CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joseph McMahon

FREE MOVEMENT OF GOODS

A. Introduction

The end of 2012 will herald the twentieth anniversary of 'deadline 1992', the projected date for the completion of the EU's internal market. Since the entry into force of the Lisbon Treaty in 2009 references to '1992' have been deleted from the Treaties, and so it may be tempting to suppose, rather more than twenty years since the first contribution on the Free Movement of Goods to this section of the Quarterly,[1] that this is old news. Isn't the law governing the internal market in general and the free movement of goods in particular now well settled?

Far from it! This remains a dynamic area of the law. The broad concept of the internal market may be well enough understood—it is, according to Article 26 TFEU, 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. But much detail remains contested. In particular there are persisting questions about, first, the type of practice that is subject to control in the name of protecting the free movement of goods (below, B) and, second, the extent to which trade-restrictive practices may be justified (below, C). These are matters that focus on the interpretation given to the key Treaty provisions by the Court of Justice. Then, in so far as diverse national measures remain justified, attention turns to harmonization of laws at EU level as the method to deepen the process of integration-through-law: this turns the focus to the legislative institutions of the EU rather than its judicial institution, although the Court retains a key role in determining the proper limits of legislative harmonization (below, D). More generally the development of the internal market, built on this basic foundation of rules that challenge national trade barriers and provide scope for EU rule-making in partial or total replacement for national regulatory choices, requires tools that ensure its effective 'management' (below, E). In this sense '1992' was merely a milestone: the internal market is a process not an event.

B. The Notion of a Trade Barrier

The Court's case law long ago established that national rules that discriminate against imported goods are caught by Article 34 TFEU. Moreover, as *Cassis de Dijon*

[1] (1991) 40 ICLQ 215–19.

[*ICLQ* vol 61, April 2012 pp 541–550] doi:10.1017/S0020589312000048

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

resoundingly declared,[2] technical standards that tend to partition the market along national lines simply because they are different State by State fall within Article 34's net. It is necessary to put such national measures to the test, because otherwise pursuit of the internal market would be fatally undermined. The question is where Article 34 TFEU s*tops*. In *Keck and Mithouard* the Court decided that a simple impediment to commercial freedom is not enough to bring the relevant national rule within the scope of Article 34 TFEU.[3] Since then it has continued to gnaw away at the central conundrum: Article 34 TFEU is *less* than a charter for general review of Member State economic policy but *more* than a mere anti-discrimination rule. But where, between those poles, does it lie?

Non-discriminatory rules that do not affect the composition of a product have emerged as the toughest case in fixing the outer limits of Article 34. Cases on 'restrictions on use' have not answered the central question about the reach of Article 34, but they provide the most vivid exploration of the competing positions.

Åklagaren v Mickelsson, Roos arose out Swedish rules forbidding the use of jet skis (personal watercraft) on particular designated waterways in Sweden.[4] That rule did not make life especially difficult for imported goods compared with local products. Nor did it demand that the product be adapted as a pre-condition for access to the target market —the 'Cassis de Dijon' problem. The product could be freely sold in Sweden. But it could not be *used* in the circumstances outlawed by the national measure. The Court ruled that the restriction imposed on the use of a product 'may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State'.[5] This triggers Article 34 TFEU, for, it added, consumers have only a limited interest in buying a product which is subject to such a restriction.

So an inquiry into the restriction's influence on consumer behaviour is called for— and that influence must be 'considerable'. The Court's cautious but imprecise insertion of the adjective 'considerable' into its definition of the reach of Article 34 aims to capture the notion that just because national laws vary does not of itself trigger the application of Article 34. The threshold at which divergence becomes a matter of concern for the EU is higher. But, as a general observation, that was the ambition underpinning *Keck and Mithouard* 20 years ago. The problem is pinning down with precision where Article 34 TFEU stops and where national regulatory autonomy begins. The adjective 'considerable' carries precisely that heavy constitutional weight, but it is hard to grasp how one can sensibly measure whether an influence on consumer behaviour is considerable or not. The threshold is crucial, but alarmingly elusive, and seems inevitably to point to messy case-by-case application.[6]

The lurking fear is that if the Court delves into a review of national measures which do not affect the construction of an internal market it is intruding into national regulatory autonomy without adequate justification and thereby damaging the legitimacy of EU

[2] Case 120/78 *Rewe-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

[3] Cases C-267 and C-268/91 [1993] ECR I-6097.

[4] Case C-142/05 *Åklagaren v Mickelsson, Roos* [2009] ECR I-4273.

[5] ibid, para 26.

[6] See eg S Enchelmaier, 'Moped Trailers, Mickelson & Roos, Gysbrechts: the ECJ's case law on goods keeps on moving' (2010) 29 YEL 190; P Wenneras and KB Moen, 'Selling Arrangements, Keeping Keck' (2010) 35 *ELRev* 397; J Snell. 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CMLRev* 437.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

law. That fear is all the greater if the Court really meant what it said recently in *Bonnarde*.[7] In that ruling the Court cited its own case law on 'restrictions on use' in support of the proposition that Article 34 TFEU catches rules that 'may influence the behaviour of consumers and, consequently, affect the access of those [products] . . . to the market' of the regulating State.[8] This formula drops the qualification that the influence on consumer behaviour must be 'considerable', and therefore seems to throw the doors of Article 34 TFEU wide open. And this leap occurs in a decision that does not concern a restriction on use at all but rather a rule of the classic *Cassis de Dijon* type that imposed a 'dual burden' on imports! *Bonnarde* is a decision of the Fifth Chamber. It seems implausible that it really should be taken at face value, so it is probably simply not a reliable decision. In an area where so much has been established—adjusted, adapted—by the case law of the Court over the years, such lack of attention to detail is frankly a source of dismay.

C. Justifying Barriers to Trade

Article 36 TFEU contains a list of matters that may form the basis for justification of barriers to inter-State trade in goods. The Court has over time allowed a far wider range of values and interests to form the subject matter of justification for national measures that obstruct inter-State trade. Once again *Cassis de Dijon* was hugely influential in that vein.[9] So, in *Åklagaren* the Court took a favourable view of the justifiability of the restriction on use of personal watercraft because of the consequent protection of the environment—even though that is an interest missing from the list found in Article 36 TFEU. Similarly the Court has embraced animal welfare as a justification for trade-restrictive national rules, notwithstanding the absence of any explicit recognition of such concern in Article 36 TFEU.[10]

The Court has lately been amply supported in this generous reading of the scope of justification in EU free movement law by the readiness of the Member States to write into the Treaty 'cross-cutting' or 'horizontal' provisions that confirm the salience of concerns such as consumer protection and environmental protection in the definition and implementation of other Union policies and activities—which doubtless includes the making of the internal market. These 'Provisions Having General Application' have been granted greater prominence by the Treaty of Lisbon, having been grouped together and installed as Title II of Part I of the TFEU, Articles 7–17. Relevant provisions of the Charter of Fundamental Rights, Article 37 on Environmental Protection and Article 38 on Consumer Protection which were granted binding status on the entry into force of the Treaty of Lisbon, strengthen yet further the profile of the EU as an entity constitutionally committed to a great deal more than mere trade liberalization.

1. The relevance of discrimination

One of the most awkward niches in this area of the law is and remains the Court's view that the *extra* grounds of derogation that go beyond Article 36 TFEU may be invoked

[7] Case C-443/10 *Bonnarde* (not yet reported) judgment of 6 October 2011.
[8] ibid, para 30.
[9] See (n 2).
[10] Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers* [2008] ECR I-4475; Case C-100/08 *Commission v Belgium* [2009] ECR I-140.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

only if the national measures under attack are not discriminatory on the basis of origin. If discrimination is present Article 36—and *only* Article 36—is relevant. The Court established this at an early stage in its shaping of this area of the law[11] and it has never recanted. Moreover, periodically—and recently—it has appeared to go out of its way to insist on the continuing salience of presence or absence of discrimination on the basis of origin in determining the available scope of justification.[12] On the other hand there are a number of rulings in which the Court appears entirely receptive to justification in the widest sense even where discrimination appears to be present, although it typically simply evades addressing the tension. This led to exasperation from (among others) Advocate General Jacobs, who on more than one occasion pressed the Court to reconsider.[13] But it chose not to. There is strong normative appeal to a model whereby all types of justification are in principle available, but according to which the presence of discrimination would make the job of the regulator in showing that the chosen scheme is lawful particularly onerous. Such a model diminishes the significance of the slippery notion of discrimination. And some commentators have concluded that this is in fact what the Court's case law amounts to, even if the Court has not admitted it.[14]

In its December 2011 ruling in *Commission v Austria* the Court has extended the narrative of evasion.[15] Austria banned lorries weighing over 7.5 tonnes from carrying certain goods—those with an 'affinity to rail'—on a section of motorway in the Inn valley. This was found to have a substantial effect on the free movement of goods between Northern Europe and Northern Italy. Is such a measure justified? The Court's judgment refers to Articles 2, 3, 6 and 152(1) EC and Articles 35 and 37 of the Charter as sources of respect for health and environmental protection mandated by the Treaty. (And this is confirmed by the Treaty of Lisbon.) But the Court then found that the 'radical' traffic ban introduced by Austria went too far.[16] Austria had not sufficiently considered alternative less restrictive methods. The Court cited two in particular, including applying a lower permanent speed limit in preference to the prevailing variable speed limit. Of broader interest to the structure of the law of free movement, the Commission had in the case argued the Austrian rules were discriminatory, because there were special exemptions in favour of local and regional traffic, so the burden was felt especially heavily by international trade. The Court's response was to find differential treatment of local traffic to be justified and not such as to call into question the 'consistent and systematic' treatment of the perceived problem.[17] The basic statements of the law governing justification omit any mention of the relevance of discrimination.[18] The Court bundles up issues of discrimination in the broader assessment of whether there is a consistent and systematic scheme adopted by the regulating authority. This is close to acceptance that the relevance of discrimination

[11] Eg Case 207/83 *Commission v. United Kingdom* [1983] ECR 1013.

[12] See eg recently Case C-153/08 *Commission v Spain* [2009] ECR I-9735 (a case on services), especially para 37; Case C-400/08 *Commission v Spain* judgment of 24 March 2011 (a case on freedom of establishment), especially para 73.

[13] Eg Case C-379/98 *Preussen Elektra* [2001] ECR I-2099 (goods); Case C-136/00 *Danner* [2002] ECR I-8147 (services).

[14] See in particular successive editions of Peter Oliver's magnum opus: now P Oliver (ed), *Oliver on Free Movement of Goods in the European Union* (Hart, 5th edn, 2010).

[15] Case C-28/09 *Commission v Austria* judgment of 21 December 2011.

[16] ibid, para 140.

[17] ibid, paras 133 and 137.

[18] ibid, paras 119 and 125.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

should be relegated from determining which heads of justification are available in principle to determining instead whether a justification is made out on the facts, which hints at *sub silentio* abandonment of the old case law. But '[l]egal certainty will only be created when the Court has the courage to reverse its earlier case law explicitly'[19]—and it has not done so yet.

2. Constitutional identity

The task of adjudication assumed by the Court in the matter of justification involves weighing the interest in trade integration against the interest pursued by national regulatory choices that impede cross-border trade. Sometimes the Court's task is easy. On occasion the national rules make little sense: they are no more than the flotsam and jetsam of regulatory history, ripe for purging. On other occasions the national rules may serve a worthy objective but they do so in an unnecessarily intrusive manner. It is a violation of Article 34 TFEU where a Member State impedes inter-State trade more than is required to meet its regulatory purpose. A recent example is provided by *Humanplasma GmbH*.[20] Austrian rules prohibited the marketing of blood for which payment has been made. That impedes cross-border trade in blood from States which apply no such prohibition. The rules were found to be unjustified. They go too far: that other States are less scrupulous than Austria does not of itself make the Austrian rules disproportionate but this background 'may be relevant'.[21] And the Court concluded that the obligation that the blood donation must have been made without any reimbursement of costs to the donor is not necessary in order to ensure the quality and safety of the blood.

The more sensitive the interest expressed under national law that collides with free movement law, the more sensitive becomes the role of the Court. *Schmidberger*, previously covered in this Survey,[22] remains a wonderful example. Protests against the damage done by trans-Alpine haulage to the environment were permitted by the Austrian authorities, but hindered trade in goods through the Brenner Pass. The Court explained that 'the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests'. It added, in language redolent of the European Court of Human Rights, that the regulating authorities 'enjoy a wide margin of discretion in that regard'.[23] It made plain that the Austrian (lack of) action against the protesters constituted no violation of EU law, despite the restrictive effect on cross-border trade in goods.

Such cases intriguingly pit fundamental economic rights against fundamental social and political rights. The Court's cautiously expressed standard of review acts as an important defence against the charge that it is shaping a system that is damagingly biased in favour of mobile economic interests. Such tension is evidently not confined to the free movement of goods, but rather also arises in connection with the free movement of persons and services. The Court has carefully accepted that the EU has 'not only an

[19] Oliver (n 14) para 8.12.
[20] Case C-421/09 *Humanplasma GmbH* judgment of 9 December 2010.
[21] ibid, para 41.
[22] Case C-112/00 [2003] ECR I-5659; see (2006) 55 ICLQ 457.
[23] ibid, paras 81–2.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

economic but also a social purpose'[24] but this is only a starting-point in deciding which interests prevail in particular circumstances, and why.

The Lisbon Treaty may have altered the balance.[25] Case law has not yet touched the free movement of goods—but it will, and one should be prepared. Among several potentially significant adjustments the Lisbon Treaty has radically amended the Treaty provision that refers to national identity. Pre-Lisbon this was Article 6(3) TEU which provided that 'The Union shall respect the national identities of its Member States'. That is bland and thin. But the new Article 4(2) TEU is at least potentially equipped with sharper teeth:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

One could read this as an instruction to the Court to show greater respect for national diversity than previously, *inter alia* in connection with free movement law's application to national restrictions. The Court's treatment of Article 4(2) TEU in its 2010 (post-Lisbon) ruling in *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* deserves consideration in this vein.[26] Austria has a law abolishing the nobility which *inter alia* does away with titles, whereas Germany has a law which does away with privileges but allows parts of the noble title to be retained in the surname. In Germany she was Ilonka Fürstin von Sayn-Wittgenstein. In Austria she was advised she must be registered instead as Ilonka Sayn-Wittgenstein. This constituted serious inconvenience to her commercial activity—which, delightfully, involved selling castles. But was the Austrian rule justified? The Court drew on Article 20 of the Charter, which states that everyone is equal before the law, but, relying explicitly on Article 4(2) TEU, it was receptive to Austrian republican concern, expressed at a constitutional level, to abolish titles in the service of equality of citizens before the law.

The judgment is rooted in the Treaty provisions on Citizenship, specifically Article 21 TFEU: she was also plainly engaged in the cross-border supply of services, so Article 56 TFEU could have been invoked. It was not a case about the free movement of goods: but *structurally* the law is equivalent in this matter across the several Treaty freedoms. One could readily extract an approach to justification according to which Article 4(2) TEU is the door through which concerns to protect national identity enter free movement law, softening its sharp deregulatory edge. One might even see the Court of Justice's interpretation of Article 4(2) EU as a means to open up EU law to national constitutional concerns while still laying formal claim to the supremacy of EU law over national law, in balance with the *Bundesverfassungsgericht*'s famous concern to open up German law to EU law, while still placing limits on its subjection to EU law in the

[24] Case C-438/05 *Viking Line* [2007] ECR I-10779 para 79; Case C-341/05 *Laval* [2007] ECR I-11767 para 105.

[25] See C Semmelmann, 'The European Union's Economic Constitution under the Lisbon Treaty: soul-searching shifts the focus to procedure' (2010) 35 *ELRev* 516; N Nic Shuibhne, 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) 34 *ELRev* 230; S Weatherill, 'From Economic Rights to Fundamental Rights', in De Vries, Bernitz and Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart, 2012).

[26] Case C-208/09 judgment of 22 December 2010.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

name of, *inter alia*, defence of constitutional identity.[27] But this cannot be a complete surrender of free movement law to cherished local concerns: that would fatally fragment the internal market and, worse, would abandon the EU's assertion of values that are apt to exercise a restraining influence on history's bony claw of nationalist excess.[28] So the question will be how the Court evaluates such reliance on Article 4(2) TEU. This promises rich fare in future litigation.

D. The Law and Practice of Harmonization

The key structural point in EU law that a barrier to inter-State in goods is not automatically unlawful but rather is capable of being shown to be justified means that the institutional buck is passed. Finding a trade barrier justified serves as an expression of the limits of the judicial role in market-making. Such persisting obstacles to trade fall to be addressed, if they are to be addressed at all, by the EU legislature—by the *harmonization* of laws. Harmonization at EU level results in a common set of rules for doing business, and within that common set of rules is found the political choice about exactly what form and intensity the EU's (re-)regulatory scheme should take.

Legislative harmonization is authorized by Article 114 TFEU. It is not aimed at correcting inter-State legislative diversity *per se*. Instead it is explicitly tied to the construction of an internal market. Harmonization of laws must carry this constitutionally necessary market-making charge and if it does not it lies beyond the EU's mandate. And so famously the Court in its *Tobacco Advertising* ruling—more properly, *Germany v Parliament and Council*[29]—determined that the suppression of tobacco advertising on a whole range of products went beyond what was permitted pursuant to (what is now) Article 114 TFEU, and found the legislative act to be invalid.

However that momentous ruling did not herald aggressive judicial control of legislative excess. Rather the reverse. Most comparable attempts to enlist the Court's help in curtailing broad legislative ambition in the name of harmonization have failed. The Court has shown itself generally receptive to a broad reading of Article 114 TFEU and in turn it has generally refused to trip up the legislature. In this vein the most striking, and certainly typical, recent ruling is *Vodafone*.[30] The so-called 'Roaming Regulation'[31] was based on Article 95 EC, the predecessor to the current (post-Lisbon) Article 114 TFEU. It imposed harmonized rules which, in effect, placed caps on the charges to be made by operators of mobile telephone networks, on the basis that divergent intervention by national regulators was imminent and would cause the fragmentation of the internal market. The Regulation's validity was challenged before the English courts by several providers, and the matter was referred to the Court of Justice.

[27] Cf *Lisbon* judgment of 30 June 2009, *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08. Available at <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

[28] See S Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7 *CYELP* 11; A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *CMLRev* 1417.

[29] Case C-376/98 [2000] ECR I-8419; see (2001) 50 ICLQ 158.

[30] Case C-58/08 *Vodafone, O2 et al v Secretary of State* [2010] ECR I-4999.

[31] Regulation 717/2007, OJ 2007 L171/32.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

The Court assembled the following test:

> ' . . . According to consistent case-law the object of measures adopted on the basis of [Article 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 114 TFEU] as a legal basis, the [Union] legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market . . . or to cause significant distortions of competition . . .. 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 . . . .[32]

This sets a threshold that is both low and imprecise. How can one effectively police a legislative claim that a measure *genuinely* improves conditions, or that differences have a *direct* effect or cause *significant* distortions of competition, or that the emergence of obstacles is *likely* (the special case of 'preventive harmonisation')? There is, in fact, a striking similarity between the Court's approach to Article 34, as seen above in the case law dealing with 'restrictions on use', and its interpretation here of Article 114 TFEU: the formula that it has devised expresses the constitutionally important principle that there are limits to intervention asserted by the EU, but in practice it is very hard to make concrete the precise location of those limits. And the consequence is a generous scope of application enjoyed by both Article 34 (in the hands of traders) and Article 114 (in legislative hands).

It is in this vein revealing how the Court decided *Vodafone*. Advocate General Maduro did not believe a sufficiently compelling case had been made in favour of valid 'preventive harmonisation', because of inadequate demonstration of the risk of national intervention—although he did find a way to uphold the Regulation's validity, under an ingenious and novel approach that treated it as a response to private parties setting prices that were much lower for domestic calls and which therefore discriminated against cross-border economic activity. Moreover the likelihood of national price controls was anyway far from plausible, because any such intervention would hurt firms based in the regulator's own territory.[33] But the Court found the measure valid. The required 'likelihood' that divergent national measures would emerge was confirmed by the explanatory memorandum to the proposal for the challenged Regulation and by the impact assessment, while the harmonization of not only retail but also wholesale charges was treated as valid by reference to the Regulation's own recitals.[34] *Vodafone* involves claims made by the EU's legislative institutions which are uncritically accepted by its judicial institution. One is readily forgiven for doubting whether an astutely drafted measure of legislative harmonization will *ever* be found to fall foul of the Treaty.[35] And in *Vodafone* the Court breezily neutered an allegation that the Regulation violated the principle of subsidiarity by observing that it is the EU, and not the Member

[32] See (n 30), paras 32–3.
[33] M Brennke, 'Annotation' (2010) 47 CMLRev 1793.
[34] See (n 30), paras 45 and 47 of the judgment.
[35] See S Weatherill, 'The limits of legislative harmonisation ten years after *Tobacco Advertising*: how the Court's case law has become a "drafting guide"' (2011) 12 *German Law Journal* 827; D Wyatt, 'Community Competence to Regulate the Internal Market' in M Dougan and S Currie (eds), *Fifty Years of the European Treaties: Looking Back and Thinking Forward* (Hart, 2009).

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

States, which is best placed to establish common rules which are apt to contribute to the smooth functioning of the internal market according to a single coherent regulatory framework.[36]

E. Market Management: The Internal Market in its Wider Context

The last Contribution to the Quarterly explained that in November 2007 the Commission published a Communication entitled *A single market for 21st Europe*.[37] In it was a commitment to placing a priority on implementation and enforcement of the existing rules of the internal market game, and a diminished profile for the orthodoxy of 'top-down' EU lawmaking. The stated aim was instead 'to foster flexibility and adaptability while maintaining the legal and regulatory certainty to preserve a well-functioning single market'.[38] Intriguing though admittedly vague, such words reveal the management of the internal market as a long-term exercise.

In May 2010 the 'Monti Report' was published, under the title *A New Strategy for the Single Market: at the service of Europe's Economy and Society*.[39] It is in some respects a rallying cry. It warns of the risk that economic nationalism and plain fatigue may undermine the internal market, when it still needs efforts to secure its completion. It laments that 'The single market today is less popular than ever while Europe needs it more than ever'.[40] And, maintaining the theme of 2007, it is admitted that 'An action to deepen the single market is therefore unlikely to require a new wave of regulations and directives, as it was the case with the 1985 White Paper.'[41] Instead there is a commitment to better public and private enforcement, while administrative co-operation and mutual evaluation of regulatory burdens are labelled 'silver bullets'.[42] There is a thematic emphasis on the need for inquiry into national implementation practice, into practical problem-solving through 'SOLVIT', EU-driven alternative dispute resolution, the training of national judges and private access to courts.

This was followed up by a Commission Communication, *Towards a Single Market Act – For a highly competitive social market economy, 50 proposals for improving our work, business and exchanges with one another*.[43] The timing could scarcely have been worse. Political attention was largely focused on 'firefighting' in the banking sector and on the turbulence in the Eurozone. This was to be no relaunch of the brilliance that surrounded the 1985 White Paper on the Internal Market. In April 2011 the *Single Market Act* was published, and '50 proposals' had been trimmed to 12 levers—'twelve levers to boost growth and strengthen confidence, working together to create new growth'.[44]

The first sentence reads: 'At the heart of the European project since its inception, the common market – which has now become the **internal market – has for over 50 years woven strands of solidarity between the men and women of Europe, whilst opening**

[36] See (n 30), para 76.
[37] COM (2007) 724: see (2009) 58 ICLQ 985.
[38] ibid, 4.
[39] Available at <http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf>.
[40] ibid, 6.
[41] ibid, 93.
[42] ibid, 99.
[43] Available via <http://ec.europa.eu/internal_market/smact/index_en.htm>: originally released as COM (2010) 608 on 27 October 2010, then in corrected form on 11 November 2010.
[44] COM (2011) 206, available at <http://ec.europa.eu/internal_market/smact/docs/20110413-communication_en.pdf>.

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press

up new opportunities for growth for more than 21 million European businesses'. A few lines lower it is stated: 'To **remedy these shortcomings** we must **give the single market the opportunity to develop its full potential**. To this end, **a proactive and cross-cutting strategy** should be developed'. (Emphasis *not* added!)

The erratic use of bold type makes for a most perplexing presentation. Worse, the content is troublingly anodyne. The promised 'twelve levers' to boost growth and strengthen confidence are: Access to finance for SMEs, Mobility for citizens, Intellectual property rights, Consumer empowerment, Services, Networks, The digital single market, Social entrepreneurship, Taxation, Social cohesion, Business environment, and Public procurement. The document explains the significance of each lever and then attaches to each one a 'key action'. The Commission urges the Council and Parliament to act to ensure each 'key action' is adopted by the end of 2012 at the latest, so as to relaunch the single market: and the Commission will then take stock and plan the next stage.[45]

Fixing a deadline is plainly a strategy copied from the 1985 White Paper's identification of 1992 as the deadline for completing the internal market, but one might expect a politically smart institution to ensure that its 'key actions' are either vague or deeply unambitious, so that it can be confident it will be able to declare victory come the end of 2012. The *Single Market Act* is of this type. But the project to complete the internal market is an enduring challenge.

STEPHEN WEATHERILL*

[45] ibid, pp 5 and 22.

* Jacques Delors Professor of European Law, Fellow of Somerville College, University of Oxford. Email: stephen.weatherill@law.ox.ac.uk

https://doi.org/10.1017/S0020589312000048 Published online by Cambridge University Press