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Schrauwen, A.

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From the Board

Review of the Balance of Competences

The division of competences between the EU and its Member States has always been based on the general principle of conferral, as outlined in Article 5(2) TEU: ‘... 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’. The clarifications that the Lisbon Treaty tried to bring to the division of competences, by outlining categories and areas of Union competence in Articles 2 through 6 TFEU, did not end the discussion on the division of competences, to say the least. The Dutch review of the balance of competences and the UK’s ongoing review of the balance of competences that will conclude by the end of 2014 are illustrative. The UK, on the one hand, uses in its review a very broad definition of competence: ‘competence is about everything deriving from EU law that affects what happens in the UK’.¹ The review will not produce specific recommendations, but is supposed to give a better understanding ‘of an important part of the governance of the UK’, on which to ground and develop the UK’s policies in relation to the EU.² The outcome of its review of the balance of competences can lead to a demand for ‘repatriation’ of competences, hence a demand for Treaty change.³ The Netherlands, on the other hand, produced a list of 54 ‘points of action’ in June 2013⁴ and the government considers it an initial basis for discussing a more modest, sober and effective Europe with Member States and institutions. The action points all relate to the question whether the EU should use its powers, and not to the question whether the EU should have these powers. In the letter accompanying the list of action points, the Dutch government states that Treaty change is neither a practicable nor a desirable way to implement the action points.⁵

¹ *Review of the Balance of Competences between the United Kingdom and the European Union presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty*, July 2012, p. 13, available from www.fco.gov.uk.

² *Ibid.*, p. 17.

³ See e.g., David Cameron’s *Europe speech* available from <http://www.bbc.co.uk/news/uk-politics-21160684>.

⁴ *Inventarisatie EU-regelgeving op subsidiariteit en proportionaliteit – Nederlandse lijst van actiepunten*, bijlage bij Kamerbrief inzake uitkomsten subsidiariteitsexercitie, MINBUZA-2013.184321, 21 Jun. 2013.

⁵ *Ibid.*, p. 1.

One concept that is associated with, or could be seen as a consequence of, lack of clarity on the delineation of competences, is competence creep. In its most narrow sense, it is 'associated with a liberal interpretation of the legal basis provisions by both the EU institutions and the ECJ'.⁶ The liberal interpretation might result in a perception of an unforeseen loss of competences on the national level that happens often by stealth, hence the 'creep'. A disagreement on the limits to the ambit and scope of a specific Treaty provision underlies the perception of competence creep. A famous discussion on limits to the scope of a legal basis refers to Article 114 TFEU, the legal basis provision for single market legislation. The debate surrounding the powers given to the EU by Article 114 TFEU is explored in the UK's Balance Review Report on the Single Market, the first of thirty-two reports that will make up the complete review.⁷ In its Chapter 2, the report sets out the Single Market's legal framework and the scope of competence, and it concludes that 'it is not possible to establish a clear division between Member State and EU competence in the Single Market area'.⁸ The impossibility of establishing a clear division of competences is also underlined by a characterization of the boundary between national and Union competence as 'a potentially infinite series of actual and potential interactions'.⁹

The Court's review of the division of competences between Union and Member States with respect to Article 114 TFEU reflects this 'potentially infinite series'. It is established case law that the choice of the legal basis for a measure

⁶ S. Prechal, 'Competence Creep and General Principles of Law', *Review of European Administrative Law*, vol. 3, nr. 1, p. 5-22. She identifies competence creep in a broader sense as the obligation of Member States to comply with Union law where they lay down the existence and exercise of rights in areas falling outside the scope of Union law. One could add the instances where the EU institutions claim that a given objective implies the existence of power reasonably necessary to attain it, see P. Craig & G. De Búrca, *EU Law. Text, Cases, and Material*, OUP, 5th ed., 2011, p. 77.

⁷ The delineation between shared powers in the area of the internal market and exclusive competences in the area of trade policy, recently reviewed by the ECJ in C-137/12 *European Commission and European Parliament v. Council of the European Union*, judgment of 22 Oct. 2013, nyr, is not touched upon in the Review report on the Single Market. It will be dealt with in the Review report on Trade and Investment, for which consultations were closed on 6 Aug. 2013. In the call for consultation, the UK mentions several areas it considers to fall under either shared competence or exclusive Member State competence. Criminal sanctions in relation to the enforcement of intellectual property rights figure among those areas, see point 11 of the Call for evidence, available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200638/bis-13-865-balance-of-competences-review-trade-and-investment-call-for-evidence.pdf.

⁸ *Review of the Balance of Competences between the United Kingdom and the European Union. The Single Market*, July 2013, p. 5, available from www.fco.gov.uk. In the Dutch list of action points, there is not much attention for the impossibility of clear delineation, as the first recommendation illustrates: 'Every action of the Union must be motivated on the basis of a clear legal basis in the Treaties. The legal basis must be, in a crystal-clear way, written and meant for the proposed action. The European Commission should refrain itself from proposals where the link with the legal basis is too indirect and uncertain ("creeping competences"). *Inventarisatie* (as cited note 3), p. 1. My translation, AS.

⁹ *Ibid.*, p. 13 (evidence submitted by Dougan; submitted evidence is available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226814/EITD-responses-all-A-to-J-FINAL-v2.pdf).

must be based on objective factors which are amenable to judicial review, among which is the aim and content of the measure.¹⁰ In its *Tobacco Advertising* ruling¹¹ the Court has shown that it is willing to place limits on the broadly worded Article 114 TFEU, taking account of the aim of the measure, as it must ‘genuinely have as its object the improvement of the conditions for the establishment and the functioning of the internal market’.¹² In addition to this substantive object, the Court also has reviewed the more procedural object found in Article 114 TFEU that limits its scope, notably that measures that do not harmonize national laws, regulations or administrative actions cannot be adopted under this provision.¹³ The internal market object and the harmonization object are cumulative limits to the scope of Article 114 TFEU as a legal basis.

Both the question whether a measure constitutes harmonization and the question whether a measure genuinely contributes to the internal market were subject to several Court rulings. In cases decided in the years following the *Tobacco Advertising* case, the Court seemed to relax the limits to the scope of Article 114 TFEU by ruling that in complex areas the legislature has a broad discretion to determine the appropriate method of harmonization,¹⁴ that a total ban of certain products can constitute a harmonizing measure that contributes to the establishment and functioning of the internal market,¹⁵ or that Article 114 TFEU could be used as a legal basis for the creation of a Union body contributing to the process of implementation of harmonizing measures,¹⁶ or as a legal basis to establish authorizing procedures.¹⁷

In its recent review of Article 28 of the Short Selling Regulation,¹⁸ which authorizes the European Securities and Markets Authority (ESMA) to take decisions directed at natural or legal persons, the Court revisited both limits to the scope of Article 114 TFEU. The case is furthermore interesting for the Courts review of the limits to the powers of an agency, but that part of the review will not be discussed in this editorial. We will concentrate on the review of the two limits

¹⁰ See e.g., Case C-84/94, *United Kingdom v. Council* [1996] ECR I-5755, para. 25.

¹¹ Case C-376/98, *Germany v. European Parliament and Council* [2000] ECR I-8419.

¹² *Ibid.*, para. 84.

¹³ Case C-436/03, *European Parliament and Commission v. Council (ECS)* [2006] ECR I-3733. The Court ruled that the contested Regulation left unchanged the different national laws already into existence and that it therefore could not be regarded as aiming to approximate national laws, para. 44.

¹⁴ Case C-380/03, *Tobacco Advertising II* [2006] ECR I-11573.

¹⁵ Case C-210/03, *Swedish Match* [2004] ECR I-11893, Case C-434/02, *Arnold André* [2004] ECR I-11825.

¹⁶ Case C-217/04, *United Kingdom v. European Parliament and Council (ENISA)* [2006] ECR I-3771.

¹⁷ Case C-66/04, *United Kingdom v. European Parliament and Council (smoke flavourings)* [2005] ECR I-10553.

¹⁸ Case C-270/12, *United Kingdom and Ireland v. European Parliament and Council* Judgment of 22 Jan. 2014, nyr.

to the scope of Article 114 TFEU, or on the two ‘conditions’ as the Court calls them.¹⁹

The Court gives ample discretion to the Union legislature with respect to the question whether the intervention mechanism set up by Article 28 of the Regulation constitutes harmonization. It confirms that, especially in fields with complex technical features, the legislature has discretion as regards the most appropriate method of harmonization and may deem it necessary to delegate to a Union agency powers for the implementation of harmonization. Furthermore, the Court acknowledges that in certain fields harmonization of general laws alone may not be sufficient to ensure the unity of the market and argues that, as a last resort and in very specific circumstances, decisions directed at certain market participants can provide an appropriate mechanism for harmonization. The Court puts emphasis on several recitals in the preamble to the Regulation in which is indicated that a divergence in measures adopted by Member States exists, and that it is important to address potential risks arising from short selling in a harmonized manner. It ignores the finding of the Advocate General that the competence to intervene attributed to ESMA is not harmonization nor the adoption of uniform practice at the level of Member States, but is in fact a replacement of national decision making with EU level decision-making, and therefore should be based on Article 352 TFEU.²⁰ The Court seems satisfied with the intention of the legislature that by empowering ESMA to take decisions directed at individuals it ensures that these decisions are applied in a uniform manner throughout the Union. The fact that ESMA may only take those decisions in case no competent authority has taken measures or in case one or more competent authorities have taken measures that are not adequate²¹ is apparently not relevant for deciding whether the intervention mechanism set up by Article 28 of the Regulation constitutes harmonization or not.

Interestingly, ESMA’s competence to intervene instead of the national authorities is an argument for the Court to give a positive answer to the question whether Article 28 of the Regulation genuinely contributes to the establishment and functioning of the market. The Court seems to rely on the aim of ESMA’s intervention, notably to respond to threats to the orderly functioning and integrity of financial markets. The Court also refers to recital 2 in the preamble to the Regulation and finds that the legislature has deemed it appropriate to set up a framework in order to ensure coordination and consistency between Member States with respect to measures on short selling. That is enough to convince the

¹⁹ *Ibid.*, para. 101.

²⁰ Case C-270/12, Opinion of AG Jääskinen of 12 Sep. 2013, para. 52.

²¹ Regulation 236/2012, *OJEU* L86/1 of 24 Mar. 2012, Art. 28 para. 2 (b).

Court that Article 28 of the Regulation is intended to improve the conditions for the establishment and the functioning of the internal market in the financial field.

The reasoning of the Court that Article 28 of the Short Selling Regulation is in fact directed at harmonization and at the establishment and functioning of the market is exclusively based on recitals in the preamble to the Regulation. One could see this as a consequence of the broad discretion the legislature has in fields with complex technical features. Be that as it may, the case certainly shows that the Court is willing to give leeway to the legislature when it comes to mechanisms designed to respond to serious threats to the orderly functioning and integrity of the financial markets.

Nevertheless, the very light review the Court applies here results in an expansion of what constitutes Single Market harmonization. One could either describe this as competence creep, or as a logical result of the impossibility to clearly define a boundary that is characterized by a potentially infinite series of potential and actual interactions. The latter view would recognize that secondary Union legislation directed at the establishment and functioning of the internal market is first and foremost the result of a political process where negotiations between the Member States within the Council, between the political parties within the European Parliament and between the Council and the European Parliament determine the level and method of intervention in the single market. Furthermore, it makes clear why the Court is reluctant to conduct a very intrusive review of secondary legislation even in cases where the Union legislature seems to interpret a legal basis provision in a liberal way. Any review of the balance of competences between Member States and European Union should take that into account.

*AS,
February 2014*