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# Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption

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## RESEARCH PAPERS IN LAW

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### **Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption**

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# Between Market Integration and Public Health: The Paradoxical EU Competence to Regulate Tobacco Consumption

Vincent Delhomme\*

## Introduction

The EU has positioned itself as a key actor in the regulation of lifestyle risks,<sup>1</sup> in particular in the fight against tobacco consumption. This figures prominently in the EU health program 2014-2020 which seeks 'to promote health, prevent diseases, and foster supportive environments for healthy lifestyles [...] by addressing in particular the key lifestyle related risk factors with a focus on the Union added value',<sup>2</sup> among which 'tobacco use and passive smoking'.<sup>3</sup> Familiar aspects of anti-tobacco policies are regulated at the EU level, from the well-known 'Smoking kills' label to the prohibition of tobacco advertising on radio and television, via two main instruments: the Tobacco Products Directive,<sup>4</sup> which regulates the manufacture, presentation and sale of tobacco, and the Tobacco Advertising Directive<sup>5</sup>, which relates to the advertising and sponsorship of tobacco products.

From a public health point of view, the action of the EU is relatively uncontroversial. But its legality and the existence of an EU prerogative to adopt tobacco control measures have been fiercely disputed. These measures have been subjected to numerous challenges, most recently with the judgements *Philip Morris*<sup>6</sup> and *Poland v Parliament and Council*,<sup>7</sup> rendered by the Court in 2016. Central to these disputes is the use of the harmonisation powers contained in Article 114 TFEU,<sup>8</sup> making up for the limited competence of the EU in public health<sup>9</sup> and the impossibility to adopt harmonisation measures in this area.<sup>10</sup> Article 114 TFEU concerns the approximation of laws necessary to the establishment and functioning of the internal market and is essentially a trade-oriented disposition, at least under the Court's current appraisal.

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<sup>1</sup> Alemanno A. and Garde A. (eds.), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets*, Cambridge, Cambridge University Press, 2015; Alemanno A. and Garde A., 'The emergence of an EU lifestyle policy: the case of alcohol, tobacco and unhealthy diets', (2013), *Common Market Law Review*, 50, 1745-1786.

<sup>2</sup> Regulation 282/2014 on the establishment of a third Programme for the Union's action in the field of health (2014-2020), art. 3(1).

<sup>3</sup> *Ibid.*, Annex I, 1.1.

<sup>4</sup> Directive 2014/40/EU of the European parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, (OJ 2014, L 127, p. 1).

<sup>5</sup> Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, (OJ 2003, L 152, p.16).

<sup>6</sup> Case C-547/14, *Philip Morris Brands SARL e.a. v Secretary of State for Health*, 4 May 2016, EU:C:2016:325.

<sup>7</sup> Case C-358/14, *Poland v European Parliament and Council*, 4 May 2016, EU:C:2016:323.

<sup>8</sup> Article 114(1) TFEU enables the EU to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market'.

<sup>9</sup> Public health is categorised as a complementary competence for which the EU can only 'carry out actions to support, coordinate or supplement the actions of the Member states' (art. 6 TFEU).

<sup>10</sup> Article 168(5) TFEU excludes 'any harmonisation of the laws and regulations of the Member States'.

Its use in the context of tobacco control raises crucial legal questions that this contribution proposes to investigate.

Legal scholarship on the (ab)use of Article 114 TFEU as an indirect legal basis is abundant, especially in relation to the ‘competence creep’ issue.<sup>11</sup> The present contribution aims at reconsidering the problem and addressing a somewhat neglected issue: the impossibility under the current competence framework to conduct a fully-fledged and coherent tobacco control policy. In a first section, the use of internal market legislation to advance public health objectives will be examined. It will be submitted that the practice does not raise any legal problem as such, but is however conceptually dishonest and illustrates very well the lack of clarity of the EU constitutional order. A second section will analyse in detail the policy options offered by this indirect competence. It will appear that the lack of direct competence to regulate tobacco limits these options and prevents further developments. We are therefore confronted to a paradoxical situation in which the EU is allowed too much and too little at the same time.

## **1. Too much regulation ? Tobacco from a constitutional standpoint.**

### **1.1. The necessity to integrate public health in internal market legislation**

The Tobacco Products Directive and the Tobacco Advertising Directive are both based on Article 114 TFEU.<sup>12</sup> The use of this disposition to pursue non-market objectives has been extensive<sup>13</sup> and somewhat lightly reviewed by the Court of Justice, an approach for which it has received numerous criticisms.<sup>14</sup> Some of those criticisms are well-founded, as will be shown in the second section, but should not overshadow the fact that the integration of autonomous and separate policy objectives in internal market legislation is perfectly legitimate. Such is the case of public health.

Public health must be included in Union policies in general, and in internal market legislation in particular. According to Article 9 TFEU: ‘in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a [...] high level of education, training and protection of human health’. Article 168(1) TFEU further adds that ‘a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’. Finally and specifically in relation to the internal market, Article 114(3) TFEU states that ‘the Commission, in its proposals envisaged in paragraph 1 concerning health,

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<sup>11</sup> See Dashwood A., ‘The Limits of European Community Powers’, (1996), *European Law Review*, 21(2), 113-128; De Burca G. and De Witte B., ‘The delimitation of powers between the EU and its Member States’ in Arnull A. and Wincott D. (eds.), *Accountability and Legitimacy in the European Union*, Oxford, Oxford University Press, 2002, p. 202 et s.; Weatherill S., ‘Better competence monitoring’, (2005), *European Law Review*, 30(1), 23-41; Dougan M., ‘Legal developments’, *Journal of Common Market Studies*, (2010), 48, 163–181.

<sup>12</sup> These two directives are also based on articles 53(1) and 62 TFEU. These articles are assessed by the Court together with article 114 TFEU and will therefore not be analysed specifically in the following developments. See case C-376/98, *Germany v European Parliament and Council*, C-376/98, 5 October 2000, EU:C:2000:544.

<sup>13</sup> See De Witte B., ‘A competence to protect: the pursuit of non-market aims through internal market legislation’, in Syrpis P., *The Judiciary, the Legislature and the EU Internal Market*, Cambridge, Cambridge University Press, 2012, pp. 25-46; ‘Non-market values in internal market legislation’, in Shuibhne N. (ed.), *Regulating the Internal Market*, Cheltenham, Edward Elgar, 2006, 61-86.

<sup>14</sup> See Weatherill S. ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide”’, *German Law Journal*, (2011), (12)3, pp. 827-864; Wyatt D., ‘Community Competence to Regulate the Internal Market’, *University of Oxford Faculty of Law Legal Studies Research Paper Series*, (2007), Working Paper No 9/2007, 1-46.

safety, environmental protection and consumer protection, will take as a base a high level of protection'. There are therefore strong legal grounds for the inclusion of public health objectives in internal market legislation, which was recognised by the Court in the landmark *Tobacco Advertising* judgement where it stated that 'provided that the conditions for recourse to Articles [114, 53(1) and 62 TFEU] as a legal basis are fulfilled, the Community 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'.<sup>15</sup> The Court polices the fulfilment of these conditions but refuses to limit the range of objectives that can be pursued by the legislator.

This interpretation is in line with the logic of Article 114 TFEU itself. It is a purposive - or functional - legal basis, to the difference of sector specific legal bases which empower the EU in relation to a particular field. Such a provision expresses an objective, the establishment and the functioning of the internal market, and gives mandate to the EU to attain it.<sup>16</sup> As Advocate General Fennelly says, this competence 'is not limited in advance by reference to a particular subject-matter defined *ratione materiae*'.<sup>17</sup> It is only logic that in exercising it the EU will touch upon many different areas, because the economic and the non-economic are always closely intertwined. This was actually foreseen by the Treaty drafters since they inserted limits to the reach of Article 114 TFEU in its second paragraph, which shelter fiscal provisions, the free movement of persons and the rights and interests of employed persons from harmonisation measures.<sup>18</sup> It should be noted that public health is not part of these exclusions but rather, as mentioned above, specifically included via its paragraph three.

Lastly, if the Court were not to follow this approach and were to restrict the action of the Union legislator solely to economic purposes, this would have problematic political consequences. Such an approach would mean that harmonisation can only be done by the deregulation of national markets,<sup>19</sup> a deregulation already supported by the sweeping approach adopted by the Court in its interpretation of the four freedoms of movement.<sup>20</sup> A wide competence granted to the legislator is necessary to re-regulate the Union markets and try to keep the balance between negative and positive integration in the EU.<sup>21</sup>

Are there limits to this approach? The Court considers that non-market objectives can be 'decisive' in the adoption of a measure but does not expressly tell us whether the market objective should be as decisive or not. But decisive should probably be

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<sup>15</sup> *Germany v European Parliament and Council*, *supra* note 12, para 88.

<sup>16</sup> For a critical approach towards purposive legal bases, see Davies G., 'Democracy and Legitimacy in the Shadow of Purposive Competence', (2015), *European Law Journal*, 21(1), pp. 2-22.

<sup>17</sup> Opinion of Advocate General Fennelly, case C-376/98, *Germany v European Parliament and Council*, 15 June 2000, EU:C:2000:324, para. 62. See also Davies G., *supra* note 16, p. 3: 'However, a defining characteristic of pure purposive power is that while it is constrained to follow specific goals, it is not constrained in the subject matter or the breadth of its impact'.

<sup>18</sup> Article 114(2) TFEU: 'Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons'.

<sup>19</sup> See the Opinion of Advocate General Poiares Maduro, case C-58/08, *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, 1 October 2009, ECLI:EU:C:2009:596, para 8.

<sup>20</sup> For the need for the Court to revise its approach, see Barnard C. 'Restricting restrictions: lessons for the EU from the US', (2009), *Cambridge Law Journal*, 68(3), 575-606.

<sup>21</sup> See Garben S. 'Confronting the Competence Conundrum: Democratizing the European Union through an Expansion of its Legislative Powers', (2015), *Oxford Journal of Legal Studies*, 35(1), 75-76. This is even more important if one considers, as pointed by Sacha Garben, that re-regulation through positive integration is in itself difficult 'due to the high majority thresholds needed to pass legislation and the great diversity of national systems and views.', *ibid.*, p. 75 note 81.

understood as predominant, as it would be hard not to consider public health as the main objective for the adoption of the directives on tobacco. These instruments were not adopted to facilitate the business-making of the tobacco industry.

One limit could be found in the constitutional doctrine of the 'centre of gravity', according to which : 'if examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component'.<sup>22</sup> Following this approach, other interests could be integrated into market legislation as long as they remain of a lesser 'weight' than the market component of the measure. This is not, however, the line of reasoning chosen by the Court in the *Tobacco Advertising* case, where it did not engage in a debate over the respective importance of the internal market and public health objectives, contrary to what Germany had suggested in its plea.<sup>23</sup> It is not entirely clear why the Court made this choice and the application of the centre of gravity doctrine to Article 114 TFEU deserves some more detailed developments.

In *Tobacco Advertising*, Advocate General Fennelly considered that the 'centre of gravity' doctrine should only be applied in cases where all the competing legal bases allow for harmonisation.<sup>24</sup> It was not the situation in the case at hand since Article 168 TFEU, contrary to Article 114 TFEU, did not allow for any harmonisation in the field of public health. According to him, no balance should therefore be made between the two legal bases.<sup>25</sup> But the Court did not formally endorse this view in its own decision and has up to date never clarified this point.<sup>26</sup>

In a subsequent case, *Netherlands v. Parliament and Council*,<sup>27</sup> the Court followed another reasoning. The litigant considered that Directive 98/44 on the legal protection of biotechnological inventions had been wrongfully adopted under Article 114 TFEU since its principle aim was industrial development and scientific research, and should have been adopted under Articles 173 and 179 TFEU (then 157 and 163 EC).<sup>28</sup> It is doubtful that these articles would have been suitable legal bases for the adoption of harmonisation measures, but the Court nonetheless decided to make a balance between the different interests at stake. It said that the aim of the directive was indeed to 'promote research and development in the field of genetic engineering in the European Community' but that 'the way in which it does so is to remove the legal obstacles within the single market that are brought about by differences in national legislation and case-law'.<sup>29</sup> '[A]pproximation of the legislation of the Member States is therefore not an incidental or subsidiary objective of the Directive but is its essential purpose'.<sup>30</sup> This distinction between the aim and the effect of a measure is confusing and unfortunate,<sup>31</sup> but this balancing could mean that the Court accepts to apply the

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<sup>22</sup> Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd et Imperial Tobacco Ltd*, 10 December 2002, EU:C:2002:741, para 94.

<sup>23</sup> *Germany v European Parliament and Council*, *supra* note 12, para 32-35.

<sup>24</sup> Opinion of Advocate General Fennelly, *Germany v European Parliament and Council*, *supra* note 17 para. 68-69.

<sup>25</sup> *Ibid.*

<sup>26</sup> Bruno de Witte considers that the Court upheld the view of AG Fennelly in the *Tobacco Advertising* judgement. However, this does not clearly appear in the text of the decision. See Bruno de Witte, *supra* note 13, respectively p.35 and p. 75.

<sup>27</sup> Case C-377/98, *Netherlands v European Parliament and Council*, 9 October 2001, EU:C:2001:523.

<sup>28</sup> *Ibid.*, para. 26.

<sup>29</sup> *Ibid.*, para 27.

<sup>30</sup> *Ibid.*, para 28.

<sup>31</sup> See De Witte B., 'Non-market values in internal market legislation', *supra* note 13, p.73 note 37.

'center of gravity' test also to situations where Article 114 TFEU is the only legal basis available.

In any case, the position defended by Advocate General Fennelly in *Tobacco Advertising* appears problematic. It would be quite paradoxical to limit the reach of Article 114 TFEU when the competence to adopt an act exists elsewhere in the Treaty but to give licence to the EU to legislate in fields where no such competence exists. This denies the very purpose of legal bases, which is to protect Member States and individuals from the action of the EU in fields where it has not been entrusted with powers.<sup>32</sup>

Another distinction should rather be made. The 'center of gravity' cannot and should not be applied to situations where the market objective of a harmonisation measure is being put in balance with another objective which is the subject-matter of the harmonisation in question.<sup>33</sup> It is the reasoning that the Court followed in the *Titanium Dioxide* case. Asked to arbitrate between Article 114 TFEU and Article 192 TFEU on the environment (then Article 130s EEC) the Court found that the directive at issue was 'concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition.'<sup>34</sup> The market and the environmental objectives could not be separated from one another and Article 114 TFEU therefore constituted the appropriate legal basis.<sup>35</sup> As Advocate General Fennelly recognised himself, in this case 'the Court examined the objective conditions for legislation on the basis of Article [114 TFEU] without regard to the relative 'weight' of the internal market and environmental aspects of the legislative scheme'.<sup>36</sup> Such an interpretation seems more in line with the fundamental dual nature of Article 114 TFEU. This disposition is indeed 'intended for the adoption of measures which have as their object the establishment and functioning of the internal market but those measures replace State measures that pursue a variety of regulatory goals of the market'.<sup>37</sup> The market objective and the other regulatory objective cannot be severed and are necessarily of the same weight, at least legally. The legislator may very well be primarily, or solely, concerned with the non-market objective, this is a political assessment that is not of the Court's concern.<sup>38</sup>

It is however different to weigh the internal market objective of a measure against other objectives that are independent from the national law being harmonised,<sup>39</sup> or to contest the existence of the internal market objective in the provisions of a measure.<sup>40</sup> In these situations, the application of the 'center of gravity' test makes sense because the various objectives at stake are not inseparable.

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<sup>32</sup> Barents R., 'The internal market unlimited: some observations on the legal basis of Community legislation', (1993), *Common Market Law Review*, 85-109, p. 92.

<sup>33</sup> *Ibid.*, p. 101.

<sup>34</sup> Case C-300/89, *Commission v. Council*, 11 June 1991, ECLI:EU:C:1991:244, para 13.

<sup>35</sup> *Ibid.*, para 22-24.

<sup>36</sup> Opinion of Advocate General Fennelly, *Germany v European Parliament and Council*, *supra* note 17 para 68.

<sup>37</sup> Opinion of Advocate General Poiras Maduro, *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, *supra* note 19, para 1.

<sup>38</sup> See Barents R., *supra* note 32, p. 101; Opinion of Advocate General Fennelly, *Germany v European Parliament and Council*, *supra* note 17 para. 75; Opinion of Advocate General Geelhoed, case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd et Imperial Tobacco Ltd*, 10 September 2002, ECLI:EU:C:2002:476, para 100.

<sup>39</sup> *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd et Imperial Tobacco Ltd*, *supra* note 22, para 92-97.

<sup>40</sup> See Case C-155/91, *Commission. v. Council*, 17 March 1993, EU:C:1993:98.

To conclude on this point, it appears that the Court does not assess the relative importance of the public health and the internal market objectives when assessing the validity of tobacco harmonisation measures. It is the appropriate position if one considers the dual nature of Article 114 TFEU, even if the exact rationale for the Court's position remains unclear. What the Court focuses its analysis on is the fulfilment of the conditions for the use of Article 114 TFEU, that the measure in question effectively pursues the internal market objective. These conditions will be analysed further in section 2.

## 1.2. The discrepancies in the EU constitutional framework

Even if there is no legal objection to the recourse to Article 114 TFEU to regulate tobacco consumption at the EU level, the result is nevertheless problematic when the broader EU constitutional framework is considered. This legislative practice appears in blatant contradiction with the current division of competence whereby public health is only a complementary competence, and with the wording of Article 168(5) TFEU prohibiting any harmonisation in this field. 'In fact, Article 114 makes a mockery of the carefully drawn restrictions in provisions such as Article 168.'<sup>41</sup> It also sits uneasily with the principle of conferral expressed at Article 5 TEU.<sup>42</sup> Of course, the meaning of Article 168(5) is clear to an EU lawyer: the Union cannot harmonise laws having health as a subject-matter unless this makes at the same time a contribution to the establishment and the functioning of the internal market. But this is probably far less clear to any citizen trying to have a clear picture of the areas where the EU can act.

This contradiction illustrates an incoherence that goes deeper in the Treaties system. It reveals the ambiguity of the European Union as a federal project and the lack of clarity of the division of competences between the EU and its Member States, despite the changes introduced by the Treaty of Lisbon.<sup>43</sup> The idea of categorizing competences in different policy areas with specific legal basis goes against the purposive nature of Article 114 TFEU.<sup>44</sup> This contradiction is rooted in a more fundamental debate over the EU constitutional model which was perfectly expressed by the Laeken Declaration: 'Lastly, there is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union [...] How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well the Union must continue to be able to react to fresh challenges and developments'.<sup>45</sup> The answer to this question has yet to be found.

In the same way, the current constitutional framework does not constitute a clear choice between dual or cooperative federalism.<sup>46</sup> The logic of complementary competences 'represents, in itself, a constitutional choice in favour of cooperative

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<sup>41</sup> Weatherill S., *The Internal Market as a Legal Concept*, Oxford, Oxford University Press, 2017, p. 171.

<sup>42</sup> Article 5(2) TEU: '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. Competences not conferred upon the Union in the Treaties remain with the Member States.'

<sup>43</sup> It is now widely accepted that the Lisbon reforms have, at best, failed to bring this clarity. See Garben S., *supra* note 21.

<sup>44</sup> See Azoulay L., 'The question of competence', in Azoulay L. (ed.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p. 11 : '[...] there is no doubt that changes introduced by the Lisbon Treaty contain a direct challenge to the predominant functional and constitutional conceptions of the European legal order of the last 50 years.'

<sup>45</sup> Laeken declaration on the future of the European Union, Presidency conclusions, European Council meeting in Laeken 14 and 15 december 2001, p. 22.

<sup>46</sup> Schütze R., *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, Oxford University Press, 2009.

federalism'<sup>47</sup> whereby the Union and member States support each other's action to attain their policy objectives. It furthers the disappearance of areas of exclusive power for member States. But at the same time, the introduction of a ban on harmonisation for these competences drastically reduces the possibility for the EU to legislate, making these areas formally exclusive from EU intervention.<sup>48</sup> This prohibition of harmonisation is a purely dual clause inserted in a cooperative framework. It is thus unsurprising that this schizophrenic approach to complementary competences led to the intensive recourse by the Union to Article 114 TFEU to deal with these policies. This choice can be qualified as 'cynical'<sup>49</sup> insofar 'the Community legislator may need to justify politically desired European "health measures" by means of the economic vocabulary of the internal market'.<sup>50</sup> This is exactly what can be found in the current legislative practice.

It is clear that the tobacco policy of the EU is a public health policy and that market integration plays an extremely limited role in its adoption at the political level. How could it be different? These rules are directly aimed at reducing and ultimately eradicating tobacco consumption and not at helping the tobacco industry to enjoy better trading conditions, and are adopted despite the inexistence of any formal competence. It is this discrepancy that should fuel the competence creep worry, more than the actual content of the measures adopted under Article 114 TFEU.

## **2. Too little? Tobacco from a public health standpoint.**

The conditions set out by the Court for the recourse to Article 114 TFEU are twofold: the measure must remove obstacles to freedom of movement – obstacles to trade – or distortions of competition.<sup>51</sup> Once this 'internal market test'<sup>52</sup> is fulfilled, the public health aspect of the measure becomes irrelevant. This may look like a low threshold, but it limits the range of policy options available to the EU legislator if taken seriously.<sup>53</sup> In this perspective, public health finds itself curtailed by Article 114 TFEU, as a detailed analysis of the actual EU anti-tobacco policy and its potential developments will show.<sup>54</sup>

### **2.1. The internal market test: what are obstacles to trade and distortions of competition?**

In order to determine if a given measure passes the internal market test, the concepts of obstacles to trade and distortions of competition must first be clarified.

#### *Appreciable distortions of competition*

The Court has specified that the distortions of competition removed by a given measure needed to be 'appreciable' in order to fulfil the conditions of Article 114

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<sup>47</sup> *Ibid.*, p. 269.

<sup>48</sup> *Ibid.*, p. 282.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, p. 283.

<sup>51</sup> *Germany v European Parliament and Council*, *supra* note 12, para 84, 95.

<sup>52</sup> This expression is borrowed from Bruno de Witte: 'A competence to protect: the pursuit of non-market aims through internal market legislation', *supra* note 13, p. 36.

<sup>53</sup> Subsidiarity and proportionality also represent limits to the action of the EU. Their role in internal market legislation is particularly important and deserves developments that go beyond the scope of the present reflection.

<sup>54</sup> This analysis is done *de lege lata* and would lead to a different outcome if another interpretation of article 114 TFEU were to prevail.

TFEU.<sup>55</sup> It is so because, as rightfully pointed by the Court, any difference in legislation between member States can be considered as distorting competition between undertakings.<sup>56</sup> For this condition to be meaningful, it was necessary to limit the reach of Article 114 TFEU to situations where the distortion was particularly problematic. Otherwise, 'the powers of the Community legislature would be practically unlimited.'<sup>57</sup>

The Court has never defined clearly what appreciable was supposed to mean in this context and the guidance to be found in the case-law is scarce. In *Tobacco Advertising*, the Court said that differences in legislation that would put some actors 'at an advantage in terms of economies of scale and increase in profits' would be too remote and indirect to constitute appreciable distortions of competition.<sup>58</sup> This contrasts with the differences at stake in the *Titanium Dioxide* case which affected the production costs in the titanium dioxide industry,<sup>59</sup> or differences between regulations leading to the relocation of economic activities in another member State,<sup>60</sup> both deemed appreciable by the Court. In the *Vodafone* case, the Court also held that divergent national laws regarding roaming charges could be considered as significant distortions of competition.<sup>61</sup> Here as well, the difference in roaming charges can affect significantly the production costs of the service provider. We also know from *Tobacco Advertising* that the notion of distortions of competition does not include restrictions on forms of competition applying to all economic operators in a Member State,<sup>62</sup> which means that there is an inherent dimension of inequality in the concept of distortions of competition.<sup>63</sup>

It derives from this that an appreciable distortion of competition, or at least an example of it, could be a difference in productions costs affecting adversely the different economic operators on the market.

### *Obstacles to trade*

The notion of obstacles to trade is clearer. Several cases dealing with Article 114 TFEU provide examples of the different types of rules falling into that category and can be used as a benchmark to assess other measures. Should the concept of 'restriction' under the fundamental freedoms of movement also constitute a yardstick? That would be logical if one considers the functional link established by the Court between negative and positive integration.<sup>64</sup> Harmonisation is used to eliminate the regulatory differences that cannot be overcome by mutual recognition. The Court itself refers to its case-law under Article 34 TFEU to identify obstacles to trade in national legislation in cases dealing with Article 114 TFEU.<sup>65</sup> Hence, leaving aside the question of whether the two concepts of obstacle and restriction can be

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<sup>55</sup> *Germany v European Parliament and Council*, C-376/98, *supra* note 12, para 106.

<sup>56</sup> *Ibid.* p 107; see also Davies G., 'Can selling arrangements be harmonized?', (2005), *European Law Review*, 30(3), 371-385, p. 372 : 'almost any national rule has an impact on economic activity, and differences between such rules will therefore create relative advantages and disadvantages for industries in different states', p. 373; Dashwood A., *supra* note 11, p. 121.

<sup>57</sup> *Germany v European Parliament and Council*, *supra* note 12, para 107.

<sup>58</sup> *Ibid.*, para 109.

<sup>59</sup> *Ibid.*; *Commission v. Council*, *supra* note 34, para 12.

<sup>60</sup> *Germany v European Parliament and Council*, *supra* note 12, para 110.

<sup>61</sup> Case C-58/08, *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, 8 June 2010, EU:C:2010:321, para 47.

<sup>62</sup> *Germany v European Parliament and Council*, *supra* note 12, para 113.

<sup>63</sup> Davies G., *supra* note 56, p. 373.

<sup>64</sup> Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 20 February 1979, ECLI:EU:C:1979:42, para 8.

<sup>65</sup> See *British American Tobacco*, *supra* note 22, para 64; *Tobacco Advertising II* para 57.

fully equated,<sup>66</sup> it is possible to say with a certain degree of certainty that the former comprises the latter.

In the case of free movement goods, which is the freedom at stake in most of tobacco regulation, one can rely on the three tests given by the Court of Justice to define a restriction:<sup>67</sup> product requirements imposed on a foreign product that has already complied with its home regulation,<sup>68</sup> selling arrangements that do not 'apply to all relevant traders operating within the national territory and [...] affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States'<sup>69</sup> and other measures which hinders the access of foreign products to the market of a Member State.<sup>70</sup>

## 2.2. The internal market as a limit to public health

Before analysing in detail some of the possibilities open to the European legislator in tobacco regulation, it is important to bear in mind that Article 114 TFEU seeks the *removal* of obstacles to trade and distortions of competition. This means that it is not enough to identify obstacles or distortions arising from divergences in national legislations to establish the competence under 114 TFEU. The EU measure must actually eliminate these divergences. It is this requirement especially that makes Article 114 TFEU unsuitable to adopt certain public health measures, since these cannot be considered as removing obstacles to trade or distortions of competition.

### *Product requirements*

EU tobacco regulation focuses mostly on the product itself, which can be explained both by the importance of such rules for public health and the fact that they fit particularly well the internal market test necessary for their legality under Article 114 TFEU. The Tobacco Products Directive has put in place strict rules on the conditioning of tobacco products, harmonising for instance the shape of unit packets, the minimum number of cigarettes contained and the size of health warnings that packets must carry. Each unit packet and any outside packaging must for instance carry a general warning, 'Smoking kills – quit now' or 'Smoking kills', and the information message 'Tobacco smoke contains over 70 substances known to cause cancer', both covering 50% of the surface on which they are printed.<sup>71</sup>

These types of product requirements undoubtedly fulfil the conditions for recourse to Article 114 TFEU. They are clearly obstacles to trade, as expressed by the Court in *British American Tobacco*: 'national rules laying down the requirements to be met by products, in particular those relating to their designation, composition or packaging, are in themselves liable, in the absence of harmonisation at Community level, to constitute obstacles to the free movement of goods',<sup>72</sup> in line with its interpretation of Article 34 TFEU.<sup>73</sup> Having a common standard for the composition of tobacco

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<sup>66</sup> Gareth Davies considers that article 34 cannot be as broad as article 114 and that the category 'certain selling arrangement' should be able to be harmonised under article 114 TFEU. See Davies G. *supra* note 56.

<sup>67</sup> For a discussion on the unitary aspect of the three tests, see Schütze R. 'Of types and tests: towards a unitary doctrinal framework for article 34 TFEU', (2016), *European Law Review*, 41(6), 826-842.

<sup>68</sup> *Cassis De Dijon*, *supra* note 64.

<sup>69</sup> Case C-267/91, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, ECLI:EU:C:1993:905, 24 November 1993, para 16.

<sup>70</sup> Case C-110/05, *Commission v Italy*, 10 February 2009, ECLI:EU:C:2009:66, para 37.

<sup>71</sup> Article 9 of the Tobacco Product Directive (TPD), *supra* note 4.

<sup>72</sup> *British American Tobacco*, *supra* note 22, para 64.

<sup>73</sup> *Cassis de Dijon*, *supra* note 64 .

products and their packaging helps removing these obstacles and is beneficial to the free circulation of these products throughout the internal market. These rules can therefore be harmonised.

Not all aspects of the packaging of tobacco products is regulated by the Tobacco Products Directive, so member States retain a small degree of autonomy in this respect. They can for instance decide whether or not to impose plain packaging, which requires a standard colour and font for all tobacco packets in order to limit the appeal of the different tobacco brands. Introduced first by Australia, its positive effects on tobacco consumption have been well documented<sup>74</sup> and it is slowly gaining ground in Europe.<sup>75</sup> The adoption of this new policy recreates obstacles to the free movement of tobacco products and there is no doubt that plain packaging could be subjected to harmonisation and generalised at the EU level,<sup>76</sup> something that had actually been discussed by the Commission during the last revision of the Tobacco Products Directive.<sup>77</sup>

The competence of the EU is therefore quite large when it comes to the harmonisation of product requirements. Yet, some of the current measures put in place by the Union appear problematic in light of the internal market requirement of Article 114 TFEU.<sup>78</sup>

#### *Minimum and partial harmonisation*

The EU legislator resorts to different harmonisation techniques. Full harmonisation prevents member States to deviate from the standard fixed at the EU level while minimum harmonisation provides for a minimum rule letting member States free to set a higher requirement. Partial harmonisation can be said of a situation where the EU measure does not apply to all aspects of a given object. It is quite straightforward that full harmonisation would be the preferred option under Article 114 TFEU insofar it prevents any obstacles or distortions to resurface. Minimum or partial harmonisation appear less effective in that respect. The margin let to member States to introduce their own rules puts into question the actual removal of obstacles to trade or distortions of competition.<sup>79</sup>

In *Tobacco Advertising*, the Court based its decision to annul the directive at stake partly on its failure to ensure the free movement of products in conformity with its provisions.<sup>80</sup> Member States were indeed permitted to impose more stringent requirements to products in compliance with the directive and refuse access to their market on those grounds. In this case, the minimum harmonisation technique used

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<sup>74</sup> Vardavas C., Filippidis C. *et al.*, 'Plain packaging of tobacco products in the European Union : an EU success story ?', (2017), *European Respiratory Journal*, 50.

<sup>75</sup> Several EU member States have adopted or will adopt plain packaging, among which the UK, France, Ireland, Slovenia and Hungary.

<sup>76</sup> Alemanno A., 'Out of Sight, Out of Mind. Towards a New EU Tobacco Products Directive', (2012), *Columbia Journal of European Law*, 18, 197-241.

<sup>77</sup> *Ibid.* p.204.

<sup>78</sup> The issues have already been discussed in an earlier publication, see Delhomme V., 'Internal Market as an Excuse: The Case of EU Anti-Tobacco Legislation', *College of Europe Case Notes*, 02/2017, 2017.

<sup>79</sup> See Weinzierl J. and Weissenmayer J., 'News from minimum harmonisation: how the tobacco advertising cases shape the law of the internal market', (2016), *European Law Blog*, accessed at: <https://europeanlawblog.eu/2016/10/04/news-from-minimum/>; Alemanno A. and Garde A., 'The emergence of an EU lifestyle policy: the case of alcohol, tobacco and unhealthy diets', *supra* note 1, p. 1769 : 'the harmonized standard should not be set at a level so low that it becomes meaningless both from an internal market point of view and from a public health perspective'.

<sup>80</sup> *Germany v Parliament and Council*, *supra* note 12, para 101.

could not lead with any certainty to the removal of obstacles to trade. In subsequent cases, such as *British American Tobacco*, the legislator did include a free movement clause, ensuring that products complying with the directive could not be refused because of stricter national requirements.<sup>81</sup>

However, even in such a case, minimum harmonisation can remain problematic. The risk of diverging national rules can make the contribution to free movement purely hypothetical. In *British American Tobacco*, the Court had to review the Tobacco Products Directive of 2001.<sup>82</sup> The directive was setting a minimum size for the health warnings to be affixed on packaging,<sup>83</sup> while allowing member States to apply more stringent requirements. Despite the presence of the free movement clause, the contribution to the free circulation of products was merely hypothetical. Indeed, a manufacturer from a country imposing larger health warnings would be put at a competitive disadvantage against products with smaller warnings.<sup>84</sup> This measure could therefore not be seen as removing obstacles to free movement or distortions of competition.<sup>85</sup> There appears to be no such issue with the new Tobacco Product Directive of 2014 since the size of the different warnings is now expressed as a fixed percentage.<sup>86</sup>

In any case, the future of minimum harmonisation in internal market legislation has been rendered uncertain by the recent *Philip Morris* judgement. In its interpretation of Article 24 of the Tobacco Products Directive which states that member States retain the right 'to maintain or introduce further requirements [...] in relation to the standardisation of the packaging of tobacco products',<sup>87</sup> the Court decided that this possibility could only apply to the aspects of the packaging not harmonised by the directive.<sup>88</sup> It explicitly said that authorising member States to impose further requirements in relation to aspects harmonised by the directive would undermine the harmonisation effect and run contrary to Article 114 TFEU.<sup>89</sup> This seems to reject the

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<sup>81</sup> *British American Tobacco*, *supra* note 22, para 74.

<sup>82</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, (OJ 2001 L 194, p. 26).

<sup>83</sup> *Ibid.*, art. 5: general warning no less than 30 % of the surface of the packet, additional warning no less than 40 %.

<sup>84</sup> This argument was made by Advocate General Lenz in his Opinion on the Gallaher case and deserves to be reproduced in full for the reader: 'As the applicants in the United Kingdom proceedings correctly argued, a manufacturer wishing to export his produce from Member State A, which imposes a more stringent spatial requirement than that laid down by the Directive, to Member State B, which has the same official language as Member State A, would have to change his packaging if Member State B treats a spatial requirement of 4% as adequate. Although the product labelled in accordance with the provisions of Member State A would also be marketable in Member State B (if one subscribes to the views expressed by the Commission and the United Kingdom), those imports would be placed at a commercial disadvantage vis-à-vis domestic goods produced in Member State B if the manufacturer were not to adapt to the less stringent requirements existing in the latter State. The liberalization of trade and the approximation of conditions of competition, as objectives of the Directive, would here be placed in equal jeopardy. [...] This conclusion is all the more justified when one considers that the Directive (if understood as laying down a minimum limit) does not specify any maximum limit for the percentage which may be imposed by Member States. Consequently, that figure could - theoretically - lie anywhere between 5% and 100%. I cannot imagine that those who drafted the Directive intended to bring about such a position in law.' Jointed opinion of Advocate General Lenz, case C-222/91, *Ministero delle Finanze and Ministero della Sanità v Philip Morris Belgium SA and others*, and case C-11/92, *The Queen v Secretary of State for Health, ex parte Gallaher Ltd, Imperial Tobacco Ltd and Rothmans International Tobacco (UK)*, 2 March 1993, ECLI:EU:C:1993:77, para 42-43.

<sup>85</sup> Wyatt D., *supra* note 14, pp. 32-33.

<sup>86</sup> See articles 9, 10, 11 and 12 of the TPD, *supra* note 4.

<sup>87</sup> Article 24 of the TPD, *supra* note 4.

<sup>88</sup> *Philip Morris*, *supra* note 6, para 73,78

<sup>89</sup> *Ibid.*, para 71.

possibility of minimum harmonisation.<sup>90</sup> The Court accepted that its interpretation would not guarantee the free circulation of products that comply with the directive,<sup>91</sup> but considered that such partial harmonisation was compatible with Article 114 TFEU since 'whilst it does not eliminate all obstacles to trade, it does eliminate some.'<sup>92</sup> As Advocate General Kokott wrote: 'In the present case, this means, for example, that manufacturers of tobacco products throughout the internal market are able to use cigarette packets which have a uniform basic design and are required to adapt that design to the specificities of their respective national laws, regulations and administrative provisions only in certain details (colours, for example), but no longer in every respect.'<sup>93</sup> While this reasoning is true in the abstract,<sup>94</sup> the case-law does not specify any substantive threshold for the removal of obstacles to trade, unlike for distortions of competition, such a 'piecemeal'<sup>95</sup> approach raises question in practice. If the harmonisation of a product was so limited that its marketing in several member States would still require separate production processes for the manufacturer, the removal of obstacles to trade or appreciable distortions of competition affecting production costs would be again quite hypothetical. The presence of economies of scale would be far from certain.<sup>96</sup> This is reinforced by the fact that certain of the provisions of the directive impose divergent rules to member States to take into account their different tax legislation and official language(s). In this case, it is the EU legislator itself which creates or reinforces the obstacles present in national legislations, a problematic point that the Court does not address in its decision.<sup>97</sup>

If from a health perspective minimum or partial harmonisation can be seen as desirable since allowing for regulatory innovation and stronger protection at the national level, it is full harmonisation that represents the most effective market-making tool under Article 114 TFEU. This is a perfect illustration of the schizophrenic nature of Article 114 TFEU and the difficulty to reconcile its different objectives.

### *Bans on products*

From the point of view of the internal market, the possibility given to the EU legislator to ban the marketing of a product is even more problematic. The Tobacco Products Directive prohibits the placing on the market of tobacco products with a characterising flavour and tobacco for oral use.<sup>98</sup> At the national level, such a ban is clearly an obstacle to trade and can therefore be subjected to Union harmonisation.<sup>99</sup> But only scraping the ban would remove the obstacle arising thereof. On the contrary, a general ban at the EU level generalise the obstacle. How could then such a measure ever be compliant with Article 114 TFEU?

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<sup>90</sup> See Weinzierl J. and Weissenmayer J, *supra* note 79.

<sup>91</sup> *Philip Morris*, *supra* note 6, para 79.

<sup>92</sup> *Ibid.*, para 81.

<sup>93</sup> Opinion of Advocate General Kokott, C-547/14, *Philip Morris Brands SARL and Others*, 23 December 2015, para 119.

<sup>94</sup> We disagree here with See Weinzierl J. and Weissenmayer J, *supra* note 79, who consider that the 'overall harmonising effect [of minimum harmonisation] is identical to that of partial harmonisation: both do not eliminate all obstacles to trade, but they do eliminate some.'

<sup>95</sup> Davies G., 'The Competence to Create an Internal Market: Conceptual Poverty an Unbalanced Interests', in Garben S. and Govaere I. (eds.), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future*, Oxford, Hart Publishing, p.79.

<sup>96</sup> *Philip Morris*, *supra* note 6, para 103.

<sup>97</sup> *Ibid.*, para 102-104.

<sup>98</sup> See TPD, *supra* note 4, article 7 and 17.

<sup>99</sup> See Case C-210/03, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, 14 December 2004, EU:C:2004:802, para 38; Case C-434/02, *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, 14 December 2004, EU:C:2004:800, para 39.

The legality of the ban on tobacco for oral use was first discussed in the cases *Swedish Match*<sup>100</sup> and *Arnold André*<sup>101</sup>, when it was first implemented by Directive 2001/37. The Court upheld this ban, stating that measures under Article 114 TFUE 'may consist in [...] provisionally or definitively prohibiting the marketing of a product or products'.<sup>102</sup> The rationale for such a decision of the Court is not clearly expressed in the judgement, but Advocate General Geelhoed defends it in its Opinion as part of a wider harmonisation regime.<sup>103</sup> The Advocate General reckons that the ban of a product cannot be said to improve trading conditions for this product itself,<sup>104</sup> but considers that such a ban can improve trading conditions for 'related products' to the extent that it reduces the enforcement costs of the legislation for these products.<sup>105</sup> Yet, this line of reasoning seems hard to sustain. It is difficult to see how banning a product reduces the effort to control other products, and most importantly, how this can lead to the removal of obstacles for these products from the point of view of the manufacturer.

The ban on tobacco with a characterising flavour was discussed more recently in the *Philip Morris and Poland v European Parliament and Council* cases and upheld by the Court.<sup>106</sup> Here again, the reasoning of the Court does not have much to offer and one has to turn to Advocate General Kokott's Opinion to understand how such a ban could be justified. According to her, the ban removes obstacles to trade since it 'serves to create uniform trade conditions for all tobacco products throughout the European Union'.<sup>107</sup> In her view, the ban would not constitute the prohibition of a product but merely a restriction of its composition: 'in other words, tobacco products may in principle still be placed on the market in the European Union, but only without characterising flavours'.<sup>108</sup> This argumentation is more convincing than the one developed by Advocate General Geelhoed and could represent a valid justification. But in the case at stake, it rests on the dubious premise that tobacco products with or without flavour are similar, that they are substitutable from the point of view of the consumer. It would mean that someone barred from smoking a menthol cigarette would switch to a 'normal' cigarette. This is far from obvious and actually goes against the very ground for the ban, which is to limit the overall consumption of tobacco products.<sup>109</sup> If flavoured and neutral products were indeed similar, no decrease in consumption could derive from a prohibition of the former.

In the same vein, these EU-wide prohibitions cannot be considered as removing appreciable distortions to competition, but rather as generalising a restriction of forms of competition, following the reasoning of the Court in *Tobacco Advertising*.<sup>110</sup>

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<sup>100</sup> *Swedish Match*, *ibid.*

<sup>101</sup> *Arnold André*, *supra* note 99.

<sup>102</sup> *Swedish Match*, *supra* note 99, para. 34, *Arnold André*, *supra* note 99 para. 35.

<sup>103</sup> Joined Opinion of Mr. Advocate General Geelhoed, C-434/02, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* C-210/03 and *Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, 7 September 2004, EU:C:2004:487.

<sup>104</sup> *Ibid.* para 78.

<sup>105</sup> *Ibid.* para 79.

<sup>106</sup> *Philip Morris*, *supra* note 6, para 117-124, *Poland v Parliament and Council*, *supra* note 7, para 57-64.

<sup>107</sup> Opinion of Advocate General Kokott, *Philip Morris*, *supra* note 93, para 83, This contradicts with the precedent paragraph where she mentions 'a class of other products'. See also Opinion of Advocate General Kokott, C-358/14, *Poland v Parliament and Council*, 23 December 2015, ECLI:EU:C:2015:848, para 40.

<sup>108</sup> Opinion of Advocate General Kokott, *Philip Morris*, *supra* note 93, para 83.

<sup>109</sup> As accepted by the court in *Philip Morris*, *supra* note 6, para 108. The same logic underlies the ban of tobacco for oral use, see *Swedish Match*, *supra* note 99, para 37; *Arnold André*, *supra* note 99, para 38.

<sup>110</sup> *Germany v European Parliament and Council*, *supra* note 12, para 113.

In both cases, tobacco for oral use and tobacco with a characterising flavour, the legislator has set up 'destructive' bans.<sup>111</sup> These do not help improve trading conditions for any class of products by removing obstacles to trade but rather removes any possibility for trade in the product concerned. This situation must be distinguished from 'constructive bans' which are introduced within the same class of products and can indeed serve to create uniform trading conditions for this product.<sup>112</sup> As expressed powerfully by Derrick Wyatt: 'the Community lawmaker has no legitimate interest in the banning of free standing products. [...] Action at the Community level makes no contribution to the internal market in fact; it simply asserts Community competence for the sake of an abstract principle; the principle that in a single market it is central authority which decides which products or services may be placed on that market.'<sup>113</sup> It is, though, this abstract principle that Advocate General Geelhoed defends when he writes that 'the primary goal of the internal market provisions of the EC Treaty that one single market appear, that is not fragmented by divergent national rules. This goal does not have as a consequence that all possible products can be sold on that market, even if they harm the health of users.'<sup>114</sup>

### *Advertising*

Restrictions on the advertising of tobacco are an important part of the regulator's tool kit, both at the European and the national levels. The first ban on television advertising for tobacco products was introduced by the Television Without Frontiers Directive<sup>115</sup> and was confirmed by the Audiovisual Media Services Directive.<sup>116</sup> In addition, the Tobacco Advertising Directive provides for the prohibition of tobacco advertising in the press, in printed publications and on radio, the prohibition of sponsorship of radio programmes by tobacco undertakings and of sponsorship of events having a cross-border dimension, such as sport events.<sup>117</sup> The EU has been particularly active on this issue.

Rules on advertising can be considered as obstacles to trade under Article 114 TFEU, as expressed by the first and second *Tobacco Advertising* judgements,<sup>118</sup> and restrictions to the free movement of goods and services under Articles 34 and 56 TFEU. These rules appear as obstacles/restrictions from different point of views.<sup>119</sup> If a Member State prohibits the advertising of tobacco in magazines and on television,

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<sup>111</sup> See the difference made by Scott Crosby between constructive and destructive bans in the case of the prohibition of ingredients. Crosby S. 'The new Tobacco Control Directive: an illiberal and illegal disdain for the law', (2002), *European Law Review*, 27(2), 177-193, p. 186.

<sup>112</sup> *Ibid.* See also Wyatt D., *supra* note 14, p. 25: 'As noted above, the rationale of withdrawal from the market of non compliant products is to enforce application of the relevant safety standard, and contribute to the elimination of disparities between national rules and their application, and thereby to the free movement of goods between the Member States. Prohibiting non compliant products as a means of enforcement of a safety standard application of which facilitates the free movement of compliant products is quite different from prohibition outright of a product.'

<sup>113</sup> Wyatt D., *supra* note 14, p. 28.

<sup>114</sup> Joined Opinion of Mr. Advocate General Geelhoed, *Swedish Match* and *Arnold André*, *supra* note 103, para 80.

<sup>115</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Article 13.

<sup>116</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Article 9.

<sup>117</sup> Article 3, 5 and 5, *supra* note 5.

<sup>118</sup> *Germany v European Parliament and Council*, *supra* note 12; Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union*, 12 December 2006, ECLI:EU:C:2006:772.

<sup>119</sup> *Germany v European Parliament and Council*, *supra* note 118, para 56-58.

this is an impediment to the free circulation of foreign magazines bearing this type of advertisement<sup>120</sup> or to the freedom of movement of television programmes.<sup>121</sup> It is also a restriction to the free circulation of the product being advertised, which may find more difficult to penetrate a foreign market without resorting to promotion.<sup>122</sup> It is finally also a restriction towards the providers of advertising services themselves.<sup>123</sup> These distinctions are crucial to analyse whether or not an advertising ban at the Union level can effectively remove obstacles to trade.

The various prohibitions on tobacco advertising enacted by the EU do not raise any concerns as to their legality since these can facilitate the free circulation of the support to which they are associated.<sup>124</sup> They are constructive bans. While prohibiting the advertising activity and hence arguably creating obstacles to trade from the point of view of advertisers and tobacco manufacturers, they also facilitate the cross-border movement of magazines or audiovisual programmes by removing the differences in legislation that affects them.

On the other hand, the prohibition of more static forms of advertising, such as posters or advertising spots in cinemas, is not possible at the EU level since it would not remove obstacles for any of the actors involved.<sup>125</sup> Contrary to press or audiovisual products, billboards or movie theatres are indeed not mobile once they are built. Diverging advertising rules between member States can therefore not affect their free circulation. Furthermore, and as pointed by the Court in the *Tobacco Advertising* judgement,<sup>126</sup> differences in advertising regulation between member states cannot in this case be considered as appreciable distortions of competition.

#### *Smoke-free environments*<sup>127</sup>

Creating smoke-free environments is intended to protect non-smokers from second-hand smoking and to 'de-normalise' the use of tobacco, 'the bans, by creating an environment where smoking becomes increasingly difficult, help shift social norms away from the acceptance of smoking in everyday life and promote public rejections of cigarettes'.<sup>128</sup> Smoking bans usually concern public places: schools, hospitals, workplaces or bars and restaurant.

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<sup>120</sup> See Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, 26 June 1997, ECLI:EU:C:1997:325, para 11 : 'The Court finds that, even though the relevant national legislation is directed against a method of sales promotion, in this case it bears on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case is not concerned with a selling arrangement within the meaning of the judgment in *Keck and Mithouard*.' See also *Germany v European Parliament and Council*, *supra* note 118, para 58.

<sup>121</sup> Case C-352/85, *Bond van Adverteerders and others v The Netherlands State*, 26 April 1988, ECLI:EU:C:1988:196; *Germany v European Parliament and Council*, *supra* note 12, para 98.

<sup>122</sup> Case C-405/98, *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)*, 8 March 2001, ECLI:EU:C:2001:135; Case C-34/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB*, 9 July 1997, ECLI:EU:C:1997:344 ; *Germany v European Parliament and Council*, *supra* note 118, para 56.

<sup>123</sup> *Germany v European Parliament and Council*, *supra* note 118, para 57.

<sup>124</sup> *Germany v European Parliament and Council*, *supra* note 12, para.98.

<sup>125</sup> *Ibid.*, para 99.

<sup>126</sup> *Ibid.*, para 108-104

<sup>127</sup> Most of these arguments have already been made in a prior publication: Delhomme V., 'Smoke-free environments: the missing link in EU anti-tobacco policy', *College of Europe Policy Briefs*, 18(8), May 2018.

<sup>128</sup> Alemanno A., 'Nudging smokers. The Behavioural Turn of Tobacco Risk Regulation', *European Journal of Risk Regulation*, 1/2012, 32-42, p. 33.

Rules on smoke-free environments vary greatly in their scope and intensity among member States. Bars and restaurant are not always covered and bans can be total or partial, in which case smoking remain allowed in designated areas.<sup>129</sup> The EU has not adopted any binding rules on the matter, the only instrument currently in force being a Council Recommendation of 2009 recommending that member States 'provide effective protection from exposure to tobacco smoke in indoor workplaces, indoor public places, public transport and, as appropriate, other public places'. Article 114 TFEU, as it stands, does not permit the EU to adopt any harmonisation measure that would reinforce smoking bans throughout the Union.<sup>130</sup>

Rules on smoke-free environments could eventually be considered as obstacles if a parallel was drawn with the case-law of the Court of Justice on the rules applicable to the use of a product. By restricting the use of a given product, these rules make its purchase less interesting for consumers and can therefore restrict the access of foreign products to the market in which they are enacted.<sup>131</sup> To be caught by Article 34 TFEU, these rules must yet to have a 'considerable influence'<sup>132</sup> on the behaviour of consumers, which suggests the existence of some sort of threshold in the Court's appraisal.<sup>133</sup> A very comprehensive smoking ban, including for instance the streets, could arguably have a considerable influence on the behaviour of consumers and be considered as an obstacle to trade. It is at least the objective of such a policy. But the European legislator would then only be competent under Article 114 TFEU to remove this obstacle and to scrap the ban. Indeed, an EU-wide smoking ban would not remove the obstacle but generalise it. The logic here is similar to the one developed for the ban on products.

As to the distortions of competition, it is difficult to argue in this case that differences in member States' legislations create any distortions of competition between tobacco manufacturers at all, as these legislations have a similar effect on domestic and foreign products, in law or in fact.

### *Selling arrangements*

The last category of anti-tobacco policies in discussion here can be qualified as 'selling arrangements', borrowing from the Court's words in *Keck*. These rules affect the time, place and techniques of sale and are particularly present in the context of tobacco regulation: specific opening times for tobacco retailers, restrictions on the places of sale, prohibition of vending machines, etc. In France, tobacco may for instance only be sold by specific shops under a strict license system<sup>134</sup> and vending machines are prohibited.<sup>135</sup> Regarding these rules, which are closely linked to the socio-economic context of each Member State, no EU legislation has been adopted. The Commission had considered a ban on tobacco vending machines, later abandoned over subsidiary concerns, during the revision of the Tobacco Products

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<sup>129</sup> See the map established by the Smoke Free Partnership, retrieved at: <https://smokefreepartnership.eu/our-policy-work/smokefree-map>.

<sup>130</sup> See Delhomme V., *supra* note 127 .

<sup>131</sup> *Commission v Italy*, *supra* note 70; case C-142/05, *Åklagaren v Percy Mickelsson and Joakim Roos*, 4 June 2009 ECLI:EU:C:2009:336.

<sup>132</sup> *Commission v Italy*, *supra* note 70, para 56; *Mickelsson and Roos*, *supra* note 131, para 26.

<sup>133</sup> Barnard C., *The Substantive Law of the EU*, Oxford, Oxford University Press, 5<sup>th</sup> edition, 2016 p. 105.

<sup>134</sup> Décret n° 2010-720 du 28 juin 2010 relatif à l'exercice du monopole de la vente au détail des tabacs manufacturés.

<sup>135</sup> Article L3512-11, Code de la Santé publique.

Directive.<sup>136</sup> It is however hard to see how the EU would have the competence to do so. If one keeps in mind the *Keck* decision and its latter development, a prohibition on vending machines at the national level applicable to all products does not seem to impose a different burden in law or in fact on foreign products<sup>137</sup> or substantially restricts their access to the market,<sup>138</sup> and hence does not constitute an obstacle to trade. Of course, this position would change if one follows Gareth Davies' approach according to which selling arrangement under Article 34 TFEU should fall within the scope of Article 114 TFEU.<sup>139</sup> But in any case, even if such a rule were considered to be an obstacle, an extension of this rule at the EU level would not remove the obstacle but reinforce it. Furthermore, for the reasons already exposed above, it is also unlikely that differences in laws concerning the availability of vending machines would qualify as appreciable distortions of competition. Here again, the legislator finds itself limited by the constraints of Article 114 TFEU.

Another kind of regulation that can be assimilated to a selling arrangement is the retail display ban for tobacco products, which require stores to keep the products invisible to the consumer inside their premises, in order to limit their appeal. These bans could possibly be qualified as obstacles from the point of view of the tobacco manufacturers. The argument could be made that these bans have an adverse effect on imported products compared to domestic products, following the logic developed in the case-law of the Court.<sup>140</sup> The EFTA Court pointed in that direction in a recent judgement concerning the display ban introduced by Norway.<sup>141</sup> Yet, the display of tobacco products is also a static form of advertising and a ban at the EU level would therefore not meet the requirement of Article 114 TFEU.<sup>142</sup> For the reasons outlined above, it would not help removing obstacles to trade or appreciable distortions of competition.<sup>143</sup>

#### *A limitation of public health in the name of the market*

Going through the various policies enacted by the European Union and the member States, it appears that the Union legislator is severely limited by the internal market objective contained in Article 114 TFEU. If product requirements and certain advertising rules are good candidates for EU action, which may explain why they have already been largely regulated, other aspects of tobacco policy seem out of the Union's reach.

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<sup>136</sup> Alemanno A. and Garde A., 'The emergence of an EU lifestyle policy: the case of alcohol, tobacco and unhealthy diets', *supra* note 1, p. 1767.

<sup>137</sup> *Keck and Mithouard*, *supra* note 69, para 16.

<sup>138</sup> *Commission v Italy*, *supra* note 70; see Barnard C., *The Substantive Law of the EU*, *supra* note 133, p. 14.

<sup>139</sup> Davies G., *supra* note 56.

<sup>140</sup> See *De Agostini*, *supra* note 122 ; *Gourmet*, *supra* note 122.

<sup>141</sup> Case E-16/10, *Philip Morris Norway AS v the Norwegian State*, 12 September 2011. See Alemanno A., 'The legality, rationale and science of tobacco display bans after the Philip Morris judgement', (2011), *European Journal of Risk Regulation*, 4; Alemanno A., 'Out of Sight, Out of Mind. Towards a New EU Tobacco Products Directive', *supra* note 76, pp. 213-214.

<sup>142</sup> We disagree with Alberto Alemanno who considers that 'display ban measures, as general rules mandating a common standard for the marketing and sale of cigarettes in Europe, would actually remove any possible obstacles emerging from disparities among national rules', 'Out of Sight, Out of Mind. Towards a New EU Tobacco Products Directive', *supra* note 76, p. 217.

<sup>143</sup> One could make the argument that the measure distorts competition between established brands and new brands. See case E-16/10, *supra* note 141, para 37.

### 3. Conclusion : The tobacco paradox

'Although pursuing a public health goal by promoting--rather than restricting--the free movement of cigarettes in Europe might appear somehow paradoxical, this is the legal logic that has dominated and continues to dominate the EU regulatory approach to tobacco.'<sup>144</sup> While this logic has enabled the EU to be an ambitious actor in the fight against tobacco consumption, it still suffers major flaws, as this contribution has sought to demonstrate. The competence of the EU is entangled in what very much resembles a paradox. The current legal framework allows at the same time for too much and too little.

On a constitutional point of view, and with the logic of the Lisbon Treaty in mind, the existence of such an extensive body of rules on tobacco appears at first sight as a clear violation of the principle of conferral. The EU was not conferred any substantial power on the matter. Article 114 TFEU does provide a solid legal basis for harmonising national rules in public health, but it does so in complete incoherence with the Treaties system. Internal market legislation may not be 'a perverse ploy of European actors seeking to extend the range of their competences',<sup>145</sup> but is used with a certain degree of dishonesty by member States to compensate for a lack of competence upon which they decided themselves. It is of course not to the Court to narrow down the scope of Article 114 TFEU, internal market legislation is necessary and must integrate non-market interests, but rather to member States to rethink the current competence framework to bring it more clarity and predictability.

On a public health point of view however, the competence given to the EU by Article 114 TFEU appears insufficient. Under the current interpretation of the Court, a number of meaningful actions are not available to the EU legislator for lack of contribution to the establishment and functioning of the internal market. This limit can be particularly felt in cases where the Court renounces to apply correctly its own case-law, possibly by reluctance to rule in favour of tobacco companies by striking down important public health measures. These shortcomings in the EU's competence will hamper future developments in tobacco policy and for other aspects of lifestyle risks, such as alcohol and unhealthy diets, which are not as heavily regulated at the moment.<sup>146</sup> This can be deplored considering the challenges posed by lifestyle risks and their direct role in the growing burden of non-communicable diseases in the European Union and worldwide, and considering also the fact that EU tobacco policy seem to enjoy a broad support from member States<sup>147</sup> and citizens.<sup>148</sup>

A softening of the Court's appraisal of what constitutes a contribution to the internal market is possible and could very well unlock some of the possibilities outlined above.<sup>149</sup> It is not, however, the preferred option, since it would deprive Article 114 TFEU of any meaningful limits and would not solve the overarching discrepancies in the competence framework. To bring in line the legislative practice with this framework and to give the Union full latitude to regulate lifestyle risks, a change to the Treaty would be required. This could take various forms, from removing the

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<sup>144</sup> Alemanno A., 'Out of Sight, Out of Mind. Towards a New EU Tobacco Products Directive', *supra* note 76, p. 202.

<sup>145</sup> De Witte B., 'Non-market values in internal market legislation', *supra* note 13, p. 76.

<sup>146</sup> See Alemanno A. and Garde A., 'The emergence of an EU lifestyle policy: the case of alcohol, tobacco and unhealthy diets', *supra* note 1.

<sup>147</sup> The Tobacco Products Directive was adopted by the Council with a unanimity minus one vote (from Poland), see : <https://www.votewatch.eu/en/term8-directive-of-the-european-parliament-and-of-the-council-on-the-approximation-of-the-laws-regulations.html>.

<sup>148</sup> *Attitudes of Europeans towards tobacco and electronic cigarettes*, Eurobarometer, May 2017.

<sup>149</sup> See Davies G., *supra* note 56, especially pp. 378-380.

harmonisation ban from Article 168(5) and moving public health from complementary to shared competences, to a more radical overhaul in the form of general legislative competence given to the EU.<sup>150</sup> The latter solution would have the merit to address the global 'competence conundrum', with some obvious political hurdles and legal discussions facing on the way.<sup>151</sup>

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<sup>150</sup> Garben, S., *supra* note 21.

<sup>151</sup> *Ibid.*



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