

THE EUROPEAN UNION

Free Movement of Goods: Positive Integration

HARMONISATION COMPETENCES

- The Union adopts positive legislation in order to remove the diversity of national laws.
- [Article 26\(1\) TFEU](#): Harmonisation principle
- Legislative competences for positive integration are often found within the specific policy areas of the Union.
- [Article 114 & 115](#) provide the Union with a general harmonisation competence for the “*approximation of the provisions laid down by the law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*” (Article 114(1))
- Specific harmonisation competences found in [Article 110-118](#) (excluding Article 114 & 115)



GENERAL COMPETENCES

Before the Single European Act (SEA):

- Sole harmonisation principles for the “internal market” used to be found in Article 115 & 116 of TFEU.
- Art 115; became an unlimited principle allowing the creation of harmonisation directives that had a direct effect on the establishment/functioning of the common market.
- Article 116; Allowed the Union to issue directives where differences between national laws was distorting the common market. (narrower scope)
- Article 115 directives required unanimity in the Council initially. This limited the exercise of the Union’s harmonisation competences.

Article 114 TFEU

- Established in SEA, it textually widened the Union’s internal market competence & removed the requirement of unanimity in the Council.
- Gives legislator’s a horizontal competence to harmonise national laws and qualified majority voting is now all that is required in the Council. (however unanimity still needed for free movement of persons & rights/interests of employed persons; Article 114(2))
- Two other qualifications created;
 - I. Article 114(3) obliges the commission to base its legislative proposals on a high level of protection to these sensitive interests
 - II. Article 114(4)-(5) Allows for differential positive integration.

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- Article 114 separated harmonisation from directives; allowing the adoption of any legislative instrument.
- *Germany v Council* [1994] considered whether a decision or executive act could harmonise national laws.
- Article 114 also allows for the establishment of a centralised authorisation procedure through the Council or creating further executive infrastructures. (*UK v Parliament & Council* [2005])
- The Union enjoys an almost total freedom with regard to the method of creating a harmonisation act.
- Article 114 can only harmonise existing rights. (*Spain v Council* [1995]) however the Union can in the absence of national laws use its harmonisation power to prevent the future fragmentation of the internal market. (See *Vodafone* [2010])

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THE CONCEPT OF APPROXIMATION



- The Union's internal market competence is horizontal in nature.
- Article 114 applies to any national measure that affects the establishment or functioning of the internal market.
- Concerns the **functioning and the establishment** of the internal market separately.
- Combining both of these means that the scope of positive integration under Article 114 is wider than the negative under Article 34 TFEU because:
 1. Article 114 can be used to harmonise future disparities in national laws if it is likely that there will be divergence that will cause obstacles in trade.
 2. The Union measure under Article 114 must actually contribute to the elimination of these obstacles.

THE FUNCTIONING OF THE INTERNAL MARKET



- Limits on the internal market competence.
- *Tobacco Advertising* [2000] confirms the existence of constitutional limits for competence. Article 114 is deemed to be incapable of granting any general powers of regulation to the Union.

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ARTICLE 114(2) TFEU & BEYOND



- Article 114 is treated like a “normal” competence. (*Titanium Dioxide Case*)
- Courts have recourse to a **centre of gravity doctrine** when determining whether Article 114 or a specific legal competence applies.
- Article 114(2) excludes three matters from its legislative scope: (*i.e.* “*fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.*”)
- Specific Union competences such as public health are excluded from harmonisation **but** these do not limit the scope of Article 114:
- Exclusion of harmonisation does not mean that harmonising measures adopted on the basis of other provisions have no effect.

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DEROGATIONS UNDER ARTICLE 114(4) &(5)

- Once the Union has adopted a harmonisation measure all conflicting national measures must be disapplied.
- (4) & (5) were drafted in parallel with [Article 36 TFEU](#) and provide the basis of the justifications a National State can apply to maintain or introduce national measures that conflict with the harmonised Union measure.
- Only covers laws that do not conform; does not cover National measures that are stricter.
- Derogations are subject to administrative procedures of the Commission (Article 114(6)-(8)) and subject to judicial review as well. ([Article 114\(9\) TFEU](#))

Application of Article 114(5)

Article 114(5) much stricter to meet the criteria.

([Denmark vs. Commission](#) [2003])

Commission is allowed to be stricter in granting derogations under 114(5) due to its administrative discretion.

([Austria vs. Commission](#) [2005])

“new scientific evidence,” and existence of a specific state problem= cumulative conditions for Member State to prove. (Specificity clarified in [Netherlands vs. Commission](#) [2007])

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SPECIAL COMPETENCES

Tax Harmonisation: [Article 113 TFEU](#)

- Allows the Union (with unanimous consent) to harmonise all forms of indirect taxation. (consumer taxes)
- Sales taxes/excise duties.
- Union-wide system for VAT. ([Directive 2006/112](#)) sets a minimum VAT rate, states can opt for higher.
- Union can also harmonise special consumer taxes. (On products such as tobacco and alcohol.)
- Article 113 excludes direct taxes.
- All tax harmonisation is subject to a [fiscal veto](#) which makes harmonisation difficult.



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SPECIAL COMPETENCES (*cont.*)



Intellectual Property Harmonisation

- Union actively engaged in the harmonisation of intellectual property rights via Article 114 however to create a set of Union wide intellectual property right's Article 352 is the basis. (Which can be seen in Regulation 207/2009 that establishes the Union Trade Mark.)
 - Article 352 has unanimity clause which has hindered intellectual property harmonisation which has resulted in Article 118.
 - This gives the Union a specific legal basis for creating IP rights and enforcing them.
- Article 118 is complemented by Article 262 TFEU that gives the Union the power to create IP Courts.
 - Article 118 was used to create a European Patent via Regulation 1257/2012 with a unitary character applied uniformly.
 - It is an optional form of harmonisation.

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HARMONISATION METHODS

- Internal market competences are shared competences. ([Article 4\(2\)\(a\) TFEU](#))
- European and National legislation can conflict.
- Union law always prevails when conflict occurs.
- Different mechanisms have been applied by the EU to harmonise goods and these have changed over time.

Total Harmonisation

- Where the Union exhaustively regulates a matter to the exclusion of national legislators. Union has exclusive responsibility.
- Creates a European product standard, with free movement and prohibits non-conforming products.
- Leads to pre-emption & legislative exclusivity.

Optional Harmonisation

- Establishment of a Union standard that establishes Free movement within the Internal Market.
- Manufacturers can choose whether to adopt the European Standard.
- Non-Conforming goods will not be prohibited.
- Union standard under this method tend to be stricter than national standards.

Minimum Harmonisation

- Member States are entitled to adopt stricter national standards.
- Complementary or stricter national laws are allowed.
- Mandatory minimum standard set to allow for upward diversity.
- Union & national legislators act as co-regulators.

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OLD APPROACH TO HARMONISATION

- [Directive 70/50](#) establishes the original harmonisation programme.
- To eliminate trade restrictions or distortions of competition, positive integration through harmonisation was deemed to be the only approach.
- It failed for two reasons:
 1. Low legislative output and total harmonisation as the chosen method was inconsistent and lacked clarity. Too much focus on total harmonisation led to Optional harmonisation which yielded more results.
 2. The vertical approach to harmonisation opted for was difficult as the Union was trying to harmonise the products themselves.
- Total harmonisation + vertical approach = diminished the delivery rate of the harmonisation (negotiations were needed for every detail).
- [Ratti \[1979\]](#) established that stricter legislation was not permitted when total harmonisation is applied as it goes beyond the terms of the directive.
- [Commission v. Denmark \[1987\]](#) stricter limits were applied by Denmark and the Commission brought proceedings for wrongful implementation. The Court held that as the standard imposed was stricter than that required it was contrary to EU legislation.

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NEW APPROACH TO HARMONISATION

Reduction in the intensity of European Harmonisation.

CASSIS de DIJON [1979]

- Judgement elevated the principle of mutual recognition; absent or pending harmonisation would result in mutually recognised national standards being applied.
- Removed obstacles arising in product requirement disparities.
- Resulted in a political consequence namely the Union reducing its scope of positive integration by aligning its harmonisation principles in line with Cassis.
- Commission reduced the scope for positive integration & harmonisation would only occur where there was inadequate mutual recognition.
- New Horizontal Approach to harmonisation introduced via the 1985 White Paper.
- Didn't explicitly mention minimum harmonisation, but cases such as [Gallaher \[1993\]](#) demonstrate the rise in this method's application and the acceptance of stricter national standards when this method is applied.

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COMMON AGRICULTURAL POLICY (CAP)

- Agriculture policies included within the scope of the internal market.
- Title III allows the Union to define and implement CAP which also includes the Common Fisheries Policy as well.
- Article 38 TFEU defines the inclusion of CAP/CFP into the internal market as a collective *lex specialis*.



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- Positive and negative integration defines the implementation of CAP into the internal market.
- Article 39 provides the basis for the widely interpreted objectives of CAP.
- Article 40 provides the methods these objectives can be achieved.

OLD CAP: VERTICAL HARMONISATION



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Product Support through Common Prices

- Common Market Organisations established for individual goods on the basis of [Article 43 TFEU](#).
- Wide range of regulatory methods (could use all measures to achieve objectives of [Article 39 TFEU](#))
- Price regulation through the market principle that was designed in order to ensure producers obtained an adequate income and to stabilise product markets.
- Regulation of common prices evolved into the policy instrument of CAP.

Legislative Pre-Emption

- See [Galli \[1975\]](#) (Para 10-16, 29-30)
- Member states could not affect prices set by the Union.
- Single market creation; strong pre-emption standard. ([Compassion \[1998\]](#))

NEW CAP: HORIZONTAL HARMONISATION

- Insistence of uniformity under the Old CAP was a result of the Union intervention method.
- The vertical approach demonstrated through the price support system aligned CAP to the dominant dual federalist approach that originally governed the internal market.
- This approach created more problems than it solved.
- Agricultural surplus started to cause a problem and led to the MacSharry Reforms and the Agenda 2000 proposals.
- CAP was decoupled from the price mechanism and product support and CMO's moved towards horizontal legislation.
- [Regulation 1308/2013](#) established a Single Common Market Organisation.
- Movement towards co-operative federalism.



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CONCLUSION

- The internal market is a key component on the free movement of goods.
- Positive integration has developed significantly in relation to the Internal Market.
- Movement from vertical to horizontal integration
- Application of the Harmonisation competences have changed over time.
- Much more efficient now.
- Shift to a co-operative approach.
- Shared CAP competence shows this development also.



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