

Articles

The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court’s Case Law has become a “Drafting Guide”

*By Stephen Weatherill**

Abstract

Ten years have elapsed since the first *Tobacco Advertising* judgment, in which the Court for the first time concluded that the EU legislature had stepped beyond the limits of its competence to harmonize national laws which is granted by the Treaty. However, those subsequently seeking annulment of measures of harmonization have almost all been disappointed. This paper surveys the accumulated case law and finds that the “limits” of EU legislative competence, though of the highest constitutional significance in principle, are in practice imprecisely defined by the Treaty itself with the consequence that the legislative institutions enjoy wide discretion. The pattern has become circular: the Court presents a formula which defines the proper scope of harmonization and which sets out the control exercised by the principles of proportionality and subsidiarity, the EU legislature duly adopts the approved but reliably vague vocabulary and, provided the drafting is well-chosen, the Court has no plausible basis on which to set aside the legislative act. Case law dealing with the limits of EU competence has been converted into no more than a “drafting guide.” The paper shows how many of these deficiencies have been maintained uncritically after the reforms made by the Lisbon Treaty, even though a major part of the reform agenda initiated by the Laeken Declaration was inspired by “competence sensitivity.” Lisbon has instead put most of its reforming faith in a new recruit to competence monitoring – the national parliaments of the Member States. These new arrangements are poorly shaped at the level of detail, but the paper concludes with a largely positive assessment of the intention behind them. In particular they reveal a proper insistence on the need to supplement judicial control, which has become largely ineffective, with fresher political sensitivity to the perils of over-hasty centralization.

* Professor Stephen Weatherill (MA Camb, MA Oxon, MSc Edin) is a Fellow and Jacques Delors Professor of European Law at Somerville College, University of Oxford. Email: stephen.weatherill@law.ox.ac.uk.

A. Introduction

Ten years have elapsed since the first *Tobacco Advertising* judgment – more properly, *Germany v. Parliament and Council*¹, in which the Court of Justice for the first time concluded that the European Union (EU) legislature had stepped beyond the limits of the competence to harmonize national laws which is granted by the Treaty. That momentous decision was heralded as an important assertion of the Court's *constitutional* role in controlling *political* infidelity to the principle that the EU's scope for action is limited to that mandated by the founding Treaties, which are now the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). However, those subsequently seeking annulment of measures of legislative harmonization before the Court have almost all been disappointed. How now, ten years later, should we assess the first *Tobacco Advertising* case? This paper begins with a summary of the groundbreaking *Tobacco Advertising* ruling (B) before expressing doubt that the "limits" of EU legislative competence in the name of harmonization are reliable (C), and reinforces that skepticism with analysis of the more recent case law of the Court (D). The paper finds that the Treaty rules governing EU competence – both its definition and the principles of proportionality and subsidiarity that govern its exercise – are ill-suited *in practice* to give real meaning to the *principle* that the EU has only limited competence granted by its Treaty (E). The pattern is circular: the Court presents a formula which defines the proper scope of legislative harmonization and which sets out the control exercised by the principles of proportionality and subsidiarity, the EU legislature duly adopts the approved but reliably vague vocabulary and, provided the drafting is well-chosen, the Court has no plausible basis on which to set aside the legislative act. Case law dealing with the limits of EU competence has been converted into no more than a "drafting guide" for the EU legislature. The paper adds that much of the energy which has propelled the spread of EU harmonization is attributable to the slippery character of the Treaty itself, and in this sense there are reasons deeper than mere institutional opportunism to explain why the Court has typically sided with the EU legislature. The paper then shows how many of these deficiencies have been maintained uncritically in the relevant Treaty texts after the reforms made by the Lisbon Treaty, even though a major part of the reform agenda initiated by the Laeken Declaration was inspired by "competence sensitivity." Lisbon has instead put most of its reforming faith in a new recruit to competence monitoring – the national parliaments of the Member States (F). Finding these adjustments poorly shaped at the level of detail, the paper nevertheless offers a largely positive assessment of the intention behind these new arrangements (G). In conclusion (H) the paper finds that ten years after *Tobacco Advertising* the Court's case law has become little more than a "drafting guide" for a legislature which finds it all too easy to assert compliance with Article 5 Treaty on European Union's (TEU) principles of conferral, subsidiarity and proportionality in a manner which is unreviewable in practice. Beyond judicial control, the need for fresher *political* sensitivity to the perils of over-hasty centralization is clear – and it is one that afflicts all federal and quasi-federal arrangements.

¹ Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419.

B. Competence Review: The First *Tobacco Advertising* Case

The first *Tobacco Advertising* case's constitutional significance as the first ever annulment of a measure of legislative harmonization by the Court of Justice is explained above in the Introduction. In it, Directive 98/43 setting harmonized rules on the advertising of tobacco products was annulled by the Court for invalid reliance on what were then Articles 57(2), 66 and 100a EC and are now in amended form Articles 53(2), 62 and 114 of The Treaty on the Functioning of the European Union (TFEU).

The Directive was stated in its Preamble to be aimed at opening up the market for products which serve as the media for advertising and sponsorship of tobacco products. Although the Court agreed that obstacles to the free movement of goods or the freedom to provide services arose as a result of disparities between national laws on the advertising of tobacco products, it was persuaded of this only with regard to the likely emergence of diverse national rules on advertising tobacco products in periodicals, magazines and newspapers. Accordingly a Directive prohibiting the advertising of tobacco products in such media could be adopted as a valid measure of harmonization under what was then the EC Treaty, now the Treaty on the Functioning of the European Union, "with a view to ensuring the free movement of press products."² Equally the Court was receptive to harmonized prohibition of certain types of sponsorship by tobacco companies because variation in regulatory practice among the Member States led to "sports events being relocated, with considerable repercussions on the conditions of competition for undertakings associated with such events."³

But the Directive went too far. It prohibited advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas. In the Court's view these prohibitions did not help to facilitate trade in the products concerned. Furthermore the generality of the prohibition against sponsorship went beyond the limits imposed by the Treaty.

The Court's ruling is confined to finding trespass beyond the limits of (what are now) Article 114 TFEU and its cousins governing harmonization in pursuit freedom of establishment and the provision of services, Articles 53 and 62 TFEU. But by implication, if not explicitly, it was accusing the EU legislature of having used the cover of harmonization to smuggle measures of public health policy into the *Official Journal*.

At one level this judgment was nothing new. The Treaty does not confer, and never has conferred, a competence on the EU to harmonize laws *tout court*. Their key provision – today Article 114 TFEU – ties legislative harmonization to the establishment and

² *Germany v. Parliament and Council, supra*, note 1, at para. 98.

³ *Germany v. Parliament and Council, supra*, note 1, at para. 110.

functioning of the internal market as defined in Article 26 TFEU. So, as the Court has put it, this means that the Treaty does not authorize a measure which has only the incidental effect of harmonizing market conditions within the Union.⁴ Put another way, the EU may intervene to cure diversity between national laws only where that diversity is shown to be harmful to the achievement of the EU's internal market. This is why Directive 98/34 on tobacco advertising, which did not cross that threshold, was annulled.

Though the *Tobacco Advertising* judgment was in principle not novel, it was the first instance of annulment of this type of EU legislation on these grounds. In part this was because until the entry into force of the Single European Act in 1987 harmonization legislation was adopted by unanimity in Council or not at all, with the result that constitutionally dubious adventurism was typically shielded from constitutional review by the assembly of political consensus.⁵ The rise of qualified majority voting in Council opened up the possibility of Member States responding to political defeat in Council by seeking to persuade the Court that the disputed legislation did not fall within the EU's Treaty mandate. This is precisely the pattern of Germany's successful application to the Court in the case. So the ruling is of landmark significance as an expression of *judicial* defense of the limits of EU legislative competence against *political* preference to slip free of the limits agreed and approved by national constitutional process at the time the Treaty was drafted and subsequently revised. The Court's reading of the Treaty, not a qualified majority in Council allied with Parliamentary support, decides what the EU may and may not do.

So *Tobacco Advertising* applies what we know today as the "principle of conferral" to the particular case of legislative harmonization. Article 5(2) TEU states that: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" and adds (superfluously) that "Competences not conferred upon the Union in the Treaties remain with the Member States." In precisely this vein the Court in *Tobacco Advertising* had refused to treat legislative harmonization as creating "a general power to regulate the internal market" because this would be incompatible with the principle that "the powers of the Community [now Union] are limited to those specifically conferred on it."⁶

⁴ E.g. Case C-155/91, *Commission v. Council*, 1993 E.C.R. I-939; Case C-209/97, *Commission v. Council*, 1999 E.C.R. I-8067.

⁵ Private litigation before a national court prompting a preliminary reference raising questions of validity was in principle possible but dauntingly difficult given the absence of any case law suggesting the likelihood of a receptive hearing in Luxembourg. Even the expression of academic disquiet was rare: for a lonely and thoughtful voice see George Close, *The Legal Basis for the Consumer Protection Programme of the EEC and Priorities for Action*, 8 EUROPEAN LAW REVIEW 8 (1983).

⁶ *Germany v. Parliament and Council*, *supra*, note 1, at para. 83.

C. Limits, what Limits?

But what really *are* the “limits of the competences conferred” upon the EU by the Member States, as envisaged by Article 5 TEU? To grasp those limits one must engage with the detail of the Treaties and, in particular, one must map the cascade of legislative competences scattered throughout the text of the TFEU. Many of those provisions are sector-specific and confer a relatively clear-cut and tightly-defined competence to legislate on the EU. For example, Article 168 TFEU permits the EU to act in the field of public health but in its fifth paragraph it carefully excludes the harmonization of such laws – which is why the ill-fated Directive 98/43 on Tobacco Advertising was not adopted under it. By contrast Article 114 TFEU is not of this confined type. It is functionally driven: *any* national measure may be harmonized provided that leads to an improvement in the functioning of the internal market envisaged by Article 26 TFEU, and nothing is placed off the EU’s limits, excepting only that Article 114(2) TFEU excludes harmonization of fiscal provisions, those relating to free movement of persons, and those relating to the rights and interests of employed persons. Fixing the limits of Article 114 TFEU – which was Article 95 EC and before that Article 100a EC/EEC - has become the preoccupation of the Court as – inevitably – the annulment in the first *Tobacco Advertising* case has been followed by further attempts to deploy litigation to attack EU legislation that has succeeded in securing adequate political support to reach the *Official Journal* but which challenges (minority) State preferences and/or private commercial interests.

From the first *Tobacco Advertising* decision we know that a measure may be validly adopted on the basis of Article 114 TFEU provided that it genuinely has as its object the improvement of the conditions for the establishment and functioning of the internal market. It may aim to eliminate an appreciable distortion of competition or it may aim to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws where the emergence of such obstacles is likely and where the measure in question is designed to prevent them. In *Tobacco Advertising* these criteria were scattered throughout the judgment in relatively unsystematic fashion⁷ but lately the Court has moved towards a more consistently expressed formula. In its most recent ruling on the scope of Article 114 TFEU, *Vodafone, O2 et al v. Secretary of State*, it explained that:

“According to consistent case-law the object of measures adopted on the basis of Article 95(1) EC [now 114(1) TFEU] must genuinely be to improve the conditions for the establishment and functioning of the internal market.... While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC [114 TFEU] as a legal basis, the Community [Union] legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the

⁷ *Germany v. Parliament and Council, supra*, note 1, at paras. 84, 106, 86 respectively.

fundamental freedoms and thus have a direct effect on the functioning of the internal market.... Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them....”⁸

The point – made explicitly in the first *Tobacco Advertising* case itself⁹ – is that effective judicial monitoring of the limits dictated by the Treaty would be impossible were a mere finding of disparities between national rules or of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition enough to justify reliance on Article 114 TFEU. The Court insists on defining and policing a threshold for fear that without one the powers of the EU legislature “would be practically unlimited.”¹⁰ In similar vein the Court chose to avoid judging the challenged measure with reference to its legislative history. The measure had been re-drafted on more than one occasion by the Commission to assert more strongly an internal market aim and to downplay the public health dimension which, one may readily suspect, was the driving motivation. This background was something of which the Court was made fully aware in the hearings.¹¹ But it is certainly important that the Court chose *not* to place any reliance on the subjective views of the political institutions in drafting and ultimately adopting the measure. Instead it preferred its own objectively presented inquiry into the contribution made by the Directive to the functioning of the internal market.

On one level this seems to promise a constitutionally proper standard of review. It seems to wrest from the political institutions and into judicial hands the ultimate source of authoritative ruling on the lawful scope of the Treaty mandate. This, however, is deceptive. The Court places enormous weight on slippery adjectives and adverbs in its attempt to define the limits of Article 114 TFEU in a more sophisticated manner than does the Treaty. The object of a measure must *genuinely* be to improve the conditions for the establishment and functioning of the internal market. Conversely an *abstract* risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify reliance on Article 114 TFEU; differences must have a *direct* effect on the functioning of the internal market or cause an *appreciable* distortion of competition. Preventive harmonization – targeted at obstacles to trade resulting from future divergent development of national law – is allowed but emergence of such obstacles must be *likely*.

⁸ Case C-58/08, *Vodafone, O2 et al v. Secretary of State*, judgment of 8 June 2010, paras. 32-33.

⁹ See especially *Germany v. Parliament and Council*, *supra*, note 1, at paras. 84 & 106.

¹⁰ *Germany v. Parliament and Council*, *supra*, note 1, at para. 107.

¹¹ And it is considered in the opinion of A.G. Fennelly, *Germany v. Parliament and Council*, *supra*, note 1, at paras. 14-20, 74-77.

These words carry immense constitutional weight. Find that an effect on the market is *direct*, a distortion of competition *appreciable* or emergence of obstacles *likely* and the diversity between national laws is of sufficient magnitude to impact on the functioning of the internal market: the matter falls within the limits of Article 114 TFEU in particular and of the EU generally. Take away that crucial quality of directness or appreciability or likelihood and the matter rests with the Member States, for it is legislative diversity of a type that does not harm the EU's market-making project.

But how to measure this? How – thinking about the role in practice of the Court – to check whether the criteria are truly met when the legislature – as it surely will – conscientiously uses the vocabulary that the Court tells it is constitutionally necessary? “Preventive harmonization,” for example, is permitted only where the emergence of future obstacles is *likely*: but how in practice can a legislative claim to respond to such likelihood be falsified?¹² The anxiety is that the Court has failed to address the problem and has instead concocted a set of phrases which merely serve as a “drafting guide” which readily enables the legislative institutions to comply with the principle of conferral.

The anxiety that the threshold is low is deeply sensitive given the scope of what may be achieved by the legislature once it is crossed. Provided that the conditions for recourse to Article 114 TFEU are fulfilled, the Union “legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.”¹³ Logically too, in the light of the commitment of Articles 114(3), 12 and 168(1) TFEU to public health and consumer protection concerns, the Court concluded that a harmonized rule “may consist in requiring all the Member States to authorize the marketing of the product or products concerned, subjecting such an obligation of authorization to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products.”¹⁴ There is plainly no objection in principle to a harmonized *ban* on goods – provided that the generally applicable criteria for reliance on Article 114 are met, which will typically mean that the ban must form part of a regime dealing with a wider category of products than simply those subjected to the harmonized ban. So although the Treaty is littered with sector-specific bases for legislation which are commonly drafted with circumspection, Article 114's functionally broad mandate for legislative harmonization goes a long way to set aside such caution in legislative practice. There is no circumvention of Article 168(5)'s exclusion of harmonization in the field of public health if the criteria of Article 114 are satisfied; similarly Article 169(2)(b) TFEU

¹² Cf. Martin Seidel, *Präventive Rechtsangleichung im Bereich des gemeinsamen Marktes*, 41 *EUROPARECHT* 25 (2006).

¹³ Cases C-154/04 & C-155/04, *Alliance for Natural Health v. Secretary of State for Health*, 2005 E.C.R. I-6451, at para. 30.

¹⁴ Case C-210/03, *Swedish Match*, 2004 E.C.R. I-11893, at para. 34; Cases C-154/04 & C-155/04, *supra*, note 13, at para. 33; Case C-380/03, *Germany v. Parliament and Council*, 2006 E.C.R. I-11573, at para. 43.

confines the EU to “measures which support, supplement and monitor” national consumer law but harmonization of consumer law pursuant to Article 114 readily proceeds in so far as divergences between national laws obstruct the functioning of the internal market. Equally the opening caution of Article 114 TFEU that it shall apply for the achievement of the internal market “save where otherwise provided in the Treaties” does not subordinate it to provisions such as Articles 168 or 169 because they are *not* dedicated to the achievement of the internal market. Accordingly harmonization in pursuit of the internal market creates a discrete EU layer of regulation affecting the harmonized sector in question: environmental protection, consumer law, public health policy, culture, and so on have all acquired a legislative dimension contributed by the EU in the name of market-making.¹⁵ This is the true energy of Article 114. The EU legislature need not seek to disguise the re-regulatory dimension of its harmonization initiatives. It needs only to tie that re-regulatory dimension sufficiently tightly to the market-making function of harmonization. But that is not difficult to achieve, partly because the Court is generous in its interpretation of the scope of the legislative grant but mainly because the Treaty, and the concept of internal market in particular, simply is broad.

D. The Nature of the Court’s Inquiry pursued in the Case Law

The key question is what is it that the Court is objectively reviewing in order to patrol the limits of the Treaty, and in particular those of Article 114 TFEU. A close inspection of the case law is needed.

I. Directive 2001/37: R. v. Secretary of State ex parte BAT and Imperial Tobacco

R. v. Secretary of State ex parte BAT and Imperial Tobacco concerned a different element in the EU’s (anti) tobacco policy from that at stake in the first *Tobacco Advertising* case.¹⁶ Directive 2001/37 deals principally with labeling (in particular health warnings) and tar yields rather than advertising. The Directive was aimed at improving the functioning of the internal market for tobacco products, not media carrying advertisements for tobacco products. The Directive was based on Articles 95 and 133 EC. The Court, asked to deliver a preliminary ruling by an English court before which questions of validity had been raised in proceedings initiated by tobacco companies,¹⁷ found that use of Article 95 EC was valid, and that although the addition of Article 133 was erroneous, that defect was purely formal

¹⁵ For an introductory survey see SYBE DE VRIES, TENSIONS WITHIN THE INTERNAL MARKET: THE FUNCTIONING OF THE INTERNAL MARKET AND THE DEVELOPMENT OF HORIZONTAL AND FLANKING POLICIES 274-297 (2006).

¹⁶ Case C-491/01, *R v. Secretary of State ex parte BAT and Imperial Tobacco*, 2002 E.C.R. I-11543.

¹⁷ Not so daunting once they had the vocabulary: see, *supra*, note 5.

and did not affect the overall validity of the measure. So the Directive survived the challenge.

In its ruling the Court considered that in view of public concern about the health risks caused by consuming tobacco products it was “likely” that obstacles to the free movement of such products would arise as Member States adopted new and stricter and, crucially, divergent rules.¹⁸ This was confirmed by the Court by virtue of a wholly uncritical regurgitation of the content of the recitals in the preamble to the Directive which – as one would have readily expected - cited divergences and imminent divergences in national practice. The Court was also sustained in its favorable view of the Directive’s validity by the observations submitted during the procedure which confirmed national practice. This too was hardly a surprise. The governments of the United Kingdom, Belgium, Finland, France, Ireland, Italy, the Netherlands and Sweden, together with the Parliament, the Council and the Commission, had taken the view that the Directive was valid, whereas only the Greek and the Luxembourg governments had taken the opposite view. Their portrayal of legislative divergence and a consequent competence and need to harmonize was hardly prepared on an impartial footing.

The Court, finding that this was a valid measure of legislative harmonization, was heavily influenced by the views of those who had participated in the adoption of the measure. To an extent this is unavoidable. Recital 7 to Directive 2001/37 states that:

“several Member States have indicated that, if measures establishing maximum carbon monoxide yields for cigarettes are not adopted at Community level, they will adopt such measures at national level. Differences in rules concerning carbon monoxide are likely to constitute barriers to trade and to impede the smooth operation of the internal market.”

The Court embarks on an objective review of the impact of regulatory diversity in the internal market but the subjective political preferences and declared intentions of the Member States intimately affect that assessment. Still, there were significant arguments to the effect that the size required under the Directive for the health warning labels precluded a trader labeling effectively in compliance with the (multilingual) rules of more than a small number of Member States. This practical objection to the plausibility of the claim that this measure not only aimed to protect public health but also truly served to improve the functioning of the internal market was pressed on the Court, but simply ignored in its judgment.¹⁹

¹⁸ *R. v. Secretary of State, supra*, note 16, at para. 67.

¹⁹ For a careful explanation see Derrick Wyatt, *Community Competence to Regulate the Internal Market*, in 50 YEARS OF THE EUROPEAN TREATIES: LOOKING BACK AND THINKING FORWARD, 93 (Michael Dougan and Samantha Currie eds., 2009).

II. Directive 2001/37: Swedish Match

Swedish Match, like *ex parte BAT*, involved an attack on Directive 2001/37, but it concerned one particular provision of it, Article 8.²⁰ This provision, originally introduced in Directive 92/41, provides that the Member States are to prohibit the placing on the market of tobacco for oral use. This targets *snus*, which is tobacco sold loose or in small sachets and intended to be consumed by placing between the gum and the lip. The litigation was driven by a Swedish producer of *snus* unable to sell the product anywhere in the EU except in Sweden itself where a derogation contained in the Swedish act of accession protected it from the ban. A preliminary reference was made by an English court. There was, the Court stated, evidence of legislative diversity. This the Court knew by reading the recitals to Directive 2001/37. Given the relatively large amount of inter-State trade in this market, “those prohibitions of marketing contributed to a heterogeneous development of that market and were therefore such as to constitute obstacles to the free movement of goods”; and it was “likely” that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting growing public anxiety.²¹ Reliance on Article 95 EC – now Article 114 TFEU – was justified.

The judgment in *Swedish Match* is terse and unsatisfactory, yet revealing. In declaring that even a ban on a product may fall within the legitimate scope of legislative harmonization the Court cited Directive 92/59 on general product safety.²² That Directive demonstrates that unsafe products may be the subject of a harmonized ban in order to improve the functioning of the market for safe products. A more recent example would be Directive 2005/29, which bans unfair business-to-consumer commercial practices in order to establish a common regime within which fair practices *are* allowed.²³ So Directive 2001/37 would fit this model were *snus* banned as one element in a regulatory scheme covering a broader range of permitted tobacco products. The problem is that there is no explanation of the existence of any such wider scheme in either the Directive or in the Court’s judgment. This seems to be a free-standing ban on *snus* – and to permit such a free-standing ban seems to contradict the Court’s refusal to accept the suppression of advertising on ashtrays and parasols in the first *Tobacco Advertising* case.²⁴ An alternative more benevolent reading of *Swedish Match*, and one which would conform to *Tobacco Advertising*, was that the Court’s ruling, though regrettably compressed,²⁵ views the ban

²⁰ Case C-210/03, *Swedish Match*, 2004 E.C.R. I-11893.

²¹ *Swedish Match*, *supra*, note 20, at paras. 38, 39.

²² O.J. 1992 L 228/24, now replaced by Directive 2001/95 O.J. 2002 L 11/4.

²³ O.J. 2005 L 149/22.

²⁴ See powerfully in this vein Wyatt, *supra*, note 19.

²⁵ *Swedish Match*, *supra*, note 20, paras. 35-42 are the culprits.

on oral tobacco products as an element in a wider regime establishing a harmonized scheme for regulating tobacco products, involving bans on some products and restrictions (such as labeling requirements) on others. This interpretation finds some support in the Opinion of Advocate General Geelhoed, who took the view that a product ban could improve the functioning of the internal market by diminishing enforcement costs, including the costs of the enforcement of regulations applying to related products. So he did not treat the ban on *snus* as free-standing and, like the Court but according to more subtle reasoning, he held the Directive to be validly based on Article 95 EC, now Article 114 TFEU.

But even if one takes the interpretation that is most generous to judicial consistency *Swedish Match* is still troubling. The benevolent reading of the ruling holds that the Court treated the ban on *snus* as part of a wider regime dedicated to freeing trade in other kinds of products which were regarded as less harmful by the legislature. This may fit with existing case law and legislative practice, but it is still extraordinarily permissive of legislative discretion. It invites strategic drafting. Worse: it encourages the drafting of legislative measures that are broad not targeted. A régime that is meant to patrol the limits of the EU's competences tends in practice to push them ever wider in circumstances where judicial control is in practice sorely lacking.

III. Regulation 1007/2009: Inuit Tapiriit Kanatami et al v. Parliament and Council

A similar anxiety emerges from inspection of Regulation 1007/2009. It is based on Article 95 EC and establishes harmonized rules concerning the placing on the market of seal products.²⁶ This is permitted only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. With narrow exceptions,²⁷ no other seal products are allowed on the EU market. The Recitals to the Regulation refer to the European Parliament's resolution on a Community action plan on the Protection and Welfare of Animals and to the Parliamentary assembly of the Council of Europe's recommendation to ban all cruel hunting methods, while also referring to existing or intended diverse national regulatory responses in the EU to public concern about animal welfare. The internal market therefore requires common rules – and they “take fully into account considerations of the welfare of animals.”²⁸ An application for interim measures suspending the operation of the measure was rejected by the Court for want of the required degree of urgency, after recitation of the familiar principles governing the scope of Article 114 TFEU.²⁹ The matter seems likely to be pursued only at WTO level

²⁶ O.J. 2009 L 286/36.

²⁷ Article 4(2) Regulation 1007/2009.

²⁸ Recital 9 to the Regulation.

²⁹ Case T-18/10R, *Inuit Tapiriit Kanatami et al v. Parliament and Council*, order of 30 April 2010.

(in proceedings initiated by Canada against the EC),³⁰ not within the EU. As a matter of EU law the problem for the challenger is that this measure, although shutting down a large part of the market for seal products, seems once again to fit the logic of Article 114. One bans unsafe products as part of a scheme to secure free movement of safe products: one bans seal products that are not the product of (in short) a traditional hunt in order to secure free movement of seal products which are so sourced. There is nothing in the wording of Article 114 nor in the Court's elaboration of its pre-conditions which excludes such an approach. Doubtless the "decisive factor" in selecting the control exercised by the Regulation was animal welfare combined with preservation of the "culture" of the Inuit hunt, but this is no constitutional objection to use of Article 114, provided that an element of market-making be achieved. To close down a large part of the market (for seal products) to release only a small part of it might be thought to constitute a disproportionate exercise of the legislative competence conferred by Article 114, but, as elaborated below in Section E.I, one would have little expectation of success in persuading the Court to intervene in the name of proportionality once competence to legislate in the first place is successfully established.

IV. Directive 2002/46: Alliance for Natural Health v Secretary of State for Health

In *Alliance for Natural Health* Directive 2002/46 on food supplements was held valid.³¹ The Directive, another Article 95 measure, harmonizes national rules governing foods containing concentrated sources of nutrients on the basis that legislative diversity at national level harms the functioning of the internal market. Once again the Court relied on the Directive's Recitals and the observations of the Parliament and the Council in finding that the claim to disruptive legislative diversity was made good. It also referred to "a substantial number of complaints from economic operators" made to the Commission about such variation,³² though it does not appear to have looked at any of these. And, without more, reliance on Article 95 EC, now Article 114 TFEU, is accepted.

As was already observed in connection with *ex parte BAT*, the Court's purportedly objective review of the impact of regulatory diversity in the internal market is immediately and unavoidably tied to what Member States do and are likely to do and is here shown to be connected to apparently unverified private complaints. The competence conferred by Article 114 TFEU is not static, but rather dynamic, depending on regulatory practices, actual and likely, at national level and the reported impact on economic operators. The easy manipulation of these threshold criteria by those politically responsible for their

³⁰ DS400, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm.

³¹ Cases C-154/04 & C-155/04, *Alliance for Natural Health v. Secretary of State for Health*, 2005 E.C.R. I-6451.

³² *Alliance for Natural Health*, *supra*, note 31, at para. 37.

application stands in stark contrast to the practical difficulty faced by the Court in finding any means to find independent evidence for claimed appreciable distortions or likely emergence of new obstacles. Whether the Court can really do more, given the breadth and ambiguity of the guiding Treaty provisions, will be addressed further below, once the case law has been fully considered.

V. Directive 2003/33: Tobacco Advertising II

After Directive 98/34 was annulled in the first *Tobacco Advertising* case the legislature responded by adopting Directive 2003/33 on the harmonization of laws relating to advertising and sponsorship of tobacco products. Not surprisingly this was prepared with a close eye on what the Court in its earlier ruling had indicated would receive the green light. Accordingly Directive 2003/33 was carefully confined to rules affecting the advertising and promotion of tobacco products in the press and other printed publications, radio broadcasting, information society services and tobacco related sponsorship.³³ Equally unsurprisingly it survived judicial scrutiny. In *Germany v. Parliament and Council* – the second *Tobacco Advertising* case – the Court referred to its earlier judgment, the recitals to Directive 2003/33 and to the Commission’s submitted observations, as well as noting the high level of cross-border trade in the relevant market, and concluded that use of Article 95 EC was valid.³⁴

The judgment confirms a further expansionist element in the case law. One complaint was that aspects of the Directive affected media with no connection to the cross-border market. But the Court did not insist that “an actual link with free movement between the Member States in every situation covered by the measure” be demonstrated.³⁵ The test is that the measure must actually be intended to improve the conditions for the establishment and functioning of the internal market. Probably it is logical that the purely internal situation is rare and becoming rarer in an increasingly integrated EU-wide market and that therefore an EU measure cannot sensibly be targeted at issues affecting only cross-border trade, for that category is not static. In any event the virtue of certainty of application militates in favor of an EU measure which exerts an impact in some instances on situations internal to a Member State, rather than basing its reach on an unclear and shifting “inter-State” criterion. But the consequent dynamic in favor of an EU regulatory competence that is *in principle* limited but *in practice* truly broad is evident. Expansionism

³³ The legislative impulse to go further (and to address *e.g.* ashtrays) was not abandoned but recycled in non-binding form: see Council Recommendation on the prevention of smoking and on initiatives to improve tobacco control, O.J. 2003 L 22/31, based on Article 152(4) EC.

³⁴ Case C-380/03, *Germany v. Parliament and Council*, 2006 E.C.R. I-11573.

³⁵ *Germany v. Parliament and Council*, *supra*, note 34, at para. 80. See also Joined Cases C-465/00, C-138/01 & C-139/01, *Rechnungshof v. Österreichischer Rundfunk*, 2003 E.C.R. I-4989, para. 41.

is very much the key trend. The Court's acceptance that legislative harmonization may validly empower the Commission to take individual measures with respect to particular products, which may entail the creation of an EU-level body responsible for contributing to the implementation of a process of harmonization,³⁶ has further emphasized the wide scope of Article 114 TFEU.

VI. Directive 2006/24: Ireland v. Parliament and Council & Decision 2004/496: Parliament v. Council

Ireland v. Parliament and Council concerned Directive 2006/24 on data retention.³⁷ The Court found it found to be validly adopted under Article 95 EC, for there is variation between national practices, likely to grow more serious over time. Ireland's unsuccessful application was largely motivated by a concern to show that the "third pillar" should have been used for a measure which it argued was primarily a measure to fight crime – this dimension of the case is now overtaken by the reforms made by the Treaty of Lisbon.³⁸ But the decision's illumination of the rubbery texture of Article 95 EC, now Article 114 TFEU, endures. The Court cited its familiar principles and then proceeded to refer to evidence submitted to it about divergent national practice in the matter of retention of data relating to electronic communications as part of anti-crime strategies. Moreover it was foreseeable that States without rules would introduce them. This justified the adoption of harmonized rules in order to safeguard the proper functioning of the internal market. Once again, the Court's inquiry has a weary feel and it scarcely extends beyond the perfunctory. It draws on the evidence of those directly and partially implicated in the adoption of the measure in the first place – the Commission, the Council and States who had voted in favour of the measure in Council, the Parliament, and the European Data Protection Supervisor. The Court skips lightly over the legal threshold and the factual appraisal: the Directive is valid.

The principal interest in the ruling in *Ireland v. Parliament and Council* lies in its difference from that in *Parliament v. Council*, which is a rare example of the Court refusing to accept legislative reliance on Article 95 EC, now Article 114 TFEU.³⁹ The Court annulled a Council Decision (2004/496) on the conclusion of an agreement between the EC and the USA on

³⁶ Case C-359/92, *Germany v. Council*, 1994 E.C.R. I-3681; Case C-66/04, *UK v. Parliament and Council*, 2005 E.C.R. I-10553; Case C-217/04, *UK v. Parliament and Council*, 2006 E.C.R. I-3771 (annotated in this vein by Vincenzo Randazzo, 44 COMMON MARKET LAW REVIEW 155 (2007)). See also Robert Schütze, *From Rome to Lisbon: "Executive Federalism" in the (new) European Union*, 47 COMMON MARKET LAW REVIEW 1385 especially 1394-96, 1406-08 (2010).

³⁷ Case C-301/06, *Ireland v. Parliament and Council*, 2009 E.C.R. I-593.

³⁸ On this aspect (and others) see Ester Herlin-Karnell, *Annotation*, 46 COMMON MARKET LAW REVIEW 1667 (2009).

³⁹ Cases C-317/04 & C-318/04, *Parliament v. Council*, 2006 E.C.R. I-4721.

the processing and transfer of passenger data by air carriers to the American authorities. The Decision was based on a parent Directive (95/46) based on Article 100a (subsequently Article 95 EC, now Article 114 TFEU). The Court once again did not investigate beyond the recitals but on this occasion it found that they revealed that the transfer of data “constitutes processing operations concerning public security and the activities of the State in areas of criminal law.”⁴⁰ Decision 2004/496 concerned a transfer of personal data within a framework instituted by the public authorities in order to ensure public security, whereas Directive 2006/24 on data retention, upheld in *Ireland v. Parliament and Council*, covers the activities of service providers in the internal market and does not contain any rules governing the activities of public authorities for law-enforcement purposes. So the limits of Article 114 TFEU are glimpsed. But this is rare.

VII. Regulation 717/2007: Vodafone, O2 et al v. Secretary of State

The most recent judgment in this vein is *Vodafone, O2 et al v. Secretary of State*.⁴¹ This, another challenge directed through English courts by a trader seeking to set aside EU regulatory intervention in the market, was an attack on the validity of the so-called “Roaming Regulation,” Regulation 717/2007. The Regulation caps the wholesale and retail charges terrestrial mobile operators may charge for the provision of roaming services on public mobile networks for voice calls between Member States. It is based on Article 95 EC. Advocate General Maduro’s Opinion is full of interesting ideas: and he did *not* think the Court’s criteria for valid “preventive harmonization” were satisfied in the case. But by contrast the Court found the case no different from most of those summarized above and it held the measure valid.

The measure appeared to be addressed at *private* practices under an assumption that the market was malfunctioning because of intransparency leading to excessive prices that were not curtailed by the exercise of consumer choice. In short the Regulation seemed to be an attempt to cure the uncompetitive operation of the market by fixing (harmonized) prices. This would have seemed to be a very significant stretch of Article 95 (though not a wholly unprecedented one⁴²). But the Court wrenched the matter back into the mainstream. It declared that the Regulation had been adopted in response to the likelihood that national price control measures of divergent type would be adopted aiming

⁴⁰ *Parliament v. Council*, *supra*, note 39, at para. 56.

⁴¹ Case C-58/08, *Vodafone, O2 et al v. Secretary of State*, judgment of 8 June 2010.

⁴² Regulation 2560/01 on cross-border payments in euros, O.J. 2001 L 344/13, based on Article 95 EC, requires that bank charges for cross-border payments in euro be the same as charges for payments made in euro within a Member State. Regulation 2560/01 is now replaced by Regulation 924/2009 O.J. 2009 L 266/11 but it maintains the model of legislative harmonization of private commercial practices.

to address the problem of the high level of retail charges for EU-wide roaming services. So this was treated as classic preventive harmonization aimed at improving the conditions for the functioning of the internal market. In similarly evasive vein the Court did not address the argument that national measures capping the cost of roaming were *unlikely* to be adopted because they would have the perverse effect of harming the competitive position of companies based on the regulator's territory while protecting only out-of-state consumers.⁴³ The conditions for resort to Article 114 TFEU are not met where diverse national measures are unlikely because no problem requiring regulatory intervention can be identified; probably they *are* met where a problem requiring regulatory attention is identified but national measures are unlikely because of want of incentives to act and/or lack of aptitude to tackle the problem.⁴⁴ In such circumstances there is, in short, a deficiency in the internal market foreseen by Article 26 TFEU which the EU legislature may remedy. The point is, however, novel, and such exploration of the limits of Article 114 would have been intriguing. Regrettably this twist was completely ignored in a judgment which takes at face value the claims of the EU legislature.

The Court conspicuously reached its conclusions in *Vodafone* by reference only to the observations presented by the EU's own institutions and those found in the recitals attached to the measure. It drew on both the explanatory memorandum to the proposal and the impact assessment to substantiate the finding that there was a likelihood of divergent development of national laws. The recital stated there was pressure for Member States to take measures to address the problem of the high level of retail charges for roaming services, and the Court adds that this was moreover confirmed by the Commission at the hearing.⁴⁵ This is yet another Mandy Rice-Davies moment: the Commission, having piloted the measure through the EU legislative process, then advises the Court it is constitutionally justified – *well, it would, wouldn't it*.⁴⁶ The Court did not stand outside the legislative choice that had been made. Instead it aligned itself uncritically with the institutions whose choices were being challenged by the applicants.

⁴³ Cf. Martin Brenneke, *Annotation*, 47 COMMON MARKET LAW REVIEW 1793 especially at 1804-06 (2010). The same author pursued this interesting inquiry well in advance of the judgment: Martin Brenneke, *The EU Roaming Regulation and its Non-Compliance with Article 95*, BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT HEFT 79 (October 2009), http://www2.jura.uni-halle.de/INSTITUT/Heft_79.pdf, last accessed 2 March 2011.

⁴⁴ Contra Brenneke *id.*, who treats Article 114 as inadequate and argues Article 352 is the correct legal base.

⁴⁵ *Vodafone*, *supra*, note 41, at para. 44.

⁴⁶ The reference is specific to a political scandal of the 1960s in the UK but the phrase is apt nonetheless to pierce self-serving attitudes more generally: http://en.wikipedia.org/wiki/Mandy_Rice-Davies, last accessed 2 March 2011.

VIII. Ten Years Later: The Case Law as “Drafting Guide”

There is circularity. The legislative institutions draw on the Court’s case law as a drafting guide when they agree the legislation and rely on it again when called upon to defend it before the Court. And the Court has nowhere to go to in reviewing the plausibility of the claims. Placing a *formal* limit on the EU’s conferred competences is central to the constitutional character of the whole project, but the problem lies in slippage which is *in practice* conducive to the inflation of centralized authority. Article 114 TFEU is a predominant source of such slippage.⁴⁷ In practice its limits are easily met by intelligent drafting. Even when the drafting is *not* so intelligent – as in *Swedish Match*⁴⁸ – the Court generously finds an adequate contribution to the functioning of the internal market. Ten years on, the first *Tobacco Advertising* case looks like an anomaly.

E. Legislative Discretion: The Limits of EU Competence in Principle and in Practice*I. Legislative Discretion in Principle: Choice of Methods, Proportionality and Subsidiarity*

The choice of measure used to harmonize involves a high measure of discretion granted to the legislative institutions. The Court consistently states that Treaty intends to confer on the legislature a discretion in selecting the method of harmonization most appropriate for achieving the desired result, in particular in fields with complex technical features.⁴⁹ This broad legislative discretion extends also to some extent to the finding of basic facts.⁵⁰ Equally although the exercise of a competence that exists requires compliance with the principles of proportionality and subsidiarity, the application of both principles involves the grant of discretion to the legislative institutions. In *ex parte BAT*, for example, the Court insisted that the legislature “must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.”⁵¹ In consequence a measure must be manifestly inappropriate having regard to its objective before the legislative choice will be regarded as disproportionate and therefore invalid. Proportionality may have bite where administrative decisions affecting the individual are at

⁴⁷ For a sustained critique, taking EU tobacco regulation as its principal case study, see, ALEXANDER SOMEK, *INDIVIDUALISM: AN ESSAY ON THE AUTHORITY OF THE EUROPEAN UNION* (2008).

⁴⁸ Case C-210/03, *supra*, note 20.

⁴⁹ *E.g.* Case C-66/04, *supra*, note 36, at para. 45; Case C-217/04, *supra*, note 36, para. 43; Case C-380/03, *supra*, note 34, at para. 42; Case C-58/08, *supra*, note 41, at para. 35.

⁵⁰ Case C-343/09, *Afton Chemical Limited v. Secretary of State for Transport*, judgment of 8 July 2010, at para. 33.

⁵¹ Case C-491/01, *supra*, note 16, at para. 123.

stake but the broader the measure's scope, the less likely that proportionality will trip up the legislature.⁵² Only legislative choices that verge on the absurd are likely to be condemned as manifestly inappropriate. So a clean bill of health was awarded in *ex parte BAT* and in all the other cases mentioned above. In *Alliance for Natural Health* the applicants attacked the use of "positive lists" – lists specifying exhaustively which additives may be used. It would be enough, they argued, to based the EU's nutrients régime on negative lists – stipulating less dictatorially what may *not* be included, But for the Court the authors of Directive 2002/46 could "reasonably take the view that an appropriate way of reconciling the objective of the internal market, on the one hand, with that relating to the protection of human health, on the other, was" to opt for a positive list.⁵³ Such perfunctory review is typical.⁵⁴

Subsidiarity too has been all but neutered as a basis for judicial intervention. *Ex parte BAT* was the first case in which the Court ruled that subsidiarity even applies to Article 95: it did so by finding that there is no exclusive competence at stake. But it then readily found compliance with the subsidiarity principle by observing that given that the Directive's objective was to eliminate the barriers caused by inter-State regulatory divergence while also ensuring a high level of health protection, it followed that since such an objective could not be sufficiently achieved by the Member States individually but rather was better achieved at EU level, the dictates of subsidiarity were satisfied.⁵⁵ This approach has become the Court's norm⁵⁶ and it entails that whenever the EU sets common rules then by definition it has complied with the principle of subsidiarity. *Principle* – that these are rules of constitutional significance which place reviewable limits on EU action - differs from *practice*.

Accordingly a measure of harmonization has never been found to violate the principle of proportionality or the principle of subsidiarity. The Court's interpretation of these principles governing the permitted exercise of Treaty-conferred legislative competence is immensely respectful of legislative discretion.

It is notorious that the legislature frequently inserts a Recital into measures asserting compliance with these principles without the slightest elaboration of why this is so. For

⁵² On the different contexts in which proportionality is applied see TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* Chapters 3-5 (2006).

⁵³ Cases C-154/04 & C-155/04, *supra*, note 31, at para. 68.

⁵⁴ For an egregious example see Case C-103/01, *Commission v. Germany*, 2003 E.C.R. I-5369 para. 48.

⁵⁵ Case C-491/01, *supra*, note 16, at paras. 181-183.

⁵⁶ *Cf.* Case C-103/01, *supra*, note 54, at para. 47; Cases C-154/04 & C-155/04, *supra*, note 31, at paras. 104-07.

example Recital 21 of Regulation 1007/2009 on seal products, mentioned above,⁵⁷ provides that:

“since the objective of this Regulation, namely the elimination of obstacles to the functioning of the internal market by harmonizing national bans concerning the trade in seal products at Community level, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.”

This is assertion rather than demonstration. As with the *existence* of legislative competence, so too its *exercise*: the legislature is evidently simply using the Court’s case law as a drafting guide. Such mechanical recitation has become commonplace.⁵⁸

One could certainly encourage the Court to be more aggressive and to demand fuller elaboration of just why the legislature has concluded that the measure in question is compatible with the dictates of proportionality and subsidiarity. In 1997 it held that an “express reference” to subsidiarity was not a necessary pre-condition of a measure’s validity.⁵⁹ That decision pre-dated the entry into force of the Protocol added by the Amsterdam Treaty, and it is probable that since 1999 no such leniency would be accorded to acts that fail to include express recognition of the place of subsidiarity. The problem, however, ultimately lies in the nature of the principles themselves, not in lenient judicial review. Subsidiarity is potentially helpful in so far as it directs an engagement with relevant learning such as that exploring the economics of federalism as a basis for calculating the virtues and vices of centralized rule-making as opposed to local autonomy.⁶⁰ Nor should

⁵⁷ *Supra*, note 26.

⁵⁸ There are countless examples! See *e.g.* Recital 12 of Directive 2006/7 on bathing water quality, O.J. 2006 L 64/37; Recitals 6 and 10 of Directive 2000/31 on electronic commerce O.J. 2000 L 178/1; Recital 22 of Regulation 924/2009, *supra*, note 42. It is not only binding acts which commonly attract unsubstantiated assertion of compliance with the principles of proportionality and subsidiarity: see *e.g.* the Council Conclusions on the Work Plan for Culture 2011-2014, O.J. 2010 C 325/1; Council Conclusions on the role of sport as a source and a driver for active social inclusion, O.J. 2010 C 326/5.

⁵⁹ Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405 para. 28.

⁶⁰ The literature is vast, the concepts contested, the restraining influence of subsidiarity (if any) controversial. For helpful introductions to the debate in a European context (not necessarily using the language of subsidiarity explicitly) see *e.g.* Emanuela Carbonara, Barbara Luppi and Francesco Parisi, *Self-Defeating Subsidiarity*, 5/1 REVIEW OF LAW AND ECONOMICS 742 (2009); Roger Van den Bergh and Wolfgang Kerber, *Mutual Recognition Revisited: Misunderstandings, Inconsistencies, and a Suggested Reinterpretation*, 61/3 KYKLOS 447 (2008); Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, 12 EUROPEAN LAW JOURNAL 440 (2006); Jukka Snell, *Who’s Got the Power? Free Movement and Allocation of Competences in EC Law*, 22 YEARBOOK OF EUROPEAN LAW 323 (2003); Jacques Pelkmans, *Subsidiarity between Law and Economics*, 1/2005 College of

such salient inquiry engage economics alone: there is evidently a sensitive and historically deep-rooted cultural context to the European debate about uniformity *versus* diversity.⁶¹ Subsidiarity as antidote to blind pursuit of “more Europe” could serve a worthwhile purpose. But this is remote from legal rules of the type apt to form the basis of judicial review of legislation. None of the economic or cultural literature serves up cast-iron conclusions on whether and, if so, how to pursue central rules. There are instead multiple relevant factors, varying in weight sector by sector, marking out a broad terrain within which political choices need to be made and priorities established. In this sense the principle of subsidiarity is to be understood as providing a framework within which to debate whether the EU should exercise a conferred competence and, if so (and in conjunction with the principle of proportionality), then how. The heart of subsidiarity – in a broader sense than that in view in the confined context of judicial review – is an inquiry into whether even if the EU’s objectives are advanced by and best achieved by the proposed measure, it is nevertheless important enough to override objections rooted in the worth of national diversity and autonomy.⁶² This type of inquiry could hardly be more important in exploring what sort of “Europe” is being created but these are matters of political judgment. One might quarrel with legislative choices made about whether to pursue problem-solving collectively at EU level or instead to tolerate the costs of unsolved or inadequately solved problems while enjoying greater scope for local diversity, but it is hard to see how such a decision could be treated as wrong *in law*.⁶³ This does not make subsidiarity (or proportionality) useless but it does point to the need to move beyond the Court in favor of a wider and more vibrant institutional culture in which the risk that the EU operates in a manner that is structurally biased in favor of centralization is confronted and its implications are critically debated – *especially* where the relevant legal base which imperils the operational utility of Article 5 TEU’s principle of conferral is the functionally broad Article 114 TFEU. A heavier emphasis on procedural openness might usefully be demanded by the Court, so that measures must explain more fully just what calculations inform the conclusion that a conferred competence should be exercised in the manner selected – and one could at least expect the Court to invalidate acts that ignore the

Europe Research Papers in Law,

http://www.coleurop.be/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_1_2005_Pelkmans.pdf.

⁶¹ Here too the literature is rich and (appropriately!) diverse: for a helpful starting-point see *e.g.* PETER A. KRAUS, *A UNION OF DIVERSITY: LANGUAGE, IDENTITY AND POLITY-BUILDING IN EUROPE* (2008).

⁶² Convincingly examined in this vein, albeit expecting the Court to exercise more controlling influence than does this paper, by Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 *COMMON MARKET LAW REVIEW* 63 (2006) and by Matthias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 *EUROPEAN LAW JOURNAL* 503 (2006). See also Gerard Conway, *Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ*, 11 *GERMAN LAW JOURNAL* 966 especially at 988-990 (2010); and SOMEK, *supra*, note 47, especially Chapter 8.

⁶³ *Cf.* emphasizing the political/ procedural character of subsidiarity ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW* Chapter 5 (2009); Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 *VIRGINIA LAW REVIEW* 731, especially 827-832 (2004).

expectations of consultation and reasoning set out in the Protocol on the principles of subsidiarity and proportionality. But a more aggressive procedural push is likely to do little more than induce the legislative institutions to find more decorative ways to say what they say now – that the political decision to act has been taken in an area of complex choices, that it has been agreed that it is better that action be taken by the EU than by the Member States and that the means used are in compliance with proportionality. If qualitative and quantitative indicators favoring EU action are recited in a legislative act⁶⁴ then, absent manifest miscalculation or illogicality, it is hard to see how a court could or should intervene.

The connecting thread in the reticent case law dealing with judicial review in the name of proportionality and (especially) subsidiarity is the concern of the Court not to trespass on the exercise of legislative discretion. Occasionally judges come clean. In an address given in 2002 the then President of the Court, Gil Carlos Rodriguez Iglesias, argued that “subsidiarity is a principle of an essentially political nature” and he asserted a concern to purge the Court’s diet of “political hot potatoes.”⁶⁵ That job has been done! Provided the matter falls within the Treaty mandate conferred on the EU by the Member States, the legislative act is immune from judicial invalidation in the name of subsidiarity or proportionality unless the legislature has committed a manifest error.

II. Legislative Discretion in Practice: The Principle of Conferral

By sharp contrast with the discretion admitted with regard to choice of method used to harmonize, it is a matter of constitutional principle that the identification of a competence to legislate in the first place is *not* in the gift of the legislature. Here there must be no discretion, but rather a firm constitutional defense of the limits on which Article 5 TEU’s principle of conferral insists. Defense of the principle of conferral in general and the limits of legislative harmonization in particular is, as a matter of constitutional purity, foundationally important. The EU’s formal legitimacy is rooted in its Treaties, which were duly authorized by approved constitutional procedures in all the Member States. That authorization was a limited grant of competence. The Court was doubtless correct to update its early observation that “... the Member States have limited their sovereign rights, albeit within limited fields”⁶⁶ to instead accept that “the States have limited their sovereign rights, in ever wider fields”⁶⁷ but the existence of *limits*, even if now wider, remains

⁶⁴ Article 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the TEU and the TFEU.

⁶⁵ *The Court of Justice, Principles of EC Law, Court Reform and Constitutional Adjudication*, 15 EUROPEAN BUSINESS LAW REVIEW 1115, 1117 (2004).

⁶⁶ Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1.

⁶⁷ Opinion 1/91, *Draft Treaty on the establishment of a European Economic Area*, 1991 E.C.R. I-6079.

constitutionally inescapable. The Union may not extend its own competences. To trespass beyond the Treaty-defined limits is to destroy the foundations of the compact: it is certainly not for the EU legislature to adjust those limits for reasons of political convenience.

Practice does not coincide with principle. The problem is that the Treaty denies the Court an operationally useful role in checking the limits of Article 114 TFEU. The problem is therefore that the legislature in practice enjoys discretion here too. It is able to exploit the broad and fuzzy contours of Article 114 TFEU to convert compliance with the principle of conferral into little more than a drafting exercise. In fact, the two go together: the Court has striven to provide a more concrete shape to the limits of Article 114 TFEU than does the terms of the Treaty, but in doing so it has simply offered up an invitation to the legislature to enjoy the protection of its slipstream. The case law serves as a drafting guide.

In the first *Tobacco Advertising* case, examined above in Section (B), the annulled Directive 98/43 purported to harmonize laws governing advertising or sponsorship of tobacco products in order to improve the functioning of the internal market in products that serve as media for such messages. The Recitals claimed a need to counter circumvention of the rules by covering all forms and means of advertising (apart from television advertising which was already covered by Directive 89/552) but, beyond this, it offered no explanation of why the material scope was so extraordinarily broad, banning “all forms of advertising and sponsorship” in the EU, according to Article 3(1). It is in fact a very short legislative text, occupying just four pages of the *Official Journal*. So the Court fixed on “static” advertising media such as posters, cinema advertising and advertising via parasols and ash-trays, none of which are explicitly mentioned in the measure at all, and commented that trade between Member States was not facilitated by the ban⁶⁸ which appears to be based on the German submission that trade is “practically non-existent and has to date not been subject to any restrictions.”⁶⁹

By contrast in *ex parte BAT*⁷⁰ and *Swedish Match*⁷¹ (which concern the same measure) and in *Alliance for Natural Health*⁷² the legislative explanation was much fuller. In Directive 2002/46, the measure at stake in *Alliance for Natural Health*, the recitals identify a “direct” impact on the functioning of the internal market as a result of legislative diversity. In the

⁶⁸ Case C-376/98, *supra*, note 1, at para. 99.

⁶⁹ *Id.*, para. 16.

⁷⁰ Case C-491/01, *supra*, note 16.

⁷¹ Case C-210/03, *supra*, note 20.

⁷² Cases C-154/04 & C-155/04, *supra*, note 31.

second *Tobacco Advertising* case⁷³ Directive 2003/33 was naturally more carefully presented than its annulled predecessor: as explained, it was tied to the advertising of tobacco products on a much more narrowly drawn range of media. Moreover the recitals to Directive 2003/33 dutifully claim there is an “appreciable” risk of distortion of competition; “likely” increase in future barriers is asserted. The legislature learns to draft measures with a good deal more care, relying heavily on the constitutionally approved vocabulary with which the Court supplied it in the first *Tobacco Advertising* case and those that have followed. And – crucially – there is minimal scope for the Court to do more than accept that the constitutional boxes have been ticked.

The question now is whether the first *Tobacco Advertising* case was really a constitutionally significant assertion of judicial policing of the limits of EU law or instead simply a glimpse of a moment of legislative laziness. All that the legislature needed to have done in the annulled Directive 98/43 was to assert the imminent emergence of diverse rules governing advertising on ashtrays and parasols (and so on), perhaps adding reference to Member State regulatory intentions and/ or concerns expressed by traders, and to connect this to obstacles to free movement in such goods. The EU legislature knows better now: thanks to the Court’s case law, it has its drafting guide. Legislative compliance with the principles of subsidiarity and proportionality is readily achieved by faithful repetition of the formulae approved by the Court: this is troubling, but reflects the intensely political character of the assessments involved which militate against intense judicial review. By contrast it is profoundly alarming that determining the limits of the EU’s conferred competence pursuant to Article 114 TFEU is also *in practice* subject to a high degree of legislative discretion. The reality, surveyed *supra*, in Section D, is a proliferation of generous judicial approval of wide-ranging regulatory intervention conducted by the EU in the (in practice) unverifiable name of market-making harmonization.

F. What can be done about this? The Lisbon Reforms

The debates about EU competence conducted over the past decade largely assume that a more effective review system is required. It is time to move beyond the orthodox assumption that the political institutions will take care of competence anxieties *ex ante* while the Court will step in *ex post facto* if needed.⁷⁴ Competence is both a political and a

⁷³ Case C-380/03, *supra*, note 34.

⁷⁴ For analysis with rich bibliography see Armin von Bogdandy & Jürgen Bast, *The Federal Order of Competences*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW*, 275 (Armin Von Bogdandy & Jürgen Bast eds., 2010), noting that preoccupation with matters of competence is a relatively recent phenomenon in EU scholarship. For comment on the adjustments planned by the Treaty establishing a Constitution which were left largely unchanged in subsequent wrangling, see Paul Craig, *Competence: Clarity, Conferral, Containment and Consideration*, 29 *EUROPEAN LAW REVIEW* 323 (2004); Stephen Weatherill, *Better Competence Monitoring*, 30 *EUROPEAN LAW REVIEW* 23 (2005); Martin Nettesheim, *Die Kompetenzordnung im Vertrag über eine Verfassung für Europa*, 39 *EUROPARECHT* 511 (2004); Vlad Constantinesco, *Les compétences et le principe de subsidiarité*, 41(2) *REVUE TRIMESTRIELLE DE DROIT*

legal/constitutional issue. Taking it seriously demands attention to both text and institutional context.

The Lisbon Treaty has made some useful reforms. But they are badly judged in some respects: this is explained below. Moreover, the need for greater scrutiny has become more pressing as it has become still clearer even after the entry into force of the Lisbon Treaty that the Court's role is and will remain limited. In summary of the examination presented above culminating in the post-Lisbon ruling in *Vodafone*,⁷⁵ the Court's case law does *not* disclose an effective basis for policing the limits of EU competence in general and those pertaining to Article 114 TFEU in particular. The case law is a drafting guide for the legislature: the Court is empowering, not restraining, the legislative institutions.⁷⁶ And proportionality and subsidiarity too have become little more than labels which the legislature attaches to adopted measures in terms which simply mimic the Court's own constitutional vocabulary.

The Lisbon Treaty aims to clarify more aggressively that the Member States are the source of the competences which are conferred on the Union. This is visible in Article 1(1) TEU. Moreover, the Treaty broadcasts the point that competences not conferred on the Union rest with the Member States. This is visible in Articles 4(1) and 5(2) TEU. These provisions reflect a political desire to emphasize more powerfully the *limited* nature of the EU's powers and functions. But this is novel rhetoric: there is no change of substance. Similarly Title I TFEU on *Categories and Areas of Union competence* (Articles 2-6 TFEU) is a good deal more transparent in its portrayal of the scope, nature and effect of Union legislative competence than anything to be found in the profoundly messy pre-Lisbon Treaty texts. This may well help to improve the quality of the debate about the nature of the EU's competence. But in substance little changes. And, for present purposes, it is important that textual adjustments made to what are now Articles 26 and 114 TFEU and to the principles of proportionality and subsidiarity are cosmetic: no attempt has been made to re-draft the relevant provisions in a way that better serves to *limit* EU action.

One must readily admit that the Lisbon reforms have a conservative taste. More radical proposed alterations were not accepted.⁷⁷ So, for example, the idea of a "hard list"

EUROPÉEN 305 (2005). On aspects of the debate even in advance of the Treaty establishing a Constitution see Ingolf Pernice, *Rethinking the methods of Dividing and Controlling the Competences of the Union*, in *THE TREATY OF NICE AND BEYOND: ENLARGEMENT AND CONSTITUTIONAL REFORM*, 121 (Mads Andenas and John Usher eds., 2003).

⁷⁵ Case C-58/08, *supra*, note 41.

⁷⁶ See Wyatt, *supra*, note 19, finding the case law to disclose both competence-restricting and competence-enhancing elements, the latter steadily eroding the former.

⁷⁷ On the several ideas aired and largely rejected in the debate over the last decade, see Stephen Weatherill, *Competence Creep and Competence Control*, 23 *YEARBOOK OF EUROPEAN LAW* 1 (2004); George Bermann, *Competences of the Union*, in *EUROPEAN UNION LAW FOR THE 21ST CENTURY*, VOLUME 1, 65, (Takis Tridimas and Paolisa

governing competence, setting an exhaustive and tightly-defined agenda for the EU and/or placing areas off-limits the Union and therefore remaining within the exclusive competence of the Member States, was rejected. The deletion of Articles 95 and/or 308 (now 114 and 352) as the principal problem cases in the corrosive trajectory of “competence creep”⁷⁸ was rejected. Equipping national Parliaments with a veto, a red card, was rejected. More aggressive judicial control of adopted or even proposed legislation, perhaps involving a freshly minted “court of competence” comprising members drawn from not only the EU but also national judiciaries, was rejected. The debates were heated and in some respects sophisticated, but the basic aim, whichever particular model among the radical alternatives was promoted, is to block “competence creep” and to confine the EU to an agenda which can be reliably identified in advance; and to ensure the whistle can be blown quickly and uncontroversially if the boundary is crossed. The problem is that this will impose significant costs measured in inflexibility. It will diminish the EU’s capacity to act effectively in order to address (the wide range of) objectives assigned to it by its Treaties. More broadly, attempting to demarcate EU from State activity suggest a separation that is not only not conducive to flexible problem-solving, it also feeds the pernicious assumption that “Brussels” is an arena divorced from and alien to national political culture. The Treaty revision process was doubtless anchored by a degree of inertia, protective of EU business-as-usual, but there were also good reason for opposing injections of rigidity, and they won the day. Internal market law is a powerful example of how areas of truly exclusive State competence are few and, were it otherwise, the achievement of the core economic objectives of the Treaty would be gravely imperiled. And the establishment of a new competence-specific judicial tribunal would set up tense jurisdictional demarcation disputes. *Tobacco Advertising*⁷⁹ would go there. Would *ex parte Watts*⁸⁰ or *Viking Line*⁸¹ or *Mangold*?⁸²

The only adjustment made by the Lisbon Treaty to the pattern of judicial control concerns standing. Article 8 of the Protocol on the application of the principles of subsidiarity and proportionality refers to the existing jurisdiction of the Court under Article 263 TFEU to check a legislative act’s compliance with the principle of subsidiarity. It then adds that the Committee of the Regions may bring an action against legislative acts for the adoption of

Nebbia eds., 2004). For pioneering anxieties, see Joseph Weiler, *The European Union belongs to its Citizens: Three Immodest Proposals*, 22 *EUROPEAN LAW REVIEW* 150 (1997).

⁷⁸ Cf. Mark Pollack, *Creeping Competence: The Expanding Agenda of the European Community*, 14 *JOURNAL OF PUBLIC POLICY* 95 (1994); Weatherill, *supra*, note 77.

⁷⁹ Case C-376/98, *supra*, note 1.

⁸⁰ Case C-372/04 2006 E.C.R. I-4325.

⁸¹ Case C-438/05 2007 E.C.R. I-10779.

⁸² Case C-144/04 2005 E.C.R. I-9981.

which the Treaty on the Functioning of the European Union provides that it be consulted; and, of present relevance, that applications may be brought by Member States or “notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.” This is peculiar. It seems that this does no more than state the current position! Perhaps the intent is to confer an *obligation* on a Member State to pursue such an application where its national Parliament or a chamber thereof so resolves: but this is certainly not the inevitable interpretation of this obscure phrasing. Moreover this route is of no practical value if the Court adheres to its cautious approach to judicial review in the name of subsidiarity (explained *supra*, in Section E.I).

The dominant assumption throughout the process of review initiated at the Convention on the Future of Europe and concluded in December 2009 on the entry into force of the Lisbon Treaty was that the Court’s review function should not be adjusted – though rarely was its actual content ever considered - but that it needed to be supplemented by other *political* controls. In particular, a more questioning political culture was needed, and it should infect the *ex ante* process.

In this vein, for all its conservative tendencies, the Lisbon Treaty has achieved institutional reform. For the first time national Parliaments are formally granted a direct involvement in the EU lawmaking process. Whereas hitherto the assumption was that their interests would be reflected in the Council and, in turn, that they would hold their representatives in Council to account, this model has been treated as inadequate. Executive power, rather than Parliamentary control, has too often been the reality of Council practice. This is one reason why EU legislative competence has crept outwards. National Parliaments are the principal losers and giving them a voice is an attractive way to re-balance the EU lawmaking debate in the direction of a more critical tone. Much of this was accepted at the Convention on the Future of Europe. Its proposals were incorporated in the Treaty establishing a Constitution and then with some small adjustment transplanted to the Treaty of Lisbon.

A new Article 12 TEU, located in Title II on *Provisions on Democratic Principles*, deals with the role of national Parliaments. They shall “contribute actively to the good functioning of the Union.” Competence control is part of this, and is of direct relevance to the current inquiry.⁸³ The Protocol on the role of national Parliaments deals with the distribution to national Parliaments of information concerning *inter alia* planned legislative initiatives; the submission of a reasoned opinion in cases of suspected violation of the subsidiarity principle by a draft legislative act; an eight week (this is extended from the six week window provided for in the Treaty establishing a Constitution) standstill period designed to give national Parliaments a real practical opportunity to intervene, applicable in all but urgent cases.

⁸³ On this, and more generally, see Martin Gennart, *Les Parlements Nationaux dans le Traité de Lisbonne: Evolution ou Révolution*, 46/ 1 – 2 CAHIERS DE DROIT EUROPEEN 17 (2010).

The Protocol on subsidiarity and proportionality absorbs this procedure in Article 6. Then in Article 7 it puts flesh on the bones. Where reasoned opinions on non-compliance with subsidiarity represent at least one third of all the votes allocated to national Parliaments, the draft legislative act must be reviewed. This is the so-called yellow card. The Commission may then maintain, amend or withdraw the draft, giving reasons for this. Where reasoned opinions on non-compliance with subsidiarity represent a simple majority of votes cast by national parliaments, then the Commission must review the proposal and, if it decides to maintain it, it must itself present a reasoned opinion setting out its view why the proposal complies with the subsidiarity principle. It is, then, not a red card – a veto - but rather it has come to be known as an orange card. It was not envisaged by the Treaty establishing a Constitution, so in this respect the Lisbon Treaty, by stepping beyond a mere yellow card, has strengthened the control. These opinions are then made available to the Union legislator and shall be considered in the manner set out in Article 7(3) of the Protocol, which provides for consideration before the conclusion of the first reading of compliance with subsidiarity coupled to special voting rules allowing Council or Parliament to terminate the proposal. The procedure is applicable not only to subsidiarity concerns arising under any Treaty provision authorizing legislative action: it applies *mutatis mutandis* to any legislative proposal adopted under Article 352 TFEU, where objections need not be confined to perceived violation of the subsidiarity principle.

There is no red card but objections on a scale sufficient to brandish a yellow card and, all the more so, an orange card will doubtless constitute real political pressure that will be damaging, if not necessarily fatal, to the proposed measure's vitality. It is moreover possible that use of the new *ex ante* monitoring system will provide the basis for a slightly more intensive *ex post* control by the Court: in particular one might envisage that if the objections of several national Parliaments were swept aside with contemptuously thin reasoning the Court might be inclined to find the measure invalid. The Court could plausibly effect a shift in presumption: the Commission would need to show something approaching a manifest error of appraisal in the objections before it could proceed with the proposal, on pain of annulment.⁸⁴ The threat of such *ex post* control might helpfully induce political actors at EU level to take seriously *ex ante* critical input by national Parliaments.

The basic aim is to maximize the opportunity for dialogue about EU legislative practice and for the voice of the national Parliaments to be heard more effectively. The Protocol has the potential to serve as a framework which national Parliaments will need actively to complete in order to ensure the procedure does not become a dead letter.⁸⁵ It is however

⁸⁴ See Derrick Wyatt, *Could a Yellow Card for National Parliaments strengthen Judicial as well as Political Policing of Subsidiarity?*, 2 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY 1 (2006): this concerns procedures foreseen by the Treaty establishing a Constitution but applies *mutatis mutandis* to the finally agreed version.

⁸⁵ Cf. Gennart, *supra*, note 83, especially at p. 46.

likely that the principal role of national Parliaments will remain that of holding executives to account in the context of national political debate – and it is probable that that is entirely proper and, in particular, sharpening up scrutiny at EU level should be in addition to, and not at the expense of, domestic control.⁸⁶

G. Lisbon: It could have been Better

The Lisbon reforms are shaped according to an assumption that straining the EU's competence is damaging to its legitimacy: under-explained centralization aggravates mistrust. Their relatively conservative character also suggests an anxiety to avoid over-hasty abandonment of what used to be known as "Community method." Judged according to the durability of the method of competence allocation and its *ex ante* and *ex post* application in order to forestall the slippage of authority from constituent elements to the centre the EU's orthodox arrangements score badly when compared with (other) federal arrangements.⁸⁷ This is not so surprising. The EU is relatively young, and it began life with nothing. The debate of the current decade can be viewed optimistically as a sign of maturity, within which a more balanced assessment may be made about the virtues and vices of centralization and local autonomy in Europe. It is also to be read as a rejection of more aggressive desire to swing the whole debate *against* the possibility of centralization in the EU.

The principal place for addressing the problems of "competence creep" must lie in the institutional culture of the EU, nourished by input from national political culture. In fact there is a mix of constitutionally distinct phenomena at stake in this debate about competence. It covers fixing the scope of legislative competence "proper" (which is Article 5(2) TEU); the directions given by the subsidiarity and proportionality principles on when a legislative competence should be exercised (Articles 5(3) and 5(4) TFEU); and, more broadly, the exhortations to regulate "better," which embrace concern for clarity, simplification, and so on. There is competence creep; legislative creep; and there is poor quality legislating. The ambition to produce "Better Lawmaking" in the EU and, more generally, "Better Regulation" and latterly "Smarter Regulation" reflects these several

⁸⁶ Anne Peters, *European Democracy after the 2003 Convention*, 41 COMMON MARKET LAW REVIEW 37, especially at 62 (2004). See on this and more generally Adam Cygan, *The Role of National Parliaments in the EU's New Constitutional Order*, in EUROPEAN UNION LAW FOR THE 21ST CENTURY, VOLUME 1, 153, (Takis Tridimas and Paolisa Nebbia eds., 2004); Adam Cygan, *The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments*, 36 EUROPEAN LAW REVIEW (forthcoming, 2012).

⁸⁷ E.g. Lori Thorlakson, *Building Firewalls or Floodgates? Constitutional Design for the European Union*, 44 JOURNAL OF COMMON MARKET STUDIES 139 (2006); Wifried Swenden, *Is the European Union in need of a Competence Catalogue? Insights from Comparative Federalism*, 42 JOURNAL OF COMMON MARKET STUDIES 371 (2004). For general EU/ US comparisons, see KALYPSO NICOLAÏDIS AND ROBERT HOWSE (EDS), *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (2001).

concerns that the EU identify its allocated task(s) with more precision and discharge them with more care.⁸⁸ The stakes are high, for where anxieties mount that local preferences will be discounted, fear of and alienation from centralization is correspondingly greater.⁸⁹ The EU's legitimacy is at stake.⁹⁰

Under the Treaty as currently structured, the Court has and can have only a limited role in policing these rules. Enhancing respect for the constitutional fundamentals among the political institutions is the real prize, and the Lisbon involvement of the national Parliaments has at least some potential for promoting that. There are, however, reasons to be skeptical about the virtues of the Lisbon arrangements. The Lisbon Treaty counts in part as a missed opportunity. There are two unfortunate errors in particular: the decoupling of Articles 352 and 114 and the decoupling of subsidiarity and proportionality.

I. The Decoupling of Articles 114 and 352 TFEU

The Laeken Declaration of December 2001, which set in motion the process that led to the Convention on the Future of Europe, picked out explicitly two Treaty provisions as ripe for review because of their tendency to generate "competence creep." The spotlight was turned on Articles 95 and 308 EC, which are now Articles 114 and 352 TFEU, and no other provisions. But *only* Article 308 EC, which is now Article 352 TFEU, is picked out in the "reasoned opinion" procedure involving national Parliamentary oversight. So control of the Treaty-conferred competence to harmonize pursuant to Article 95 EC, now Article 114 TFEU, remains focused on judicial control – no extra political dimension has been injected.

This is regrettable. The linkage made at Laeken appears to have been broken at the Convention on the Future of Europe simply because of the distribution of matters among

⁸⁸ For relevant documentation see http://ec.europa.eu/enterprise/policies/better-regulation/index_en.htm, last accessed 2 March 2011. The Commission publishes an annual report on "Better Lawmaking" pursuant to the Protocol on the application of the principles of subsidiarity and proportionality. The report on 2006 was the last to cover not only subsidiarity and proportionality but also improving the quality of the regulatory environment: "Better Lawmaking 2006," COM (2007) 286, 6 June 2007. Beginning in 2007 the coverage has been split between a "Report on Subsidiarity and Proportionality," e.g. the report covering 2009 is COM (2010) 547, 8 October 2010, and a separate strategic review of Better Regulation, now to be transformed into Smart Regulation: see Commission Communication "Smart Regulation in the European Union" (COM (2010) 543, 8 October 2010). "Intelligent" would be a more elegant word in English and is indeed the chosen word in the French and German texts - "smart" betrays a strong background American influence. See generally STEPHEN WEATHERILL (ED.), *BETTER REGULATION* (2007); CLAUDIO RADAELLI AND FABRIZIO DE FRANCESCO, *REGULATORY QUALITY IN EUROPE: CONCEPTS, MEASURES, AND POLICY PROCESSES* (2007).

⁸⁹ Cf. the sustained critique in this vein offered by SOMEK, *supra*, note 47.

⁹⁰ See Stephen Weatherill, *Competence and Legitimacy*, in *THE OUTER LIMITS OF EUROPEAN UNION LAW*, 17, (Catherine Barnard and Okeoghene Odudu eds., 2009).

the several Working Groups, rather than by any conscious design.⁹¹ And the linkage was never re-established. So the Treaty establishing a Constitution planned special treatment for what is now Article 352 TFEU alone and the Lisbon Treaty retained that narrow focus. It is most unfortunate. Both Article 114 and Article 352 are twinned in the Laeken Declaration as problem cases from the perspective of “competence creep” and they should have remained twinned in the new procedure involving political oversight by national Parliaments.

If anything, Article 114 is *more* of a danger than Article 352: at least, its creeping tendencies are too little appreciated. As explained above, energetic use has been made of Article 114 TFEU to shape the EU’s harmonized programme in fields such as public health and consumer policy, where the relevant sector-specific legal bases, Articles 168 and 169 respectively, are narrowly drawn and consequently little used. The breadth of Article 114 in this respect is especially striking when one recalls that the Court has *not* been so generous in its reading of Article 352. That Treaty provision is commonly damned as the principal threat to the “limits” of the Treaty, but it may *not* be used where a sector-specific legal base is available: the specific excludes the general. This has been the Court’s long-standing approach⁹² and its limiting effect on the role of Article 352 was of sufficient political significance for one particular application of it to be inserted by the reforms made by the Lisbon Treaty: this is now Article 352(3) which provides that use of Article 352 shall not entail harmonization of Member States’ laws or regulations in cases where the Treaties exclude such harmonization. Article 114 is *not* so limited. Perhaps this reflects the need for Article 114 as a functionally broad provision that is apt to ensure the legislative dynamism necessary for the construction of an internal market. Perhaps, too, it reveals a certain lack of appreciation of the bite of Article 114.

It is not only those engaged in drafting what ultimately emerged as the Lisbon Treaty who failed to heed the Laeken Declaration’s wise insistence that (what are now) Articles 114 and 352 TFEU should be coupled in appreciation of the perils of “competence creep.” The German *Bundesverfassungsgericht* (Federal Constitutional Court) has gathered a reputation as a concerned observer of the tendency of the EU to play fast and loose with the constitutionally fundamental principle of conferral, now located in Article 5 TEU. In its 1993 *Maastricht* ruling it asserted a power of review of EU acts to check they remain within the limits mandated by the Treaty: transgression would deprive the measure of legally binding effect in Germany.⁹³ In its 2009 *Lisbon* ruling it insisted on the primacy of

⁹¹ On the progress of the matter at the Convention see Weatherill, *supra*, note 74.

⁹² E.g. Cases 8/73, *Hauptzollamt Bremerhaven v. Massey-Ferguson*, 1973 E.C.R. 897; Case 45/86, *Commission v. Council*, 1987 E.C.R. 1493; Case C-350/92, *Spain v. Council*, 1995 E.C.R. I-1985.

⁹³ Judgment of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, BVerfGE 89, 144 (*Brunner v. European Union Treaty*).

the principle of conferral as a buffer against the EU asserting *Kompetenz-Kompetenz* or violating a State's constitutional identity.⁹⁴ These rulings disclose hunger for predictability in the scope of EU competence as an essential element in practical supervision of the principle of conferral. The *Bundesverfassungsgericht* has *not* found an EU act to have committed the transgression it deemed impermissible in *Maastricht*; and in *Lisbon* it found the Treaty met its demands and so Germany could and did ratify it. But even absent execution, the *threat* of national judicial refusal to apply an EU act that it treats as lying beyond the Treaty mandate provides a lurking anxiety in the background to the Court of Justice's self-awarded *exclusive* jurisdiction to police the limits to EU legislative activity. And yet for all the skeptical tendencies of the *Bundesverfassungsgericht* its *Lisbon* ruling is oddly short-sighted. The *Bundesverfassungsgericht*'s suspicion of all those actors and institutions engaged in propelling a perceived extravagant use of (what is now) Article 352 TFEU in a way that may undermine the principle of conferral prompted it to make German ratification of the Lisbon Treaty conditional on domestic political reform designed (in short) to enhance the braking power exercisable by the *Länder*. This will undoubtedly diminish, perhaps even halt, EU lawmaking activities pursuant to Article 352.⁹⁵ But it had nothing comparable to say about the perils of Article 114 TFEU as a threat in practice to the principle of conferral. The *Lisbon* judgment takes some account of the reliability of the textual limits placed on the harmonization of *criminal* law but even in this respect its observations are strikingly complacent in assuming the textual limitations in the Treaty can be reliably monitored and maintained.⁹⁶ Harmonization of laws is treated by the *Bundesverfassungsgericht* as a minor threat, if a threat at all, to the principle of conferral. The practice speaks otherwise.

II. The Decoupling of Subsidiarity and Proportionality

Article 352's ill-considered divorce from Article 114 counts as a deficiency in the arrangements introduced by the Lisbon Treaty. A further regrettable dimension of the arrangements introduced by the Lisbon Treaty concerns the focus of national Parliamentary scrutiny on subsidiarity to the exclusion of proportionality. The two principles are closely related and in some respects they overlap. This is most obvious when one considers the intensity of an EU measure: does it go beyond what is necessary to achieve the end in view? This engages both proportionality and subsidiarity. So for example the ruling in *ex parte BAT* confirms compliance with the subsidiarity principle by

⁹⁴ Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08.

⁹⁵ Cf. Philip Kiiver, *The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU*, 16 EUROPEAN LAW JOURNAL 578 (2010).

⁹⁶ See especially, but not only, para. 362.

simply cross-referring to the paragraphs of the judgment which deal with proportionality.⁹⁷ In *Vodafone* the Court was faced with the argument that Regulation No 717/2007 infringed the principles of proportionality and subsidiarity by covering not only wholesale but also retail charges. It resisted on the basis that – in short – there is an interdependence between the two levels in the chain which makes the regulation of one but not the other ill-suited to the task at hand. But although the treatment of proportionality is lengthier than that pertaining to subsidiarity the core of the analysis is just the same. Even the Protocol on the principles of subsidiarity and proportionality fails in Article 5 to achieve any clear separation between the two principles.

Accordingly to include subsidiarity but not proportionality in the review process conducted by national Parliaments risks triggering unhelpful demarcation disputes. Largely, it seems, as a result of accident not design,⁹⁸ the Treaty establishing a Constitution made this mistake, and, left uncorrected, it is repeated in the Lisbon Treaty.

III. The Pressing Need for Fresh Thinking and Constructive Debates

These are to some extent technical “lawyer’s objections.” In practice perhaps national Parliaments will be able to initiate constructive debates without concern for tight textual demarcation of the scope of the “reasoned opinion” procedure. In October 2010 the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) encouraged national Parliaments to “monitor the application of the principles of subsidiarity and proportionality according to the procedures outlined in Protocol 2 annexed to the Treaties”; and, moreover, to “continue the political dialogue with the European Commission not only limited to legislative proposals and going well beyond the issue of subsidiarity.”⁹⁹ This plainly evidences a desire to slip free of the formal restraints set out in the Treaty and its Protocols. And it is possible that national Parliaments will find the Commission receptive to such practical extension in their involvement. But focus on Article 352 TFEU and on subsidiarity, and exclusion of Article 114 TFEU and proportionality, is ill-advised and needlessly increases the risk of the procedure being treated in a narrow formal manner that will generate political tensions and risk it being sidelined as ineffective. It could have been better.

The main issue will, however, be the extent to which constructive dialogue can truly be promoted. Pre-existing problems such as sheer lack of time to turn the gaze away from domestic politics to Brussels cannot be solved by creating a procedure on paper. And

⁹⁷ Case C-491/01, *supra*, note 16: paragraph 184 cross-refers to paragraphs 122 to 141.

⁹⁸ On the composition and progress of the Working Groups see Weatherill, *supra*, note 74.

⁹⁹ O.J. 2010 C 340/9, at para 4.4.

national executives dominate Parliaments most of the time in most of the Member States. So one needs to be careful in identifying what fresh critical thinking national Parliaments may be able realistically to contribute, and what they may not.¹⁰⁰ But as a minimum this agenda points to the thematic concern of the Lisbon Treaty to raise the profile of *national*-level political processes and controls, and to make thinner the apparent divide between “Brussels” and national political life. This is to be applauded – loudly.

It is absolutely critical to the success of the new arrangements that a vocabulary is found that goes beyond the very narrow reading of subsidiarity which the Court uses for the purposes of (avoiding) judicial review of adopted acts. If national Parliamentary protests advanced in the name of subsidiarity are dealt with by formal recourse to the judicial mantra that only the EU can deliver common rules then nothing useful will emerge: in fact this may generate new and thoroughly unhelpful antagonisms. But at the same time subsidiarity review cannot be allowed to collapse into a general rancorous cry by grumpy national politicians to “keep Brussels out.” So a wider, more sophisticated and more *questioning* version of subsidiarity is required – one which allows the dialogue to address in an informed sector-specific context whether an EU initiative, though coherent even compelling when viewed from the perspective of the achievement of the objectives of the EU, is nonetheless sufficiently detrimental to national or local values or interests to deserve rejection. There may be some small scope for the Court to improve the quality of this debate by insisting more sternly on transparency and reason-giving in support of legislative choices made. Acts bare of any serious attempt to explain why a conferred competence has been exercised in the manner selected deserve annulment: so too those that fail to describe the process of and influence exerted by consultation. The Court does not demand pious legislative adherence to an *ex ante* Commission impact assessment: but it correctly requires that any departure be properly explained.¹⁰¹ The yellow and orange cards introduced by the Lisbon Treaty offer the Court further opportunities to promote dialogue about the nature and purpose of EU laws by withholding validity from an act adopted in the absence of serious engagement with objections raised by national Parliaments.¹⁰² Such review, however, remains predominantly procedural. The Court properly seeks to push the legislative institutions to adopt a fuller and more transparent approach to the question ‘why legislate?’ but answers given are not apt for judicial invalidation, unless manifestly absurd. As elaborated *supra*, in Section E.1, the wider political (social, cultural) assessment of whether or not to adopt centralized rules in the EU

¹⁰⁰ For a helpfully nuanced discussion see Katrin Auel, *Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs*, 13 EUROPEAN LAW JOURNAL 487 (2007). For a skeptical view of the value of national Parliaments in this area see PHILIP KUIVER, *THE NATIONAL PARLIAMENTS IN THE EUROPEAN UNION – A CRITICAL VIEW ON EU CONSTITUTION-BUILDING* (2006).

¹⁰¹ Case C-343/09, *supra*, note 50 (where there was such departure, adequately explained); Case C-58/08, *supra*, note 41 (where there was no departure).

¹⁰² Cf. Wyatt, *supra*, note 84.

is not of a type that serves as a basis for judicial review of the *substance* of adopted acts. Accordingly it must be loaded more effectively into the deliberations of the Commission, Council and Parliament. In this regard it is worth repeating that national Parliaments' primary, if no longer exclusive, means of access to the EU lawmaking process is by holding their representatives in Council to account, not least where under-explained centralization is favored. Generally the point of greater involvement by national Parliaments is not to inject radical change but rather to nudge the political system in the direction of a more critical approach to EU lawmaking. It is worth trying.¹⁰³

H. Conclusion

The title of this article was made in Washington. The accusation that lenient judicial control becomes no more than a "drafting guide" which enables easy legislative compliance with the principle of conferral is extracted from the Opinion of Sandra Day O'Connor in the US Supreme Court's 2005 ruling in *Gonzalez v. Raich*.¹⁰⁴ This concerned a challenge to the constitutionality of a federal law adopted under the US "Commerce Clause," which has close functional similarities to Article 114 TFEU. The federal law in question, the Controlled Substances Act enacted in 1970, placed controlled substances – drugs, in short - into five categories and defined exhaustively how, if at all, they may be manufactured, supplied or possessed. Of particular relevance to the litigation in the case, which had emerged from California, the federal act prohibited intra-State non-commercial cultivation and possession of cannabis for personal medical purposes. Was this within Congress's legislative power? The Supreme Court held that it was. Regulating purely intrastate or local activity was justified for fear that permitting it would "undercut" the wider interstate régime: that is, the very notion of purely local trade was treated as improbable in a market that is economically integrated. And Congress had a "rational basis"¹⁰⁵ both to find the need to curtail such undercutting and to place the particular targeted ban at stake within the wider scheme of a national regime devoted to drugs generally.

Bringing even such local activities within the regime was treated as valid. To check this, the majority went to the introductory sections of the Act itself – and were satisfied with what

¹⁰³ On emergent practice even pre-Lisbon see Commission Report on Better Lawmaking 2006, COM (2007) 286, 6 June 2007, pages 8-9; see also the (short) report of the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC), O.J. 2007 OJ C 206/7, section 2. The Commission Report on Subsidiarity and Proportionality covering 2009 (COM (2010) 547, 8 October 2010) also contains brief mention of pre-Lisbon practice (para. 3.2) and promises an overview of post-Lisbon co-operation with national Parliaments in the following year's report (para. 5).

¹⁰⁴ 545 U.S. 1 (2005).

¹⁰⁵ 545 U.S. 1, *supra*, note 104, Majority Opinion pages 16, 19, 24, 28, 30.

was there even in the absence of any “particularized findings” concerning this element of the wider regime.¹⁰⁶ The ruling has much in common with several of those considered above, perhaps most evidently of all *Alliance for Natural Health*¹⁰⁷ and, on the “benevolent” reading provided *supra*, in Section D.II, *Swedish Match*¹⁰⁸: a wide regime within which particular niche/targeted prohibitions are embedded is treated as valid with reference to the preferences of the lawmaker, which is plainly a very soft standard of review. Given how low the threshold is for finding the required commercial impact on inter-state trade, this is not so surprising. The similarities are evident throughout: *Gonzalez v. Raich* and previous case law establishes that Congress has the power to regulate activities that *substantially* affect interstate commerce, which immediately evokes the Luxembourg Court’s concern to find some notional threshold to prevent Article 114 becoming a claim to general regulatory competence. The majority makes nothing of how to quantify that element of substantiality (though Judge Scalia, in a separate Opinion approving the Act, expressly makes clear it serves to place limits on federal power): it is a legislative task, it seems.

It seems highly probable the Court of Justice would similarly uphold the validity of such a measure were it introduced in the EU as a measure of harmonization adopted pursuant to Article 114 TFEU. Once this is conceived as a ban on X in order to open up the market for Y, then the threshold for invocation of Article 114 TFEU is crossed. The question as to whether to exercise such a competence is *political* – but there is *legal* competence to do so. The Court has plainly produced a drafting guide for Article 114 TFEU and the likely outcome is that in practice a great deal of autonomy from constitutional review is conferred on the legislative institutions. The US and the EU confront similar problems and, at least for the time being, their leading courts have adopted comparable solutions.

Very occasionally the limits of Article 114 TFEU are found to be breached: as in the first *Tobacco Advertising* case. Recent Supreme Court decisions where federal laws adopted under the Commerce Clause have fallen foul of constitutional review notably include *Lopez*¹⁰⁹ concerning possession of a firearm in a school zone and *Morison* concerning violence against women.¹¹⁰ These were much narrower measures, lacking the comprehensive scheme of regulation at stake in *Gonzalez v. Raich*. Again, the troubling intimation is that the smart/ intelligent legislature should draft a wide regime, in which the prohibition is packaged as simply one element of a broad regulatory framework. So the

¹⁰⁶ 545 U.S. 1, *supra*, note 104, pages 17-18.

¹⁰⁷ *Supra*, note 31.

¹⁰⁸ *Supra*, note 20.

¹⁰⁹ 514 U.S. 549 (1995).

¹¹⁰ 529 U.S. 598 (2000).

principle of *limits* to legislative activity is in practice wholly turned on its head! The error in *Lopez* and in *Morison*, as in *Tobacco Advertising*, was simply not to be bolder.

And this was exactly the protest made by Justice Day O'Connor in her dissenting Opinion in *Gonzalez v. Raich*. She complained that the Congress has a "perverse incentive" to legislate broadly rather than with precision, and she protested that the majority's receptivity to such "packaging" allowed Congress "to set the terms of the constitutional debate." In terms strikingly reminiscent of the European debate she viewed this as "tantamount to removing meaningful limits" on the scope of the relevant power, granted by the Commerce Clause. The case law has become a mere "drafting guide."¹¹¹ She therefore prefers much more vigorous review. She finds "objective markers"¹¹² which cast sufficient doubt on Congress's largely unexplained preference to lump everything, including such local activity, into one statute for her to refuse to approve the Act as a proper use of the Commerce Clause. The "bare declarations" and the "abstract assertions" in the Controlled Substances Act do not persuade.¹¹³ She wants more precision. The majority in Washington, like the Court in Luxembourg, does not.

The purpose of this article is not at all to embark on a comparison of EU and US practice in this area. That is a quite different, though intriguing, project. I confine myself to two observations. First, that the Supreme Court split 6-3 on this apparently simple question. The United States has been tackling these kind of questions for more than two centuries and still it has no finality. This suggests that federal questions of this nature are incapable of uncontroversial resolution, but rather that they are cyclical. The EU is at an early stage in its evolution. Second, Justice Day O'Connor was dissenting. The majority was constitutionally comfortable with case law which she lambasted as a legislative "drafting guide." So the Supreme Court, like the Court of Justice, is exposed to the criticism that it is a poor guardian of "states' rights."¹¹⁴ The implication is that the political process should take the strain: indeed the majority Opinion in *Gonzalez v. Raich* concludes by handing responsibility for change to the democratic process.

Similarly in the EU the practical consequence of the Court's approach is to entrust the legislature with a high level of discretion in choosing whether and how to harmonize laws. Once can easily criticize the Luxembourg Court for lax standards of review and for

¹¹¹ 529 U.S. 598, *supra*, note 110, the quotes are from pages 2, 4, 4, 4 & 6, and 5 respectively.

¹¹² 529 U.S. 598, *supra*, note 110, page 6.

¹¹³ 529 U.S. 598, *supra*, note 110, pages 13 and 17 respectively.

¹¹⁴ Innocent Europeans should be aware that although the phrase "states' rights" seems to capture rather well the intent behind controlling the limits of the competence of the central authorities (federal or EU), for Americans it carries echoes of the struggle by Southern states to protect slavery and, later, racial segregation in the name of state autonomy.

inventing words – *appreciable, likely* – which carry the highest constitutional significance, for they define the limits of EU legislative competence, yet the lowest degree of operational precision (*supra*, Section C). But the fundamental and inescapable problem here is not primarily the Court but the wording of Article 114 TFEU and of Article 26 TFEU to which Article 114 is explicitly connected. This is a classic instance of the need to confer flexible powers on the EU so that it can effectively perform its broad and ill-defined mission: tightly written controls would militate against effective discharge of tasks. And yet this immediately challenges the principle of conferral in Article 5 TEU. Pure in principle, in practice it is tainted by the functional breadth of the two principal “problem provisions,” Articles 114 and 352.

This, indeed, is where we came in. Advocate General Fennelly in his Opinion in the first *Tobacco Advertising* case observed:

The Community’s internal market competence is not limited, a priori, by any reserved domain of Member State power. It is a horizontal competence, whose exercise displaces national regulatory competence in the field addressed. Judicial review of the exercise of such a competence is a delicate and complex matter. On the one hand, unduly restrained judicial review might permit the Community institutions to enjoy, in effect, general or unlimited legislative power, contrary to the principle that the Community only enjoys those limited competences, however extensive, which have been conferred on it by the Treaty with a view to the attainment of specified objectives. This could permit the Community to encroach impermissibly on the powers of the Member States. On the other hand, the Court cannot, in principle, restrict the legitimate performance by the Community legislator of its task of removing barriers and distortions to trade in goods and services. It is the task of the Court, as the repository of the trust and confidence of the Community institutions, the Member States and the citizens of the Union, to perform this difficult function of upholding the constitutional division of powers between the Community and the Member States on the basis of objective criteria.

It is indeed a “difficult function”! The circular pattern whereby the Court’s analysis of the proper scope of legislative harmonization and the requirements of the principles of proportionality and subsidiarity is conveniently recycled into the explanations routinely presented to support EU measures of legislative reveals how in practice “the constitutional division of powers” between the Union and its Member States is unreliably policed. Placing a *formal* limit on conferred competences is central to the constitutional strategy for preserving diversity and local autonomy in the EU but the problem is the inflation of centralized authority *in practice*. The EU’s legitimacy is thereby imperiled. This is why such hope is invested in the Lisbon reforms: the fresh if in some respects poorly framed involvement of national Parliaments in critically reviewing proposals for compliance with subsidiarity (but regrettably not proportionality) and with the scope of Article 352 (but regrettably not Article 114). And, more generally, there is pressing need for all actors and institutions to engage with the crucial assessments of how much centralization is worth

pursuing where it will damage local autonomy. Centralization *versus* local autonomy in Europe: the general problems and tensions associated with competence distribution show no inclination to subside.