

EU Internal Market Law

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Session No 8 "The role of EU secondary law in the construction of a EU single market: the harmonisation of national laws"

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Negative integration

The EU fundamental freedoms as
"negative" freedoms

- ⇒ They prevent national rules from being applied if, and to the extent that, their application results in a restriction on intra-EU free flow of products, productions factors and economic actors...
- ⇒ Unless such obstacle may be justified by reasons of general interest

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The application of fundamental freedoms implies to **strike a reasonable balance** (rule of reason) between

- a) **Market integration** (removing barriers to free movement incompatible with a single EU-wide market) and
- b) The protection of **vital public interests** such as consumer protection or public health

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Regulating the market

The starting point (the principle)

- It is for the Member States to regulate economic activities within their territories

The impact of EU (the exception)

- The application of national rules may not have the effect of fragmenting the EU single market without justification (economic activities must be freely carried on across the frontiers)
- If this is the case, national rules must be disapplied

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Consequence: Regulatory competition

- Various and different national legislations co-exist within a common market
- They are implemented by local authorities (including courts)
- But such local rules must be compatible with supranational principles (EU free movement)
- And it is for local authorities to implement EU principles (by disapplying conflicting local rules)

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Positive integration

Where regulatory competition fails

- ⇒ No general powers to regulate economic activities are granted to EU legislature
- ⇒ EU rules are the exception
- ⇒ harmonization legislation enacted by EU institutions is necessary

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The legal basis for harmonising rules

- No general power to legislate conferred on the EU → the need for legal basis
- Achievement of the objectives set out in Art 26 TFEU (internal market)
 - specific legal basis: ex. Arts 48 (workers), 50 and 53 (establishment)
 - general or residual legal basis: Art 114 TFEU → it applies "save where otherwise provided in the Treaties"

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Art 114(1) TFEU

- "...The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, 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**".
- Case law: "the object of measures adopted on that basis must genuinely be to improve the conditions for the establishment and functioning of the internal market".

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The scope of Art 114(1) TFEU

For the EU legislature to have legitimate recourse to such a legal basis:

- A mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient
- differences between national rules are to be 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

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Art 114(3) TFEU

- "The Commission, in its proposals envisaged in paragraph 1 concerning **health, safety, environmental protection and consumer protection**, will take as a base **a high level of protection**, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective".

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The dual aim of EU harmonization

- 1) By setting harmonized standards applicable in the EU as a whole, it enables goods, persons, services and capital to freely move
- 2) At the same time, it has to protect vital public interests (those justifying the restrictions on free movement resulting from national rules)

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 EU primary law vs EU secondary law

EU primary rules (prohibitions of restrictions) only come into play in the absence of EU secondary law (harmonisation measures)

Case C-322/01, *Deutscher Apothekerverband*:

"A national measure in a sphere which has been the subject of **exhaustive harmonisation** at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaties (fundamental freedoms)"

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