2 The end game? Year 2016 challenges to the new Tobacco Directive

The regulation of tobacco products within the EU have in recent years increased, with the latest development being the new tobacco directive from 2014, having a deadline for implementation in the Member States in the spring of 2016.[140] When examining the new directive, keeping in mind that the legal basis is Article 114 TFEU, one could ask if the directive creates obstacle to trade with tobacco products – affecting businesses in the tobacco industry and the free movement of goods in a negative sense. One could on the contrary ask if the directive serves as a protection for public health, especially for youngsters, an objective that would serve as a justification for the impact on trade, or

[136] Case C-434/02 A*rnold André GmbH & Co. KG v Landrat des Kreises Herford* ECLI:EU:C:2004:487, Opinion of AG Geelhoed, paras 29 and 78-79.
[137] *Barnard* (n 1), page 609.
[138] *Arnold André (n 137)*, Opinion of AG Geelhoed, para 73.
[139] *BAT* (n 68), para 62 and *Swedish Match* (n 5), para 31.
[140] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC Text with EEA relevance, OJ 2014 L 127.

even as a main objective trumping the market objectives. It could also be that the directive harmonises Member States legislation, that differs when it comes to tobacco, and thus the directive contributes to a smooth functioning of the internal market. In the end, it may be that all of these claims are true, making the new tobacco product directive an up to date example of how market and non-market objectives are balanced under Article 114 TFEU.

The new tobacco directive aims to ease the smooth functioning of the internal market for tobacco products, with a high level of protection for public health, especially for youngsters.[141] To reach the objectives, the directive provides for new and detailed legislation for tobacco products. The rules cover how the manufacture, presentation and sale of tobacco and related products should be further approximated. For example, there is a prohibition on the placing on the market of tobacco products with a characterising flavour, or products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity.[142]

The new tobacco directive has been subject to a lot of discussion due to its far reaching regulation. Not surprising, big tobacco companies such as Philip Morris and British American Tobacco have challenged the validity of several provisions in the directive. In *Philip Morris*[143] the tobacco companies brought an action for judicial review of the intent and/or duty of the British government to incorporate the directive in British law. The companies are of the impression that the directive completely or partially is invalid due to reasons including that Article 114 TFEU does not constitute an appropriate legal basis. The provisions questioned was the ones targeting the labelling and packaging of tobacco products as well as the prohibition against tobacco products with characterising flavour.

[141] Ibid, recital 8.
[142] Ibid, Article 7(1).
[143] *Philip Morris* (n 2).

The CJEU reasoned that, as for the question on the standardisation of tobacco products labelling and packaging, so can a ban on labelling that are marketing tobacco products or encouraging the consumption of them, be used to protect consumers against the risks associated with smoking. For instance, there is a prohibition on using expressions such as light, slim, natural or ultra-light. Of interest is that the directive still leaves room for the Member States to impose bans on cross-border distance sales, since the directive does not intend to fully harmonise the marketing and labelling of tobacco products. That a company complies with the directive is thus not a guarantee for the goods to flow freely, since Member States can impose stricter rules than what is laid out in the directive. The CJEU however concluded that this does not affect the validity of the directive, since the directive *in general* is positive for trade.[144]

More interestingly, Poland with the support of Romania brought an action for annulment with special regard to the prohibition on the placing on the market of tobacco products with menthol flavour, products greatly contributing to trade in those Member States. Poland especially questioned why menthol cigarettes should be bundled up with other characterising flavours, and argued that menthol cigarettes constitutes a classic tobacco product that should not be banned. However, the action was unsuccessful. In *Poland v European Parliament and Council*[145] the CJEU followed similar reasoning as in *Philip Morris* [146] and previous case law such as *Tobacco Advertising II*[147] and concluded that the prohibition on the placing on the market of tobacco products with a characterising flavour promotes the functioning of the internal market since it harmonises the differences between what flavours on tobacco that are permitted to sell in the Member States. A total prohibition is further proportional, due to the high level of protection for public health that the prohibition serves.

There are arguments for and against the use of Article 114 TFEU as a legal basis for a directive that prohibits certain products in its entirety from being placed on the market.

[144] *Philip Morris* (n 2), para 94.
[145] *Poland v European Parliament and Council* (n 2).
[146] *Philip Morris* (n 2).
[147] *Tobacco Advertising II* (n 44).

Special concern can be given to the fact that tobacco products still flow freely in the EU, but not the ones with characterising flavour. Tying this to the theory that product bans could facilitate trade if allowing other products within that product category to flow freely, such reasoning could be legitimised. However, there is also risk of policy regulation in internal market disguise. That public health is decisive for the considerations in the directive tends to be an objective that is important, but somewhat hollow since tobacco products in general still is available on the market. The EU legislator do not have exclusive or shared competence in the area of public health, since it is a supportive power and as such the question on if Article 114 TFEU is a proper legal basis for tobacco regulation general prohibiting products seems legitimised. That a power is supportive means that the Member State have exclusive competence in the field. The Union can provide for support and co-ordination, but not harmonisation.[148] With reasonable speculation, it would not be surprising if the directive in questions would be adopted under a public health ground if the EU had this competence, and not as now turning to Article 114 TFEU as a general legal basis for all measures affecting the internal market, with less thought to the reference to the free movement of goods in Article 114(1) TFEU and more thought to the reference of non-market objectives such as public health in Article 114(3) TFEU. It can hence be discussed to what extent Article 114 TFEU can be used as a legal basis for secondary legislation serving non-market objectives. In the area of public health, one can conclude that the discretion for the EU legislation is far reaching. It is enough that the directive in general aims for the proper functioning of the internal market, and as long as the conditions are fulfilled public health can be a decisive factor for the choices made in the provisions for the secondary legislation in question. Even a partial harmonisation has advantages for the functioning of the internal market since even though not all, some of the barriers to trade, are eliminated. With this reasoning even a total prohibition of a product can serve the functioning of the internal market, since it eliminates the differences between Member States on what products that can be put on the market.

[148] See Article 6 TFEU for the list of the supportive competences.

Concluded, Article 114 TFEU has, correctly so if accepting the broad interpretation by CJEU, been used as a legal basis for secondary legislation that not obviously serves the free movement of goods. The directive, even though not aiming for full harmonisation, is far reaching. Independent on view on the action oriented nature of the directive, with arguments that people that is already in a weak position using tobacco should be helped from refraining from it, so is the objective of public health a vital and important interest than can be decisive for the choices made when legislation is passed using Article 114 TFEU as a legal basis. These cases are perpetrating various aspects of how dual objectives can be pursued using Article 114 TFEU and as such further strengthens the CJEU's and EU legislator opinion that public health and the internal market are objectives in symbiosis and not contradiction.

Before turning to other areas of policy choices within Article 114 TFEU, it need to be noted that public health is a fairly non-controversial objective for a balance with market integration objectives since public health is expressly mentioned in Article 114(3) TFEU.[149] Even though Article 114 TFEU can be said to have been correctly used as a legal basis and correctly interpreted by the CJEU in these cases, this is *not* the end-game. The correct interpretation and use of Article 114 TFEU as a legal basis could also be seen as correct solely because a careful and considerate expansion of the scope of the Article since *Tobacco Advertising I*.[150] Article 114 TFEU have been suggested to be used for non-market objectives not mentioned in the article, and could serve as an important driving force for further integration in the EU. However, this integration comes with a risk of sovereignty loss and expanding Union competences. There is further a risk that certain national interests are favoured, when depending on preference and national policies, the concept "object to the establishment and functioning of the internal market" are twisted and turn.

4.3 An Outlook to other areas of policy choices in Article 114 TFEU

It is not only in the field of free movement of goods where Article 114 TFEU have played a crucial role for the development of non-market objectives within EU internal market

[149] See eg. Article 168 TFEU on that a high level of health protection should permeate all Union action.
[150] *Tobacco Advertising I* (n 4).

law. It is not either only in the field of tobacco where public health and free trade objectives have been put in a position where different objectives need to be balanced. There are various cases reaching the CJEU where Article 114 TFEU has been contested as a wrongful legal basis for a measure, providing for interesting insight on to what extent certain non-market objectives can be within the scope of Article 114 TFEU, especially in sensitive fields where the level of protection in the Member States are different. In *Vodafone*[151] the public interest subject of roaming came before the Court, when companies in the industry challenged a roaming regulation aiming for consumer protection. Initially the applicants brought a case in the United Kingdom, challenging the intent of the UK government to implement the regulation, consisting of a Commission proposal to limit tariffs on retail and wholesale level. The regulation had Article 114 TFEU as legal basis and served consumer welfare objectives. However, the CJEU followed the reasoning recognised from previous case law, and ruled that if there are no regulation on EU level, then the Member States may alone create obstacles to trade with roaming. The CJEU thus confirmed the validity of the regulation on the basis of art 114 TFEU since it had a genuine object of improving the functioning of the internal market. The regulation was further proportionate, since there had been in depth analysis made and to only regulate wholesale markets would not have achieved the same result. As for subsidiarity, the CJEU referred to the necessity to guarantee the smooth functioning of the internal market. Once again the broad scope of Article 114 TFEU was shown, where the general principles serve as quite a weak restriction for the purpose of how appropriate the measure at hand is to facilitate trade.

In *Alliance for Natural Health*[152] the CJEU upheld a directive limiting the use of food supplements to those expressly mentioned in the relevant legislation. This limitation in the directive created a ban on the market for products containing other supplements. This ban is however not as far reaching as in the tobacco cases, since the concept of a ban is easier justified if it does not concern the final product. In the case only certain

[151] *Vodafone and others* (n 68).
[152] *Alliance for Natural Health* (n 90) and *Alemanno* (n 77), pages 167-168.

ingredients were banned, and these could be changed by manufacturers, contrary to a ban that targets a final product.[153]

In *Inuit*[154] the General Court ruled on the prohibition on trade with seal products. Due to animal welfare concerns from the citizens of the EU, trade with seal products after long going debate was prohibited in its entirety within the EU through legislation enacted under Article 114 TFEU.[155] A long line of lawsuits followed the prohibition, part because criticism on if the prohibition improves animal welfare for seals and part because of the negative impact on trade. For a far reaching measure such as a total ban of trade with seal products in the EU, the aim of animal welfare must be possible to realise through the prohibition, otherwise it is hard to justify. The EU legislator should not turn to Article 114 TFEU for policy legislation if it is not proved that a successful strategy for the public or policy interests that needs protection can be realised. In the appeal from the General Court[156], the whole reasoning surrounded if the regulation with seal products was correctly based on Article 114 TFEU. The General Court had found that Article 114 TFEU constituted a solid legal basis[157], a founding that the applicant considered an error in law. The arguments of the applicants were however dismissed. Even though the trade with seal products is small, there still is trade to be facilitated. It does not matter that the cross border trade in itself as well as the amount of sales are small, when a product is regulated differently on national level this can impede the free movement of these products.[158]

Even though Article 114 TFEU does not expressly mention animal welfare as an objective that should be offered high level of protection in all action from the Union, support for such reasoning can be found in Article 13 TFEU. Article 13 TFEU provides for protection

[153] *Weatherill* (n 35), page 849.
[154] T-526/10 Inuit Tapiriit Kanatami and Others v European Commission, ECLI:EU:T:2013:215.
[155] Ibid, para 35 and Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ 2009 L 286.
[156] Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625.
[157] Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:T:2011:419.
[158] Cf. *Lindqvist* (n 80), on that an internal market measure does not need to be purely economic or even have any economic gain at all, as long as the conditions in Article 114 TFEU is met.

for animal welfare stating that in formulating and implementing the Unions internal market policies, the Union and the Member States shall pay full regard to the welfare requirements of animals. Examining *Inuit*[159] in relation to benefits for the internal market, there are however some inconsistencies to address. One reason to prohibit a product from entering the market is to facilitate trade in general by securing trade with other products within that product category on the market. Such link between a product ban and the internal market can be enough for the measure to object to the establishment and functioning of the internal market.[160] However, the prohibition of trade with seal products enlightens how hard it is to challenge a measure through general principles of EU law, even for a measure that when enacted have stretched such restrictions for the sake of policy interests. It could be discussed that for a measure to be in line with the principle of proportionality, it should be properly established that other products in the category indeed can flow freely because of certain prohibitions. To close down a large part of the market for seal products to release only a small part of it might be seen as a disproportionate exercise of the EU legislator competence as conferred by the Treaties.[161] The same criticism could be applied to *Swedish Match*[162] where the logical reasoning examining all content in the measure towards the conditions in Article 114 TFEU, as seen in *Tobacco Advertising I*[163], was turned upside down when eliminating an entire product category of tobacco products. The bite of general principles however can be vastly different, and the CJEU is reluctant to rule simply on the lack of fulfilling of general principles, even though the principles are intended to permeate all EU action.

[159] *Inuit* (n 156).
[160] See eg. *Weatherill* (n 35), page 837 and *Alemanno* (n 77), page 168.
[161] *Weatherill* (n 35), page 838.
[162] *Swedish Match* (n 5).
[163] *Tobacco Advertising I* (n 4).

5 Future obstacles and possibilities – to limit or broaden the scope of Article 114 TFEU

5.1 Ultra vires action as reason for limitation

The Union law is built on the Treaties. To change the law, the Treaties need to be amended. Such amendment is done by concluding a new Treaty with all parties from the old Treaty, and the Treaties can only be amended with the consent of all the Member States. The procedure is the same as known from international law, there are negotiations and every state need to ratify the amendment.[164] It depends on the national law what is needed for ratification, some Member States organise a referendum which gives more power to the people.

It is however difficult to change the Treaties. The practical and political challenges when wanting to amend the Treaties can be used as an argument both for and against a more active approach by the CJEU regarding the scope of Article 114 TFEU. For the CJEU to expand the EU legislator's competence through extensive interpretation of the scope of Article 114 TFEU could on the one hand raise concerns on lack of root in the democratic process and competence creep. On the other hand, the difficulties to amend the Treaties makes it important for the CJEU to pave the way for effective development and progress for the integration – taking into account all forms of objectives under Article 114 TFEU to secure a sustainable internal market both for companies and the citizens of the Union. However, one must be careful what is the personal preference of the judicial result examined and the time, and where the boundaries for the CJEU acting ultra vires for the sake of Article 114 TFEU goes.[165] Examining the case law, there is reason to class the interpretation on the scope of Article 114 TFEU and the reasoning on measure having as their object the establishment and functioning of the internal market as settled case law. The CJEU could even be argued to hold a cautious approach when action for annulment is brought involving Article 114 TFEU. To not let general principles too easy be used to challenge measures enacted after years of negotiations and process of creating the legislation, where the Member States as well are involved, is reasonable

[164] See Article 48 TEU.
[165] Cf. *Craig* (n 16), page 395 ff.

as it would lead to both losses of efficiency and legal certainty otherwise, causing compliance problems for the market if settled case law and measures are too quickly challenged.

5.2 To do good: Article 114 TFEU as driving force for balancing of objectives

In the preamble of the Charter it is stated that: *"It is necessary to strengthen the protection of fundamental rights in the light of changes in society".* To be able to strengthen, one must be able to enact legislation with teeth. The scope of application for the Charter is in consistent debate, and a way to enact measures fulfilling objectives set out therein have been suggested to be Article 114 TFEU.[166] An argument for this expansion can be found in the Charter itself as cited above. For the same reasons the protection of fundamental rights must be strengthen in the light of changes in society, so needs a sustainable internal market. The internal market today is not a purely economic concept, but a concept in consistent balance between market and non-market objectives – the same balance that can be found in primary legislation for the free movements in relation to express derogations and mandatory requirements.[167] Setting the constitutional law aside, there are values that could be argued to justify an expansion of Article 114 TFEU. For public health, the EU and the Member States also have international obligations. In Article 168(3) TFEU it can be read that the EU must cooperate in the field of public health, a cooperation resembling the international policy adopted by WHO. The same reasoning has been applied for animal welfare within Article 114 TFEU, even though there is no express reference for such protection in the article.

However, there is a slippery slope in accepting an expansion of Article 114 TFEU by the EU legislator and upheld by the CJEU. One must be careful with subjectivity. Even though "setting the constitutional law aside" as an argument can be discussed in theory for the progress of non-market objectives, it is not something that can be done in practise without risking the rule of law. The scope of application is best monitored by the

[166] Sybe A. de Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU Single Market; The Quest for a More 'Holistic Approach', [2016] The International Journal of Comparative Labour Law and Industrial Relations 32 no 2, pages 203-230.
[167] See eg. Article 28 and Article 36 TFEU.

supervision of the EU institutions, and since they have not been too reluctant to expand the legal basis there is still room for argumentation for academics having a personal preference for Article 114 TFEU as a general legal basis for the internal market. The conditions for recourse to Article 114 TFEU may be settled, but they are broad without clear cut limitations, and as such the conditions opens the debate for argumentation stemming from certain research goals or situation in a particular Member State instead of the legal limits clearly set by the principle of conferral in the Treaties. As introduced above this have been seen inter alia in the field of fundamental rights, where academics have argued for an application of Article 114 TFEU despite the consistent rephrasing from the CJEU that the article cannot be used as a general power to regulate the internal market. However, in line with the case law developed there is nothing precluding to pursue fundamental rights protection on the basis of the internal market, as long as the conditions for recourse to Article 114 TFEU is met.[168] For other interests, there must be a tied connection to the general principles and competence of EU law. There need to a competence laid out in the Treaties in the field at hand before turning to Article 114 TFEU, it is not possible to exercise competence through Article 114 TFEU without first establishing the existence of such competence.

It should however not be doubted that Article 114 TFEU can be an appropriate legal basis even for measures not purely seeking economic or free trade purposes. But for Article 114 TFEU to be used for welfare protection does not necessary mean that the level of protection will be higher than what is already afforded in some Member States. Some Member States have high regulatory standards and some lesser, comparing the 28 Member States different policy interests have different weight and welfare protection are far from equal. Article 114(3) TFEU speaks of a high level of protection for health, safety, environmental protection and consumer protection in all the proposals from the Commission. But a high level is not necessary a level higher than what is already afforded in the Member States. From a Member State perspective, there may be little understanding for why national norms compatible with EU law, offering a high level of protection of vital societal interests as well as facilities trade, should be

[168] *Kosta* (n 88), page 15.

replaced by an EU standard offering rules with less protection for both the non-market and market objectives. However, it could be discussed that this is also why non-market objectives can serve as an important factor for measures based on Article 114 TFEU. To aim for the highest standard, instead of today's wording of high standard, could be seen as contrary to the primary objectives and economical aims of the internal market. To set a standard all Member States can live up to would further in general serve the fulfilment of the non-market objectives for the Union as a whole – opening up for Article 114 TFEU to be a driving force to do good without forcing businesses to live up to the highest standard available.

5.3 Lessons learned – the broad scope of policy discretion

The issue if Article 114 TFEU should allow the EU legislator to have a general power to regulate the internal market have been described to raise two questions. One question targets how the prohibition of a general competence relate to non-economic objectives, and the other question targets what conditions that needs to be met for a measure to establish a necessary connection for recourse to Article 114 TFEU.[169] To summarise these questions they seek to understand to what extent non-market objectives can be taken into account within Article 114 TFEU without losing the necessary link that the measure should object to the establishment and functioning of the internal market. After examining the case law from the CJEU and debate in literature it can be concluded that there is no clear answer as the broad conditions allows for different views to find support for their preferential scope of Article 114 TFEU. *Tobacco Advertising I* could have served as a desirable starting point on the outer limits of the conditions in Article 114 TFEU. But, in the legal debate there have been disappointment of the development of the case law since the ruling. *Weatherill* compares the conditions set by the CJEU as a drafting guide. And *Barnard*, seeing the wider range of measures that now fits within the scope of Article 114 TFEU, describes that the development since *Tobacco Advertising I* makes the decision more symbolic than of substance. If the development continues in the same expanding direction as seen since *Tobacco Advertising I*, Article 114 TFEU will in practise lean towards being a general legal basis for the internal market. This is

[169] Ibid.

especially the case when examining the outright prohibitions of products on the market, where the arguments for the link to the internal market not is as strong as one could wish when considering the far reaching impact on trade.

An often used method for determining the appropriate legal basis by the CJEU is the centre of gravity, weighing the objectives in the measure to see which carries what weight and by this conclusion then selecting the appropriate basis.[170] The centre of gravity approach has however been dismissed when it comes to decide if Article 114 TFEU is an appropriate legal basis. This goes back to the functional nature of the article. Recourse to Article 114 TFEU is appropriate as long as the conditions are fulfilled, even though non-economic considerations is decisive for the adoption. There is not a discussion about which of the objectives is of most importance. To use a centre of gravity approach as argument for an expansion of Article 114 TFEU to a general legal basis should with this background not be possible, despite the wide interpretation of the conditions in Article 114 TFEU, the conditions need to be met. However, it could be discussed if the centre of gravity test could serve a purpose as guiding light on if recourse to Article 114 TFEU is *appropriate,* such reasoning is of different character than if it is merely possible to turn to Article 114 TFEU. In any event the centre of gravity test is an easy tool to get a first impression of a measure and where it indeed seems to lean more towards non-market objectives, then the conditions in Article 114 TFEU could be argued to need to be more thorough investigated with the content of the measure at hand and not only with the measure as a whole.

Despite different level of protection in the Member States there is secondary legislation enacted with Article 114 TFEU also in sensitive policy areas. However, it is also because of the different level of protection in these areas that harmonisation is necessary as it mitigates restrictions on the free movements when the Member States are subject to the same rules on inter alia product requirements.[171] The broad scope of policy discretion for the EU legislator can be seen as a necessity for efficiency when a

[170] *Investment in Energy Infrastructure* (n 42), para 46.
[171] *Barnard* (n 1), page 633.

procedure is built on compromises. In some policy areas affecting the internal market, there will be Member States that oppose the harmonisation – out of concern for competence as in *Tobacco Advertising I*[172] *and Tobacco Advertising II*[173], or out of the belief that the aims with the measures proposed are better achieved on Member State level or too far reaching as in *Poland v Parliament and Council*.[174] What is the best solution for a certain Member States may however not be what is best for the Union as a whole.[175] A single Member State cannot go against what is best for the whole of the Union, that is why there is extensive negotiation when secondary legislation are enacted. It could however be discussed how some Member States have more negotiating capital than others, even though the Member States are bound to be equal. The action for annulment of the new tobacco directive brought by Poland, as menthol cigarettes is an important trading good, was not welcomed by the Member States after years of negotiating the common rules.

Article 114 TFEU has thus been used for a broad range of measures serving both market and non-market objectives. The CJEU have been argued to keep a deferential position, when giving the Commission, Council and Parliament such a wide margin of discretion to decide the scope and content of internal market regulation. This lenient approach on the conditions set out in Article 114 TFEU creates a virtually unlimited approach on internal market regulation.[176] Academics have raised severe concerns for Article 114 TFEU as an instrument for general governance. There need to be competence to regulate the internal market, and the EU legislator cannot extend their action to harmonise diverse national rules so as to merely facilitate trade or to remove uncertainty. The competence in theory is clear, but in practise Article 114 TFEU raises competence concerns.[177] This can be compared to the opinion by AG Geelhoeds that the importance for Article 114 TFEU lies in if a measure is appropriate to facilitate trade,

[172] *Tobacco Advertising I* (n 4).
[173] *Tobacco Advertising II* (n 44).
[174] *Poland v Parliament and Council* (n 2).
[175] See Case C-508/13 *Republic of Estonia v European Parliament and Council of the European Union* ECLI:EU:C:2015:403.
[176] *Van Cleynenbreugel* (n 9), page 67.
[177] Derrick Wyatt, 'Community Competence to regulate the Internal Market' [2007] Working Paper No 9/2007 University of Oxford Faculty of Law Legal Studies Research Paper Series, page 1.

a reasoning with a potential to target various objectives.[178] *Barnard* raises the issue of that the sense is that Article 114 TFEU is used as a general legislative power, despite the limits set out in the article itself and in *Tobacco Advertising I*.[179] According to *Barnard*, this gives the effect that the principle of conferral is honoured in the breach rather than the observance. Since Article 114 TFEU is satisfied with qualified majority voting this opens up for overstep of competence, since there is no safety pin as a requirement for unanimity in Council would provide for or proper given weight to the principle of conferral before enacting legislation.[180]

Examining the wording there is no absolute promotion of free trade, or unconditional terms for this promotion. The issue boils down to what type of market the internal market is, depending on this view the opinions on how to determine the discretion of the legislator to ensure non-economic objectives within Article 114 TFEU can be very different.[181]

[178] *Arnold André* (n 2), Opinion of AG Geelhoed, para 73.
[179] *Tobacco Advertising* I (n 4).
[180] Cf. *Barnard* (n 95), pages 28-29.
[181] *Kosta* (n 88), page 23.

6 Concluding comments and remarks

6.1 General remarks

Are we supposed to have concerns for the use of Article 114 TFEU as a general power for the EU legislator to regulate in the field of the internal market? The answer is both yes and no depending on if the answer finds its support in the rule of law or the rule of policy. From the perspective of constitutional EU law, with the division of competence and the principle of conferral at heart, a clarification would be welcomed on what is needed for the conditions in Article 114 TFEU to be fulfilled. As there clearly has been an expansion of the legal basis since *Tobacco Advertising I*, when measures now can be outright banned on the market or be subject to strict product requirement for policy interest, it is necessary that such expansion is properly justified by the institutions.

For the promotion of welfare protection and for the effective integration of the social dimension of the EU, Article 114 TFEU could serve as an effective mechanism for legislation serving non-market objectives. To merely facilitate trade or abolish disparities between Member States legislation may ultimately serve the overall interest for the internal market and effective integration, and hence in general be positive for the internal market. In some cases, individual Member States may need to step aside with their legislation regardless that it offers a higher level of protection for certain interest and that it previous have been in conformity with Union law. However, such a generous interpretation and application of Article 114 TFEU must still be combined with clear cut explanations on how and why the conditions in Article 114 TFEU is met in a certain case.

6.2 Can and should Article 114 TFEU give the EU legislator a general competence to regulate the internal market?

When reading the objectives upon which the Union was founded, there are various policy areas aiming for welfare protection and public interests, where one could find support for an expansion of Article 114 TFEU to areas pursuing non-market objectives. For such expansion to be legitimised, a connection to the internal market must be made. As learned from the case law from CJEU this connection can sometimes be weak with

general arguments such as that a measure *facilitates trade*, is *genuinely appropriate* or *abolishes obstacles to trade* without further explanation on the content on how to reach these conclusions. However, it need to be remembered that the development of secondary legislation is a long process. There are plenty of safety mechanisms while legislation is negotiated for the Member States to argue for their national policy interests. Post Lisbon there is for example more involvement for the national Parliaments in the legislative procedures available.

The CJEU is in theory clear that Article 114 TFEU can and should not be used as a general legal basis. A measure must *genuinely* object to the improvement of the market and affect the market *direct*, it is not enough with mere findings of disparities between Member States legislation. If a measure is enacted because of the risk of emergence of future *obstacles* to trade, such obstacles must be *likely* and the measure designated to prevent them. When there is a risk of distortion of competition, this risk must be *appreciable* for recourse to Article 114 TFEU to be legitimised. These conditions serves as a safety guard for Article 114 TFEU not to be used as a general legal basis for the internal market, but without clear thresholds on when these conditions in reality are met the EU legislators power to regulate with Article 114 TFEU is in practise unlimited.
It is not difficult to understand why academics and practitioners sees a black cloud approaching the division of competence when examining the expanding use of Article 114 TFEU. In practise Article 114 TFEU, especially in relation to product bans, could be seen as leaning towards being a general legal basis for the internal market and such general application of the article would be in breach of the principle of conferral. There is no discretion for competence, and there is a reason why there are specific legal basis containing conditions that need to be fulfilled to be able to enact new legislation. The EU legislator cannot give itself competence for the convenience of realising certain political interests, and for the CJEU to simply repeat the conditions to be met for recourse to Article 114 TFEU is not a sufficient constitutional safeguard. The constitutional law should not be circumvented, using Article 114 TFEU as a more convenient legal basis to legislate on due to its lenient voting procedure. There is an alternative in the flexibility clause in Article 352 TFEU, which is possible to use when there is no explicit legal basis for a measure. However, the use of Article 352 TFEU is

surrounded by political implications and requires unanimity voting, and because of this it is rarely used. There is instead effectiveness to gain by turning to Article 114 TFEU for measures that *may* object to the establishment and functioning of the internal market.

Once again, when it comes to the choice of legal basis, it is not a choice of discretion. There is no subjectivity in the competence and the criteria to be met. However, after examining the scope of Article 114 TFEU, this lack of discretion for the competence should not be confused with the level of discretion once the issue of competence is cleared. It is settled that non-market objectives can play an important role in Article 114 TFEU and even be the centre of gravity for measures adopted. For the EU legislator and the CJEU to legitimise exercise of such discretion relating to non-market objectives there need to be clear guidelines on the application and interpretation of the conditions in Article 114 TFEU. The case law on product bans here serves for interesting insight on the scope of Article 114 TFEU for non-market objectives. To be able to legitimise such a ban there needs to be a policy interest of certain value, where support for the realisation of this objective is found in the Treaties, so it can be on equal level when balancing it with market objectives. The other approach is to legitimise such a ban through market assessments for the product category where the supposed harmful product belongs. If a product ban of one product could secure that other products within that category can flow freely, due to an otherwise risk of Member States enacting divergent legislation, it is an appropriate measure to facilitate trade. Even though raising concerns from a traditional economic market making rationale for the internal market, a further approach is that it could be as easy as that when a product is regulated differently on national level this can impede the free movement of these products, hence making it possible to justify a product ban enacted under Article 114 TFEU.

Combining all approaches above with the conditions in Article 114 TFEU and the ones established in case law it could be argued that there are enough safety mechanisms for a measure, even for an outright product ban, to pursue non-market objectives and be in line with free movement and the goal of a single market.

It is a conclusion of emotion rather than law to say that the bottom line is what kind of internal market we want and what level of protection for certain interests we are willing to accept. Competence is given from the Member States to the EU and the EU must act within these competences. To little by little extend the scope of a competence for policy reasons is not desirable for a functioning market based on the law. Still, this does not mean that the EU legislator should be too formalistic when it comes to the exercise of competence. A legal basis such as Article 114 TFEU could need a functional approach for measures serving twofold objectives prompting market and non-market objectives to be balanced. As AG Fenelly put it already in the early development of the case law on Article 114 TFEU; *"the Community must give weight to national policy concern which are not the subject of specific community competence."*[182] To honour the non-market objectives must however be done in the exercise of competence, and not when determining the existence of such competence.

For now, we have probably not seen the last of Article 114 TFEU, rather the opposite. The trade promotion premise in Article 114 TFEU is not forgotten, but there is bound to be spill over competence with a legal basis as functional as Article 114 TFEU, where non-market objectives can be decisive for the choices to be made. The message from the CJEU is in theory clear, Article 114 TFEU can and should not be used as a general legal basis for the internal market. The CJEU has for the two last decades repeatedly held in the case law that a mere finding of disparities between Member States is not enough for recourse to Article 114 TFEU.[183]

Where the threshold is to be drawn concerning the transition from a mere finding of disparities to a measure that object to the establishment and functioning for the internal market, is however, much due to the functional and broad trade facilitating nature of Article 114 TFEU, yet to be explored.

[182] Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* ECLI:EU:C:2000:324*,* Opinion of AG Fennelly*,* para 65.
[183] See eg. *Philip Morris* (n 2), para 58, *Tobacco Advertising I* (n 4), paras 84 and 95, *Arnold André* (n 2), para 30*, Tobacco Advertising II* (n 44), para 37*, BAT* (n 68), paras 59 and 60, *Swedish Match* (n 5), para 29, *Vodafone and Others* (n 68), para 32.

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