

# *The Internal Market in a Context of Deepening Integration – Long on Content and Short on Modes of Delivery?*

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## *Abstract*

This contribution takes one of Advocate General Fennelly's most influential Opinions during his time at the European Court of Justice – the Opinion in Case C-376/98 known as *Tobacco advertising I* – as a starting point to look at developments in the internal market legislation of the European Union since. It thereby explores the diversifying limits to integration by harmonisation of national law for the 'establishment and functioning of the internal market' (Article 114 TFEU) by the adoption of substantive and procedural 'measures' under EU law in the past decade and a half.

## I. INTRODUCTION

THE EUROPEAN UNION'S (EU) internal market is an 'area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' (Article 26 TFEU) inter alia by the possibility for the EU legislature to adopt 'measures' for its establishment and functioning (Article 114 TFEU). Defining the outer limits of this legal basis<sup>1</sup> for the adoption of 'measures' has always been a complex task, but it has become more so in

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<sup>1</sup> On this notion in EU law generally, see K Bradley, 'Powers and procedures in the EU Constitution: Legal bases and the Court' in P Craig and G de Búrca, *The Evolution of EU Law* 2nd edn (Oxford, OUP, 2011) 85.

the past decade and a half, not least because of two main factors. The first is that regulation which is relevant for the establishment and the functioning of the internal market can rarely be completely disassociated from the regulation of other policy areas. Product rules, for example, will also have an influence on health, safety and environmental standards. Free movement of services and workers, as well as rules on the establishment of businesses and self-employed persons will have an immediate influence on matters such as social security systems and labour policies, professional qualifications and education, to name just a few. This means that balancing economic rights with social and political rights is a key feature of regulation of the internal market.<sup>2</sup> The second contributing factor to the difficulties of defining the limits to the Union's power to adopt internal market legislation is an increasing diversification of the forms of 'measures', in the context of the steady transformation of the EU from an organisation primarily engaged in legislative action into an organisation increasingly active in the field of the administrative implementation of Union law.

In the area of internal market regulation, therefore, there are many hard cases on the reach of internal market-related legislative powers of the Union. In this chapter, I will outline some of the major developments of the past decade and a half in this field starting with Advocate General (AG) Fennelly's Opinion in 2000 in *Tobacco advertising I*<sup>3</sup> on issues of the definition of the possible extent of legislative 'measures' and the limits thereof in the context of the principle of conferral, expanding and explaining *Titanium dioxide*<sup>4</sup> and laying the foundations of *Alliance for Natural Health*.<sup>5</sup> This contribution laid many of the foundations on which the following complex issues of structural and procedural integration were based. I will discuss these regarding the concepts of subsidiarity and proportionality which were further explored in *Vodafone*,<sup>6</sup> *Smoke flavourings*,<sup>7</sup> *ENISA*<sup>8</sup> and, more recently, *Short selling*.<sup>9</sup> I will add a different dimension by looking at the notion of 'measures' not only from a substantive and legislative angle, but additionally review the issue of the limits on the legislature's discretion in this regard from their structural, institutional and implementing perspective. I will discuss the various parameters of the limits of legislative powers for the harmonisation of the internal market, first, from the more traditional angle of the limits of legislative measures adopted by the EU (I), before turning to the question of using the internal market related powers to establish structural and procedural measures coordinating Member State

<sup>2</sup> S Weatherill, 'Free Movement of Goods' (2012) 61 ICLQ 541, 545.

<sup>3</sup> Opinion of 15 June 2000 in Case C-376/98 *Germany v Parliament and Council (Tobacco advertising I)* [2000] ECR I-8423.

<sup>4</sup> Case C-300/89 *Commission v Council* [1991] ECR I-2867.

<sup>5</sup> Joined Cases C-154/04 and C-155/04 *The Queen, on the application of the Alliance for Natural Health and Ors v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451.

<sup>6</sup> Case C-58/08 *Vodafone and Others* [2010] ECR I-4999.

<sup>7</sup> Case C-66/04 *UK v Parliament and Council (Smoke flavorings)* [2005] ECR I-10553.

<sup>8</sup> Case C-217/04 *UK v Parliament and Council (ENISA)* [2006] ECR I-3771.

<sup>9</sup> Opinion of AG Jääskinen of 12 September 2013 in Case C-270/12 *UK v Council and Parliament (Short selling)*, judgment of 22 January 2014. The Opinion is discussed by H Marjosola, 'Case C-270/12 (UK v Parliament and Council) – Stress Testing Constitutional Resilience of the Powers of EU Financial Supervisory Authorities' (2014/02) *EUI Law Working Papers*.

implementation of EU law (II). These discussions are brought together in a new generation of cases starting with *Short selling* (III), which I will discuss briefly before drawing some conclusions from the diverse developments in EU internal market legislation for the future of Union powers (IV).

## II. LIMITS OF LEGISLATIVE ‘MEASURES’ HARMONISING MEMBER STATE LAW

Limitations on the legislative powers of the Union are to be found first and foremost in the three basic principles of Union competence listed in Article 5 TEU: the principle of the limited attribution of powers to the Union, generally known as the principle of conferral; the principle of subsidiarity; and the principle of proportionality of Union action.<sup>10</sup>

### 1. Conferral

One of the cornerstones of the definition of the notion of conferral was given by AG Fennelly’s Opinion in *Tobacco advertising I*,<sup>11</sup> on the basis of which the Court famously clarified and re-stated that a legislative act which is based on Article 114 TFEU may not simply reduce or eliminate regulatory differences between the Member States. Teleologically speaking, Article 114 TFEU is not available in order to level regulatory differences between the Member States without restriction. Instead, a measure under Article 114 TFEU must actively contribute in some way or another to the creation or functioning of the internal market. This has been heralded as a ‘momentous’ ruling,<sup>12</sup> since in it the European Court of Justice (ECJ)<sup>13</sup> for the first time concluded that a legislative act of the EU harmonising national legislation was ultra vires the rules of what is now Article 114 TFEU as breaching the principle of conferral.

The case concerned the highly controversial first Directive on tobacco advertising.<sup>14</sup> According to its preamble, the Directive sought to approximate national laws on products and services which until then had traditionally been used as media for advertising tobacco and tobacco products. These included newspapers and magazines, goods such as umbrellas and perfumes, as well as services such as broadcasting and sports events. Divergent national rules on the treatment of such goods and services were addressed by the Directive in a way which, to many commentators, appeared to be driven predominantly by

<sup>10</sup> Article 5 TEU.

<sup>11</sup> N 3 above.

<sup>12</sup> Weatherill (n 2 above), 547.

<sup>13</sup> The abbreviation ‘ECJ’ refers to the Court of Justice, part of the Union’s judicial institution, the Court of Justice of the European Union; ECJ is therefore to be understood as opposed to the General Court, the former Court of First Instance.

<sup>14</sup> Directive 98/43 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 [1998] OJ L213/9.

the intention to combat smoking and thus to be oriented towards consumer health protection. The Treaty provisions on public health at the time of the adoption of the contested *Tobacco advertising I* directive (Article 167(6) TFEU), however, explicitly excluded, and continue to exclude even now, ‘any harmonisation of the laws and regulations of the Member States’. In the absence of a legal basis for measures harmonising in the field of health, the Directive was designed as a measure for the approximation of rules for the single market which, as is required by Article 114(3) TFEU, attempt to ensure a high level of health protection.

The choice of legal basis under the principle of conferral is an area to which the ECJ applies full judicial review. The choice is based on what the Court refers to as objective criteria, clarifying that this choice is not a matter which falls within the political discretion of the decision-maker. This is the context in which the Court, following AG Fennelly, and enforcing the concept of the limited attribution of powers to the Union, found that Article 114 TFEU is not linked to a specific policy matter but, under its functional approach, must be reviewed by assessing the ‘objective requirements of the internal market’.<sup>15</sup> These include in particular, ‘the concrete internal market benefits claimed for the measure’<sup>16</sup> as a ‘test of the reality of the link between such measures and the internal-market objectives.’<sup>17</sup> Effectively, prohibiting activity within a sector without harmonising Member State laws concerning that sector or the remaining legal activity therein cannot, in the words of Advocate General Fennelly, be said to facilitate the exercise of the fundamental freedoms in the internal market, or ‘remove distortions of completion in the sector in question.’<sup>18</sup>

By contrast, Advocate General Fennelly explains that in order to be within the scope of application of Article 114 TFEU, measures approximating Member State laws would have to satisfy a two-step test: they ‘should be specific to the sector, however widely drawn, and should not be merely incidental’.<sup>19</sup> Advocate General Fennelly thereby applied and clarified the approach adopted in *Titanium dioxide* under which the distortion of competition leading to a harmonising measure had to be ‘appreciable’.<sup>20</sup> Given that in the view of the Advocate General and the Court the Directive did not have a sufficiently appreciable and merely incidental effect on the conditions of the internal market, it violated the principle of conferral for want of a proper legal basis in the Treaties.<sup>21</sup>

Applying these criteria, the Court in *Alliance for Natural Health* confirmed that it is not *per se* forbidden to ban the marketing of a product in the context of a measure adopted under Article 114 TFEU.<sup>22</sup> The case concerned a

<sup>15</sup> N 3, para 58.

<sup>16</sup> Ibid.

<sup>17</sup> N 3, para 89.

<sup>18</sup> N 3, para 58.

<sup>19</sup> N 3, para 91.

<sup>20</sup> N 4, para 23.

<sup>21</sup> N 3, para 116.

<sup>22</sup> N 5, paras 38–40.

legislative act containing certain prohibitions on the marketing of products which had not been cleared for human consumption. At the same time, the contested measure ensured that those products which had been approved under the system established for their control could freely circulate throughout the internal market. But apart from the fact that the measure in *Alliance for Natural Health*, unlike that in *Tobacco advertising I*, actually created conditions for free movement of food additives within an internal market, the measure differed as regards the definition of the relevant market for product or services. This is relevant for the definition of when an actual or potential distortion of competition can be found. The definition of such market is often only undertaken implicitly by the Courts. Openly addressing this definition would be preferable in that it might well contribute to further clarification of the reasoning behind a judgment.

According to the principle of conferral, the legality of legislative ‘measures’ under Article 114 TFEU in today’s case law of the ECJ therefore contains the following key criteria:<sup>23</sup> Article 114 TFEU cannot be used to erase all forms of disparities between national rules.<sup>24</sup> Instead, disparities between national regulatory approaches, in order to qualify, must be found to ‘obstruct’ the fundamental freedoms in a specific sector, and thus have a direct and not merely incidental effect on the functioning of the internal market or the conditions of competition therein.<sup>25</sup> On the basis of this finding, Article 114 TFEU can also be used to remove existing or prevent likely appreciable future obstructions.<sup>26</sup> Article 114 TFEU can also be used as legal basis for subsequent updates and adaptation of legislative acts originally based on Article 114 TFEU, when necessary to accommodate new circumstances or technical and scientific developments.<sup>27</sup> Within these limits, there is legislative discretion in relation to the method of approximation most appropriate for achieving the desired result.<sup>28</sup> The Union legislature is obliged to balance various interests and societal values ‘once the competence is triggered by the need to harmonise a particular field’ in the context of Article 114 TFEU.<sup>29</sup>

<sup>23</sup> See for an overview especially K Lenaerts, ‘The European Court of Justice and Process-oriented Review’, *College of Europe, Research Paper in Law* 1/2012, 4. See for criticism of this set of criteria eg S Weatherill, ‘The Limits of Legislative harmonization Ten Years after *Tobacco Advertising*: How the Court’s Case Law has become a “Drafting Guide”’, (2011) 12 *German Law Journal*, 827, 827. In his view, the use of these criteria risks becoming part of a circular pattern which relies on ‘approved but reliably vague vocabulary’.

<sup>24</sup> Opinion of AG Miguel Pólares Maduro of 1 October 2009 in *Vodafone* (n 6) para 1: ‘this is not a provision intended to give to the Community a general power of regulation over the internal market’.

<sup>25</sup> Judgment in *Tobacco advertising I* (n 3 above) paras 84 and 106.

<sup>26</sup> Case C-301/06 *Ireland v Parliament and Council (Data retention)* [2009] ECR I-593, para 64.

<sup>27</sup> Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco (Tobacco advertising II)* [2002] ECR I-11453, paras 77 and 78, and Case C-374/05 *Gintec* [2007] ECR I-9517, para 29.

<sup>28</sup> *Eg Smoke flavourings* (n 7 above), para 43.

<sup>29</sup> *Maduro* (n 24 above) para 8. Obviously high levels of protection of values protected by Union law including those listed in Article 114(3) TFEU must be ensured – see eg *Alliance for Natural Health and Others* (n 5 above) para 30.

## 2. Proportionality and Subsidiarity

One of the reasons for the definition by the ECJ of detailed limits on the use of Article 114 TFEU under the principle of conferral is that the choice of legal basis is subject to full judicial review. By contrast, the review of the exercise of the powers once conferred is more limited, given that the Court must take account of the existing broad legislative discretion of the EU legislature in these matters which requires some more or less pronounced judicial self-restraint.

In the context of this review, the Court has developed in the past few years a key instrument which is based on the fact that review of compliance with the principles of subsidiarity and particularly of proportionality is based on a certain degree of information about the motivation for the legislative choice and potential alternatives which had not been adopted in the process. This has led the Court to oscillate between exercising restraint and undertaking an increasingly more stringent review of compliance with legislative procedures, incidentally having an effect on the legislative substance also.<sup>30</sup>

One key step in this direction was *Vodafone*,<sup>31</sup> in which various mobile telephone operators challenged the legality of an EU regulation on roaming charges which had been based on what today is Article 114 TFEU.<sup>32</sup> This regulation had the effect of capping the fees that telephone service operators could charge their customers for cross-border calls within the internal market. The Commission's impact assessment study had found that mobile phone operators were using national licences which allowed for service provision within specific territories of individual Member States to charge customers who were moving within the internal market exorbitant fees which often stood in no relation to the cost associated with providing this service.

Reviewing the legality of the legislation capping the fees, Advocate General Maduro in *Vodafone* suggested a new kind of procedure-based review of compliance with the principle of proportionality. He suggested taking into account the institutions' impact assessment reports to analyse whether the legislature had complied with the requirements of the Court's proportionality test, especially whether the legislature had reviewed whether there were regulatory alternatives which were less onerous with regard to the applicants' rights. He was satisfied with compliance with the proportionality test *inter alia* on the ground that the legislature had analysed, prior to adopting the Regulation, the relevant alternative means of achieving the objective under Article 114 TFEU, and had not found solutions which were less onerous for the applicants' rights than the solutions chosen by the Union legislature in the Regulation.<sup>33</sup> The ECJ confirmed the Opinion in its judgment, establishing that the Regulation was aimed at bringing to an end an activity which was detrimental to the provision

<sup>30</sup> See eg A Alemanno and A Meuwese, 'Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link of "New" Comitology', (2013) 19 *European Law Journal* 76.

<sup>31</sup> N 6.

<sup>32</sup> [2007] OJ L171/32, amended by Regulation No 544/2009, [2009] OJ L167/12 (enlarging the scope of application to SMS and data roaming).

<sup>33</sup> Maduro (n 24), paras 38–40.

of mobile telephone services within the internal market, and that it was thereby genuinely aimed at improving the conditions for the establishment and functioning of the internal market.<sup>34</sup> The distortions of competition arose from the fact that telephone companies were essentially exploiting to the disadvantage of the consumers the territorially exclusive licences which Member States had accorded to them. In doing so, the Court followed the ‘procedural’ approach to proportionality-review proposed by Advocate General Maduro.<sup>35</sup>

The ECJ has applied this procedure-based approach to the review of the principle of proportionality, making reference to impact assessment studies by the institutions, in *Afton Chemicals*<sup>36</sup> and *Luxembourg v Commission*.<sup>37</sup> Lenaerts, himself a judge at the ECJ though writing in a personal capacity, comments that under the *Vodafone* approach, the ECJ ‘applies the principle of proportionality in a procedural fashion’ by focussing not on the regulatory substance of the measure but on whether the institutions showed that they ‘had examined different regulatory options and assessed their economic, social and environmental impact’ before adopting a legislative act.<sup>38</sup> This approach so far developed for the review of proportionality could potentially also be applied for review of compliance with the principle of subsidiarity. This has, as far as I can see, so far not been done.

### III. ARTICLE 114 TFEU AND STRUCTURAL MEASURES – *QUI PEUT LE PLUS, PEUT LE MOINS* ?

Whilst the decision on the allocation of regulatory powers which was addressed in *Tobacco advertising I* was, at the end of the day, one of the transfer of legislative power *tout court*, the possibilities of what could be understood as a ‘measure’ under Article 114 TFEU have since been expanded.<sup>39</sup> It has branched out into two related sub-issues: one is the question of the degree of ‘Europeanisation’ of the implementation of a policy through sub-legislative measures, the other is the question of whether instead of wholesale legislative harmonisation more cooperative and sovereignty-preserving means could be identified.<sup>40</sup>

Two ‘post-*Tobacco advertising I*’ cases illustrate this change in nature and perception of integration. *Smoke flavourings*<sup>41</sup> and *ENISA*<sup>42</sup> are both disputes concerning the extent and limits of the powers conferred on the Union under what was Article 95 EC, now Article 114 TFEU.<sup>43</sup> They each raise the question

<sup>34</sup> N 6, para 32.

<sup>35</sup> N 6, referring to the impact assessment report in paras 45, 55, 58 and three times in para 65.

<sup>36</sup> Case C-343/09 *Afton Chemical Limited* [2010] ECR I-7027.

<sup>37</sup> Case C-176/09 *Luxembourg v European Parliament/Commission* [2011] ECR I-3727.

<sup>38</sup> Lenaerts, n 23 above, 7.

<sup>39</sup> See eg, with great detail, H-H Herrfeldt, AEUV Artikel 114, in J Schwarze (ed) *EU-Kommentar*, 3rd edition (Baden-Baden, Nomos, 2012) 1421–1476.

<sup>40</sup> See, eg *Smoke flavourings* (n 7) and *ENISA* (n 8) which will be discussed in greater detail later in this paper.

<sup>41</sup> N 7.

<sup>42</sup> N 8.

<sup>43</sup> Comments in the literature on these two judgements have included worries that they might ‘inflamm[e] the perennial tensions underlying the division of competence between the Community



of resorting to European agencies and, in *Smoke flavourings*, also that of using a comitology procedure as means to reduce the ‘hard’ legislative approach to harmonisation, and achieve legislative goals through the use of forms of integrated administration.

In *ENISA*, the UK relied essentially on the illegality of using (what is now) Article 114 TFEU as the legal basis for adopting structural ‘measures’ instead of the ‘straightforward’ approximation of the rules of the Member States. In this case, the structural measure was the creation of the European Network and Information Security Agency (‘ENISA’) as an EU agency with its own legal personality and designed to advise Member States on matters related to safety of information networks. Similarly, in *Smoke flavourings* the UK incidentally challenged the use of what is now Article 114 TFEU as the legal basis for the empowerment of an EU agency – the European Food Safety Authority – to participate in a procedure provided by law to establish a market authorisation for certain food additives referred to as smoke flavourings. In the absence of general regulatory powers of the Union in the area of the internal market, in the UK’s view Article 114 TFEU merely intended to confer powers for the adoption of measures directed at the Member States. Under this view, the creation of multiple-step regulatory procedures failed to harmonise national law directly and was thus illegal.<sup>44</sup> Similarly, in *ENISA*, the UK contested the legality of the regulation establishing ENISA as a ‘measure’ under Article 114 TFEU.<sup>45</sup> The UK argued that the creation of an agency to improve the conditions of the exchange of information within the internal market could not be regarded as a measure designed to approximate Member State law, since it was not aimed directly at addressing the conditions of competition in a specific policy field.

The Court’s judgements in *Smoke flavourings* and *ENISA* are noteworthy specifically because they do not follow the applicant’s approach of portraying the possibilities of EU law in terms of a two-level model, in which the EU may exclusively legislate and Member States must maintain all implementing powers. In *Smoke flavourings*, the ECJ held by contrast that the Union legislature enjoyed discretion ‘as regards the harmonisation technique most appropriate for achieving the desired result’.<sup>46</sup> This may include cases ‘where the Community

and the Member States’ and have the ‘potential to enliven concerns about the magnitude of the Community’s competence’: K Gutman, Case note on Case C-66/04, *Smoke Flavourings*; Case C-436/03, *SCE*; and Case C-217/04, *ENISA*, (2006/2007) 13 *Columbia Journal of European Law* 147, 182. For further critical reviews of the cases, especially with respect to the principle of conferral see A Epiney, ‘Anmerkung zu C-217/04, (2007) *Neue Verwaltungsrechts Zeitschrift*, 1012; M Ludwigs, ‘Artikel 95 als allgemeine Kompetenz zur Regelung des Binnenmarktes oder als “begrenzte Einzelmächtigung”’, (2006) *Europäische Zeitschrift für Wirtschaftsrecht*, 417.

<sup>44</sup> The UK acknowledged that establishing a detailed decision-making procedure with a regulatory committee procedure assisting and supervising the Commission, whose decisions are prepared with input from the European Food Safety Agency established a procedure which could result in harmonisation of national law. That, according to the argument, was too far removed to be acceptable under Art 95 EC.

<sup>45</sup> Reg EC 460/2004 of the European Parliament and Council of 10 March 2004, [2004] OJ L77/1. The UK argued that Art 308 EC, requiring unanimity in the Council, would have been the correct legal basis for such a measure.

<sup>46</sup> N 7 paras 45 and 46.



legislature establishes the detailed rules for making decisions at each stage of such an authorisation procedure, and determines and circumscribes precisely the powers of the Commission as the body which has to take the final decision'.<sup>47</sup>

AG Kokott's Opinion had stressed this latter point by entering into a detailed analysis of the principles of proportionality and subsidiarity comparing different possible regulatory approaches in the case. These consisted of, on the one hand, a multi-step procedure for establishing a list of marketable smoke flavouring food additives, which consisted of a comitology committee procedure for decision-making in combination with scientific analysis prepared by the European Food Safety Authority. She compared this with, on the other hand, a more traditional notion, generally referred to as 'executive federalism'. This consists of harmonising legislation on the European level and implementation by the Member States, combined with the obligation of mutual recognition on the Member States regarding administrative decisions within the internal market. In the long term the latter solution, she reasoned, could not only lead to conflicts between Member States to the disadvantage of the internal market. It also risks restricting the competences of the Member States 'just as much' as the solution chosen by the Regulation, and 'would at the same time make the procedure for the authorisation of smoke flavourings considerably clumsier and if anything reduce the rights of participation of manufacturers'.<sup>48</sup>

In *ENISA*, the ECJ rejected the UK's claim and recognised the validity of the contested Regulation. It held that, first, the addressees of 'measures' are not exclusively the Member States. Second, the objective of the Regulation, 'to improve the conditions for the establishment and functioning of the internal market'<sup>49</sup> by creating a 'body responsible for contributing to the implementation of a process of harmonisation' where 'the adoption of non-binding supporting and framework measures seems appropriate,' was in conformity with Article 114 TFEU.<sup>50</sup> Third, echoing the requirements developed in *Tobacco advertising I*, the Court found that the tasks conferred on such a body must be 'closely linked to the subject matter of approximation of laws'.

To these criteria, one might also add, in the words of the judgment in *Tobacco advertising I*, the requirement that the measure 'genuinely have as its object to improve the conditions for the establishment and functioning of the internal market',<sup>51</sup> by preventing or eliminating an actual or potential 'appreciable distortion of competition' or 'the emergence of future obstacles to trade resulting from multifarious development of national laws'.<sup>52</sup> In view of the Court, in a field of complex and rapidly developing technical circumstances the creation of an agency providing technical advice facilitated the implementation of EU

<sup>47</sup> N 7 para 49.

<sup>48</sup> Opinion of Advocate General Kokott in *Smoke flavorings* (n7 above) para 47.

<sup>49</sup> N 8 above, para 42, with reference to *Smoke flavourings*.

<sup>50</sup> N 8 above, paras 44 and 45. The Court explains that '[s]uch is the case in particular where the Community body thus established provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application.'

<sup>51</sup> Judgment (n 3), para 84.

<sup>52</sup> *Ibid* para 86.

law, and thereby made a real contribution to the achievement of the internal market.<sup>53</sup> ‘Low-intensity approximation’ in the form of establishing an agency providing advice to national bodies who remain free to exercise their discretion and adopt different measures than the ones proposed, is possible,<sup>54</sup> in this context, under an ‘*a maiore ad minus*’ argument. Applying an approach based on administrative cooperation in order to achieve technically sound solutions, while at the same time devising a sovereignty-preserving measure,<sup>55</sup> appeared to the ECJ to give effect to the principles of subsidiarity and proportionality. Therefore, although the principle of conferral remains the basis of the rule of law and the control of whether the Union has acted within its competencies, for the delimitation of EU law, conferral needs to be understood in the context of an integrated legal system, for the most part in the form of executive networks with participants from the Member States, the Union institutions and private parties.<sup>56</sup> Interestingly, the development of a system of decentralised yet cooperative administrative structures historically goes hand in hand with the emergence of subsidiarity as a constitutional notion.<sup>57</sup>

#### IV. MEASURES MATURING – SHORT SELLING DELEGATION?

The Court of Justice recently added a layer to these considerations in *Short selling*.<sup>58</sup> The case concerns predominantly the validity of an EU legislative provision, that is, Article 28 of the EU regulation on short selling and certain aspects of credit default swaps,<sup>59</sup> and also addresses the creation of the European Securities and Markets Authority (ESMA) on the basis of Article 114 TFEU. ESMA is one of the three EU agencies established in 2011 to support the surveillance of key financial actors within an Economic and Monetary Union.<sup>60</sup> Article 28 of the Regulation vests ESMA with powers to intervene inter alia by adopting binding legal acts addressed to individuals, in the event of threats to the orderly functioning or the stability of financial markets or the financial system in the EU. These may contain injunctions to comply with various

<sup>53</sup> N 8, paras 60–66. It needs to be added that in *ENISA*, the ECJ did not agree with AG Kokott’s Opinion. AG Kokott had argued that Art 95 EC was not the correct legal basis for measures which are not closely related to the approximation of national law. In this way, she argued, it was immaterial whether the measure finally adopted ‘had less of an effect on national competences than a genuinely approximating measure’ (Opinion of AG Kokott (n 8) para 39).

<sup>54</sup> N 8, paras 25 and 38.

<sup>55</sup> Especially when compared with full-scale detailed regulation for transposition in Member States under a more traditional two-level model.

<sup>56</sup> M Egeberg, ‘Europe’s Executive Branch of Governments in the Melting Pot: An Overview’ in M Egeberg (ed), *Multilevel Union Administration* (London, Palgrave, 2006) 1.

<sup>57</sup> HCH Hofmann, ‘Conflicts and Integration: Revisiting *Costa v ENEL* and *Simmenthal II*’ in M Maduro and L Azoulai (eds), *The Past and the Future of EU Law* (Oxford, Hart, 2010), 66.

<sup>58</sup> Judgment, n 9 above.

<sup>59</sup> Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1.

<sup>60</sup> Regulation (EU) No 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2011] OJ L 331/1.

disclosure requirements and a prohibition against entering into certain types of transactions, namely those commonly known amongst market participants as ‘short selling’.<sup>61</sup> The UK claimed *inter alia* that Article 114 TFEU was an invalid legal basis for authorising EMSA to impose prohibitions on short selling under Article 28 of the Regulation. This would not only constitute a breach of the limits on delegation to agencies set by the Court in the *Meroni* judgment of the early days of European integration.<sup>62</sup> It would also be *ultra vires* Article 114 TFEU, as that provision does not allow for the delegation of individual regulatory decisions overriding those taken by national authorities.<sup>63</sup>

*Short selling* thereby combines the various strands of the ongoing debate about the limits of Article 114 TFEU – the questions of substance and procedure, and regarding which structural measures can be adopted as ‘measures’ for the approximation of the conditions on the internal market. Accordingly, AG Jääskinen’s Opinion looked at the limits of Article 114 TFEU as a legal basis in two respects: first, for the adoption of a structural measure such as the creation of ESMA as an EU agency, and second, for the substantive question of whether ESMA could be vested with the power to adopt measures prohibiting certain market activities such as short selling, even in cases in which the supervisory authorities of the Member State saw no reason to intervene. Instead of considering the preliminary question of the legality of the creation of an agency vested with these powers, the Court, by contrast, mixes the questions of the empowerment of the agency with that of its creation.

Regarding the creation of an agency such as ESMA on the basis of Article 114 TFEU, the Court had established *inter alia* in *ENISA* and *Smoke flavourings* that Article 114 TFEU allows not only for the adoption of measures addressed at Member States but also for the creation of structures under EU law such as agencies. The Advocate General found that creating ESMA and conferring on it the power to regulate short selling activities was in fact undertaken in view of the divergences in Member State rules. The EU legislature claims that this was one of the causes of the market volatility which had led to the financial crises since 2008. Given the legislative discretion in this field, in view of the Advocate General, there should be no objection in principle ‘to the establishment of ESMA and the regulation of its tasks and powers on the basis of Article 114 TFEU’.<sup>64</sup> The Court, by discussing the matter principally in the context of delegation of powers outside of Articles 290 and 291 TFEU, implicitly concurred with that approach.<sup>65</sup>

The second question concerning ESMA’s power to adopt individual measures on the basis of Article 28 of the Regulation is more problematic.

<sup>61</sup> Article 28 (1)(b) and (2)(a) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1.

<sup>62</sup> Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133. The case concerned the legality of delegation of powers from the High Authority of the European Coal and Steel Community to bodies established under Belgian law.

<sup>63</sup> Judgment, n 9 above, paras 28–34, 89 and 90.

<sup>64</sup> Opinion, n 9 above, paras 32–34.

<sup>65</sup> Judgment, n 9 above, paras 78–86.

Whether the conferral of powers to regulate and prohibit certain types of trades on financial markets falls within the scope of Article 114 TFEU can be judged against the criteria of ‘whether or not the decisions of the agency concerned either contribute or amount to internal market harmonisation, in the sense this notion is used in EU law.’<sup>66</sup> For the Advocate General, it was not the fact of ESMA having been granted the power to impose a prohibition on, or lay down conditions related to, short selling, which would render the powers vested in ESMA ultra vires with regard to Article 114 TFEU. Instead, the Advocate General, siding with the applicant Member State, found Article 28 of the Regulation conferring powers on ESMA to be objectionable because it allowed to ‘lift implementation powers ... from the national level to the EU level when there is disagreement between ESMA and the competent national authority or between national authorities’.<sup>67</sup> In his view, this did not comply with the three most central criteria for the application of Article 114 TFEU requiring approximation of Member State law: first, whether the emergence of obstacles to the conditions of competition on the internal market is ‘likely’, and the measure was designed to prevent these obstacles; second, whether the measure would ‘genuinely’ improve the conditions on the internal market,<sup>68</sup> and, third, whether the emergence of obstacles to the conditions of competition on the internal market was ‘closely linked to the subject matter of the acts approximating’ the Member State provisions.<sup>69</sup>

The Court, however, dismissed the Advocate General’s view that a harmonisation measure under Article 114 TFEU, such as Article 28 of the Regulation, should only allow for the adoption of a general regulatory measure such as establishing standards for national agencies.<sup>70</sup> It found that ‘general laws alone may not be sufficient to ensure the unity of the market,’<sup>71</sup> especially in view of the fact that measures under Article 114 TFEU did not necessarily have to be addressed at the Member States. After all, the idea of a close relation between disturbances on the financial markets and certain market behaviour seems to be a necessary pre-condition for action of the agency under Article 28 of the Regulation. Therefore, the action of an EU agency intervening vis-à-vis individuals could still be deemed the approximation of the Member State provisions in the core sense of Article 114 TFEU. The Court had little to say about whether the prohibition of an activity such as short selling would fall foul of the conditions for the regulation of the internal market established by *Tobacco advertising I* and *Alliance for Natural Health* which required some sort of market to remain regulated. It simply referred to the necessity of creating a ‘common regulatory framework with regard to

<sup>66</sup> Opinion, n 9 above N 9 para 36.

<sup>67</sup> Ibid, paras 50 *et seq.*

<sup>68</sup> Opinion, n 9, para 46, with reference to *Tobacco advertising I* (n 3).

<sup>69</sup> *Tobacco advertising I* (n 3) paras 84–86; *ENISA* (n 8) para 44.

<sup>70</sup> Judgment, n 9 above, para 45; A Orator, ‘Die unionsrechtliche Zulässigkeit von Eingriffsbefugnissen der ESMA im Bereich von Leerverkäufen’, (2013) *Europäische Zeitschrift für Wirtschaftsrecht* 852.

<sup>71</sup> Judgment, n 9 above, para 106.

requirements and powers relating to short selling and credit default swaps'.<sup>72</sup> However, from the context of the judgment it would appear that the Court assessed that an exceptional and occasional banning of certain specific market activity was consistent with the requirements of Article 114 TFEU. Whether the prohibition of one activity was part of the regulation of a greater market, or simply limited the scope of a specific one, was not openly discussed. The issue of the reach of powers under Article 114 TFEU and the necessity of there remaining a market to be regulated will therefore continue to be an open issue in the future. The strict criteria set up by *Tobacco advertising* in the context of setting the limits of internal market harmonisation in this regard, seem to have been an exception of clarity.

At the end of the day, the judgment in *Short selling*, which following the Opinion of Advocate General Jääskinen, could have become another milestone in the developing case law on Article 114 TFEU, does not live up to expectations. It will not be remembered for its necessary definition and explanation of Article 114 TFEU. It might instead, rather sadly, become cited for its quite unwarranted expansion of the *Meroni* doctrine. Prior to this case, the Court had consistently applied *Meroni* only to specific cases of sub-delegation of powers by the institutions.<sup>73</sup> The Advocate General had convincingly dissected the principles contained in *Meroni* which were also generally applicable beyond that limited scope.<sup>74</sup> But the Court, seemingly eager to follow the lead of the pleas of the applicant Member State, instead of simply ignoring a false lead and leaving *Meroni* aside, as it had for example in *ENISA* and *Smoke flavouring* but also in *Schröder v CPVO*,<sup>75</sup> in *Short selling* discusses questions of when the delegation of discretionary powers is too broad to be permissible. Lacking any definition of what it understands as 'discretionary powers', instead of clarifying the issue the Court in *Short selling* further confuses the matter of delegation under EU law. In so doing, it has opened the door wide open to litigation arising from a host of different notions of discretion, stemming both from considerations on procedure and the extent of judicial review, as well as from matters of substance. It would have been far better to have left *Meroni* to rest in the well-deserved peace of the Court's archives.

<sup>72</sup> Ibid, para 114.

<sup>73</sup> See with further detail, HCH Hofmann and A Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through "Agencification"', (2012) 36 *European Law Review*, 419, 423–426.

<sup>74</sup> Opinion, n 9 above, paras 61–64.

<sup>75</sup> Without discussing *Meroni* or equating the discretion exercised by the Community Plant Variety Office (CPVO) with the quasi-legislative discretionary powers of the type discussed in *Meroni*, the General Court held in *Schröder* that an agency, such as the CPVO, can be entrusted with the exercise of administrative discretion, including a certain margin of appreciation. As a result it did not subject the exercise of a power requiring complex scientific and technical appraisals to 'strict review in the light of objective criteria', but accepted the limited nature of judicial review of certain agency decisions in the field akin to trade mark law (Case T-187/06 *Schröder v CPVO* [2008] ECR II-3151, para 63, confirmed on appeal in C-38/09 P *Schröder v CPVO* [2010] ECR I-3209; cf judgment in *Short selling*, n 3 above, para 41).

## V. THE NEW FRONTIERS OF INTERNAL MARKET LEGISLATION?

This overview of some of the main cases on the limits of legislation under Article 114 TFEU decided in the last decade and a half illustrate the dynamic development of the Union. It is moving away from a traditional two-level legal system, with the Union legislating and the Member States implementing and towards an integrated legal system linking the various levels through ever more procedural cooperation in implementation. In this process, Article 114 TFEU continues to be an important legal basis, not least for the reason that the internal market remains at the heart of the European integration project. The last few years have seen a reinforcement of earlier trends towards deeper integration, though not predominantly in the sense of ever more matters being addressed by EU legislation. On the contrary, the use of EU agencies as coordinators of the activities of the Member States in implementing EU policies might even be seen as a means of replacing the need at the EU level for increasingly detailed legislation harmonizing Member State law. This predominantly competence-friendly and subsidiarity-enhancing approach has been accepted by the Court of Justice in the context of what might be described as an ‘*a maiore ad minus*’ approach.

The new frontier, it appears with *Short selling*, is how far the agencies may be empowered to adopt measures vis-à-vis market participants and other individuals, when the agency exercises regulatory powers normally reserved to national regulators. *Short selling* allows the conferral of regulatory powers in the internal market on a body created on the basis of Article 114 TFEU, which powers are to be used *ad hoc* and selectively. But what *Short selling* gives with one hand, it takes away with the other by limiting the possibilities of delegation to an agency because it relies on an ill-defined and altogether quite woolly definition of ‘discretionary powers’. These questions thus straddle the borders of the past developments of defining the limits for using Article 114 TFEU for general legislative measures, as well as the limits of its use for structural ‘measures’. The combination of structural, individual and general measures will require a new set of limits which have not so far been defined in the case law. Additionally, it would appear from the discussion of the matter in this chapter, that the question of the distortion of conditions of competition might require further development. Which conditions of competition in which markets need to be addressed appears to be a worthwhile topic of further reflection – perhaps more so than the mode of delivery of the ‘measure’ for approximation on which cases such as *ENISA*, *Smoke flavourings* and *Short selling* had concentrated. The suggestion might be, to use the language of financial markets, to go long on content and short on modes of delivery.