> first, according to settled case law fundamental rights form an integral part of the general principles of law whose observance the Court ensures and, second, that the requirements flowing from the protection of human rights in the Community legal order are also binding on member states when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements. . . .

This emphasis upon the fundamental rights dimension, rather than a purely technocratic interpretation of the concept of pay within the Insolvency Directive is important in steering the Court's reasoning and on the remedy available. The fundamental right invoked by the Court here is the general principle of equality and non-discrimination. Under the Spanish rules all workers who are dismissed are entitled to the compensation but in the event of insolvency workers are treated differently in that Fogasa is only liable for claims determined by a judicial decision. The objective justification for this discrepancy in treatment put forward by the Spanish government was to avoid abuse. The Court rejected this. There were mechanisms in place to avoid abuse. In reality the conciliation processes were strictly supervised by the courts that had to approve the outcome. The Court held that once discrimination, contrary to Community law has been established, and where measures guaranteeing equal treatment are not in place 'the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages enjoyed by persons within the favoured category'.[46] There is a duty on the national courts to set aside any discriminatory provision of national law without having to request or await its prior removal by the legislature, and to apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers. This duty of 'levelling up' is drawn from the principles underpinning equal pay claims in Community law, first developed in *Defrenne II*.[47]

ERIKA SZYSZCZAK*

II. FREE MOVEMENT OF GOODS

A. Ten Years without Frontiers

The Commission has spent time in 2003 celebrating the tenth anniversary of the establishment of the internal market. In this context the use of deadlines is misleading. The building of an internal market is more process than event. Many significant pieces of legislation entered into force at the end of 1992, but many pre-dated that moment and others again have been agreed subsequently. And the Court's interpretation of relevant provisions of the Treaty was not fossilised at the end 1992, but rather its dynamic evolution continues to exert influence over the process of market-building. The Commission is perfectly well aware of this. It admits that the Internal Market will never be 'completed'.[1] The core mission is to promote and sustain improved economic performance, not to hit crude targets. Nonetheless dissemination of propaganda possesses base appeal in all political systems and the Commission has taken the trouble to emphasise

[46] Para 42.

[47] Case 43/75 [1976] ECR 455. See Case C-184-89 *Nimz* [1991] ECR I-297, paras 18–20; Case C-408/92 *Avdel Systems* [1994] ECR I-4435, para 16.

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[1] Internal Market Scoreboard No 11, Nov 2002, available via <http://europa.eu.int/comm/internal_market/en/update/score/index.htm>.

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the gains that have accrued from the process of integration, while also devoting attention both to remaining gaps and strategies for plugging them. In making its case the Commission is confronted by the unavoidable absence of reliable data on what would have occurred had the internal market *not* been pursued in the chosen manner. Sector by sector, it is difficult to demarcate advantages accruing from the '1992' initiative from those that would have occurred in any event or which are attributable to other factors such as global trade liberalisation. Moreover, the essence of the internal market programme is that benefits will be felt not only in the short term, but also in the long term, and accordingly, in line with Chairman Mao's reported refusal to assess the importance of the French Revolution on the basis that it was too soon to tell, measurement of the impact of the internal market project cannot yet be decisive. However, in its report *The Internal Market—Ten Years without Frontiers* the Commission insisted on demonstrably favourable macroeconomic consequences.[2] It highlighted price reductions and improved productivity. Its simulation results suggest that real Gross Domestic Product would have been 1.4 per cent lower in 2002 without the internal market programme. The level of employment would have been 0.86 per cent lower. Moreover further gains are expected of the former, though not the latter, type in future.

B. Administrative Cooperation and Transparency

There is, of course, much more to the Commission's post-1992 strategy than merely advertising the splendours of integrating markets. The Commission has shifted its principal focus away from proposing new legislation towards ensuring that the legal framework which has been adopted is treated by commercial operators and consumers as a trustworthy basis for an integrated market. Laws on paper should be matched by laws in practice. Transparency is paramount. The 'Single Market Scoreboard', periodically published by the Commission in an attempt to name and shame defaulting Member States so as to induce improvement in their practices, revealed improving rates of compliance with the obligation to transpose Directives in the early years after its launch in 1997.[3] More recent reports reveal difficulties associated with rooting out truly stubborn obstacles. The data available in the Eleventh Scoreboard, published in November 2002, confess to recent interruption in the record of increasingly faithful compliance. A minority of Member States met the European Council's target for Spring 2003 of having a transposition deficit of 1.5 per cent or less. The figures are getting worse, not better. In May 2003 the Twelfth Scoreboard was published. Only Denmark, Finland, Sweden, Spain, and the United Kingdom meet the 1.5 per cent (or less) target, while the overall average deficit in implementation of internal market Directives has risen to 2.4 per cent. Italy, scoring a dismal 3.9 per cent, is the poorest performer. The Commission expresses particular alarm about these patterns in the light of the pressures of enlargement.

In order to foster a 'compliance culture' among the Member States, the Commission has placed emphasis on administrative cooperation. It has pioneered 'SOLVIT'—Problem Solving in the Internal Market—as the latest punchy idea for raising the

[2] <http://europa.eu.int/comm/internal_market/10years/docs/workingdoc/workingdoc_en.pdf>.

[3] It is currently accessible via <http://europa.eu.int/comm/internal_market/en/update/score/index.htm>.

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profile of effective market management.[4] Each Member State is required to make available contact points for parties wishing to lodge complaints. The Commission hopes to establish a system promoting, and ultimately a culture embracing, rapid and effective remedial action by national public administrations accused of misapplying the rules of the internal market game. In December 2002 the Commission released a communication aimed at better monitoring of the application of the law.[5] It prizes preventive action and, should that fail, rapid solutions. It wishes as far as possible to minimise resort to the cumbersome and slow Article 226 infringement procedure. It is of particular significance that the communication explicitly connects the practice of market-management to broader constitutional debates. In the White Paper on European Governance, which generated great interest if only lukewarm acclaim when published in July 2001, the Commission commented that 'Late transposition, bad transposition and weak enforcement all contribute to the public impression of a Union which is not delivering.'[6] In its December 2002 Communication, the Commission developed the notion of administrative cooperation as a basis for generating the required public confidence. It is plain that the internal market is anything but old news and anything but a mere technical exercise. Its study takes us to the heart of the quest to shape a transnational market without the support of a conventional state-like apparatus. Market freedoms may, apparently paradoxically, demand new and perhaps more intense forms of rule-making. As Michelle Egan recently observed, in an important and rich study, 'markets are absolutely dependent on public authority. The market-oriented reforms enacted by the European Union are particularly striking in this regard since the effort to create 'freer markets' has resulted in 'more rules' and strengthened the authority of the European Union in exercising market governance.'[7]

C. Notification

The Commission treats transparency as central to its quest to achieve effective market management. This is plain in the above-mentioned structures that it is actively intent on encouraging, but there are also more formal relevant legal obligations. Directive 98/34, which superseded Directive 83/189, provides for Member States to give advance notice of plans to introduce new product specifications and to refrain from applying such rules for a defined period pending Commission inspection.[8] This is designed to forestall the introduction of trade restrictions rather than having to tackle them *ex post facto*. Previous contributions have traced how the Court's case law has significantly strengthened the incentives of Member States to comply with this system. In *CIA Security International SA v Signalson SA and Securitel Sprl* it was held that breach of the procedural obligation to notify robs the measure of enforceability in proceedings before national courts involving third parties.[9] The Commission was delighted. In 1986, it had argued for the outcome subsequently reached in *CIA Security*[10] and in turn

[4] See <http://europa.eu.int/comm/internal_market/solvit/index_en.htm>.

[5] Commission Communication, *Better Monitoring of the Application of Community Law* COM (2002) 725, 11 Dec 2002.

[6] COM (2001) 428 p 25.

[7] M Egan, *Constructing a European Market* (2001), 260.

[8] (1998) OJ L204/37, itself amended by Directive 98/48 (1998) OJ L217/18.

[9] Case C-194/94 [1996] ECR I-2201; see (1997) 46 *ICLQ* 704.

[10] Communication 86/C 245/05 (OJ 1986 C 245/4); the Court cited this Communication in para 36 of *CIA Security*.

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it now routinely cites this judgment with pride when it publishes notified technical rules in the Official Journal.[11] In *Johannes Martinus Lemmens* the Court delicately adjusted its reasoning, stating that failure to notify renders regulations inapplicable only inasmuch as they hinder the use or marketing of non-conforming products.[12] So a conviction for driving while drunk could not be challenged on the (wonderfully ingenious) basis that the equipment for recording the level of intoxication was designed according to standards that had not been notified under the Directive. In *Unilever Italia SpA v Central Food SpA* Central Food rejected olive oil supplied to it by Unilever under a contract on the basis that the goods were not labelled in accordance with a relevant Italian law.[13] But that law had been enacted in violation of the Directive's 'standstill' obligation. Were the Italian rules applied they would have the effect of hindering trade in a product not complying with the rules and the Court insisted that the national court accordingly treat them as unenforceable. So Central Food had to accept the goods.

In this way the State's breach of the obligations imposed by Directive 98/34 had a decisive impact on the outcome of a dispute between two private parties. In *Unilever* the Court appears to assume that this ground had already been broken in *CIA Security*, but the legal right asserted in that case was created by legislation against unfair trade practices. *Unilever* by contrast involved purely contractual obligations. Advocate General Jacobs had urged the Court in *Unilever* to take heed of the damage that would be done to commercial certainty were it to approve the invocation of the Directive in contractual disputes. How would contracting parties know if relevant technical standards had been introduced in accordance with the demands of Directive 98/34? More pertinently still, how would they even know they needed to know? The Court's ruling in *Unilever* ignored the issue, but the matter has re-surfaced in *Sapod Audic v Eco-Emballages SA*.[14] The Court explored the extent to which Community law may affect the conclusions that should be drawn by a national court in such circumstances. National law governs the rules of contract law which limit or adjust the sanction of unenforceability in order to render its severity proportionate to the particular defect found. The Court added that those national rules may not be less favourable than those governing similar domestic actions (the principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (the principle of effectiveness). The Court here draws on general jurisprudence. Neither cited principle is problem-free and both leave scope for argument about their precise impact. This is true generally, and a brief consideration in the context of the Court's gnomic statement in *Sapod Audic* illuminates the tricky terrain in which EC law crosses over with domestic law of remedies. First, what are 'similar domestic actions' for the purposes of comparison? Nothing is obviously 'similar' to the peculiar notion that contractual enforceability may be affected by State mishandling of the obligation to notify draft technical rules pursuant to Directive 98/34, so presumably this is an invitation to draw comparisons with contract law remedies more broadly. But what should really follow is very opaque. Much the same can be said of the imprecation to avoid making the vindication of Community law rights impossible in practice.

[11] Eg (2001) OJ C152/4.
[12] Case C-226/97 [1998] ECR I-3711; see (1999) 48 *ICLQ* 217.
[13] Case C-443/98 [2000] ECR I-7535; see (2001) 50 *ICLQ* 158.
[14] Case C-159/00 [2002] ECR 5031.

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Sapod Audic appears to offer an invitation to national courts to use national law to evade the more extreme implications for contractual stability suggested by the draconian penalty of unenforceability of technical standards imposed by *Unilever*. But exactly what this involves is left unclear and will doubtless be handled differently in different jurisdictions. *Unilever* caused the legal position of private parties to be vulnerable to the lurking presence of an unimplemented Directive of which they may be perfectly unaware. *Sapod Audic* offers a route for mitigating the prejudice, but the blameless ignorance of contracting parties persists and one wonders whether the Court would be better advised simply to abandon *Unilever* and to accept that State default under Directive 98/34 has no bearing on private contracts.

D. Articles 28–30 EC

There has been less novelty in the Court's case law dealing with Article 28 EC in the period under examination when compared with tales of previous years. A basic pattern has been established according to which the Court first considers whether a challenged measure constitutes a trade barrier requiring justification by the regulating authority before proceeding, should that threshold be crossed, to examine the submitted justifications. The rich case law at both stages of the inquiry has been feasted on in previous contributions and nothing has lately caused any radical adjustment in the basic framework of the law.[15] *Keck and Mithouard*—the most remarkable case of the last 10 years dealing with the first question, that pertaining to the identification of a trade barrier—remains the starting point when faced with the need to determine whether a particular rule is trapped by the Article 28 net.[16] And, with regard to the second question, that of justification, the Court remains wedded to invocation of Article 30 EC and to the rather broader category of justifications first introduced in developed form as the 'mandatory requirements' in its landmark *Cassis de Dijon* ruling.[17] Perhaps the most striking feature of recent case law has been the Court's reluctance to accept the invitation of (in particular) Advocate General Jacobs to clarify precisely when justification pursuant to Article 30 is the only route available to a regulating authority forced to defend its rules and when instead resort to the more generous category of 'mandatory requirements' is permitted. The orthodox answer has long been plain. If a national rule discriminates between products on the basis of their origin, Article 30 alone provides a possible source of justification. By contrast a rule purged of discrimination, which nevertheless causes a trade barrier as a result of disparity between national rules, may be justified with reference to the 'mandatory requirements', a class of matters serving the public interest which is not closed and which embraces *inter alia* defence of the economic interests of consumers, protection of the environment and maintenance of plurality in the media, none of which is included in Article 30 of the Treaty. Therefore the nature of the trade barrier—the first issue in the basic legal framework mentioned above—affects the scope of available justification—the second question, above.

This approach heaps great weight on the need to identify discrimination. This in

[15] For major recent explorations see Oliver, *Free Movement of Goods in the European Community* (2003); Barnard and Scott (eds), *The Law of the Single European Market* (2002); Snell, *Goods and Services in EC Law* (2002).

[16] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[17] Case 120/78 [1979] ECR 649.

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turn asks awkward questions about what is really meant by discrimination—a matter of profound interest in many areas of the law. In EC trade law the potential instability of a discrimination-based inquiry was clearly revealed in the *Walloon Waste* case, *Commission v Belgium*.[18] Wallonia prohibited the storage, tipping or dumping of waste from other Member States or from elsewhere in Belgium. The measure was aimed at protecting Wallonia from becoming the target for waste from areas with tighter regulatory regimes. It restricted the importation of waste, but the Court found it justified as a contribution to environmental protection. It drew on the Treaty principle, now found in Article 174(2) EC, that 'environmental damage should as a priority be rectified at source'. The oddity in the ruling is that the regime appeared to be discriminatory and the orthodox view holds that discriminatory measures are not justifiable with reference to the mandatory requirements, which include environmental protection. In fact, the Court expressly confirmed this principle in *Walloon Waste* but found the measures to be indistinctly applicable and therefore capable of justification as measures of environmental protection.

The core problem is that choice of discrimination as a test presupposes a need to decide what constitute legitimate subjects for comparison.[19] In *Walloon Waste* waste originating from one source was unambiguously treated differently from waste from another. How should one define the subject matter of the regulation under challenge? Waste? Or is the place of production of waste a factor bearing on its very nature, which may be taken to mean that transported waste is simply not the same thing as local waste? The problem is particularly acute in cases involving environmental protection measures which conflict with product mobility, but it is not in principle unique to that issue. Consider, for example, whether products which are capable of being put to the same use but which, because of inclusion of chemically different components, present different levels of danger to health should be considered to be like products.

One means to resolve this problem would be to abandon the separation of trade barriers into discriminatory and non-discriminatory types and to accept that all trade barriers, whatever their character, would be susceptible to justification according to the same criteria. Discrimination would simply become an element in the broader factual assessment of the validity of a measure. This is the approach lately proposed with some vigour by Advocate General Jacobs in *Preussen Elektra*.[20] German legislation required private electricity supply undertakings to buy electricity produced in their area of supply from renewable energy sources, at minimum prices set above the economic value of electricity produced in this way. This would seem to confer an advantage on local undertakings producing electricity from renewable energy sources, and thereby to damage the commercial opportunities of *inter alia* traders from further afield. Yet the scheme contributed to protection of the environment by promoting use of renewable energy sources. On an orthodox understanding of the Treaty's free movement rules, the discrimination based on origin on which the German rules was founded precluded resort to environmental protection as a source of justification. Mr Jacobs referred to *Walloon Waste* but criticised that case's reasoning on the question of whether a national measure applies without distinction to domestic and imported products as 'flawed'. But he did not criticise the result in *Walloon Waste*. In his view allowing the

[18] Case C-2/90 [1992] ECR I-4431.
[19] See eg the contributions of De Burca and of Scott to Barnard and Scott (eds), above n 15.
[20] Case C-379/98 *Preussen Elektra AG v Schleswag AG* [2001] ECR I-2099.

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possibility of justification of (what he regarded as) discriminatory measures on the basis of their contribution to environmental protection was desirable. Mr Jacobs cited the work of Jan Jans and Peter Oliver for the proposition that 'it cannot be ruled out that the relevance of the distinction between Article 30 [formerly Article 36] interests and rule of reason exceptions is on the decline',[21] a point which constitutes an interpretation of what the Court has *done* in environmental cases such as *Walloon Waste*.[22] But it is not what the Court has *said*. Quite the contrary! The Court remains resolute in refusing formally to abandon the rule that mandatory requirements cannot be invoked to justify discriminatory measures. And in *Preussen Elektra* it resisted the blandishments of Advocate General Jacobs. The Court simply accepted that the use of renewable energy contributes to the reduction in emissions of greenhouse gases, an objective to which the Community and its Member States are committed under EU and international instruments, including the Kyoto Protocol. It referred to the 'integration' provision in Article 6 EC. And, taking a surprisingly breezy approach to inspection of the relevance to the specific facts at hand of general legal texts, it found no violation of Article 28.[23]

The Court failed to address the issues of principle which were the subject of its Advocate General's attention. In a subsequent case dealing with the free movement of services, *Danner*, Mr Jacobs was again ignored in his detailed call for legal certainty promoted by a universally applicable test of justification.[24] The principal objection to the approach advocated by Mr Jacobs is the risk that it would lead to undue loosening of the discipline to which national measures affecting inter-State trade are subjected by Articles 28–30 EC. But a growth in inventive excuses for protectionism even in overtly discriminatory guise would not go unchecked by the judiciary and the Court's lack of decisiveness in addressing, let alone accepting, the line proposed by Mr Jacobs is hard for its admirers to defend.

E. Harmonisation, Competence and Subsidiarity

It is internal market orthodoxy that in so far as national rules restrict inter-State trade but survive the test of justification, the quest to eliminate market fragmentation becomes a matter for the legislature not the judiciary. Diverse national laws may be subject to harmonisation. Significant recent case law has dealt with the permissible scope of harmonisation.

The most recent contribution to this section was written shortly after the Court's October 2000 decision in *Germany v Parliament and Council*[25] in which it annulled the 'Tobacco Advertising' Directive.[26] It may be recalled that the Directive had been adopted as a measure designed to advance the building of an internal market. It imposed harmonised rules governing tobacco advertising, although in content it aimed at largely suppressing such advertising. The Court insisted that the Treaty provisions

[21] In *European Environmental Law* (2000), 'Some further reflections on the scope of Arts 28–30 (30–6) EC' (1998) 38 CMLRev 783 respectively.

[22] Cf eg Case C-389/96 *Aher-Waggon v Germany* [1998] ECR I-4473.

[23] Nor did it consider that the scheme fell foul of the Treaty State aid rules, though the case is controversial on this point too: see annotation by Bronckers and Van der Vlies [2001] ECLR 458.

[24] Case C-136/00 *Danner* [2002] ECR I-8147.

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

[26] Directive 98/43 (1998) OJ L213/9.

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governing harmonisation do not create a general regulatory power, but rather permit the adoption of measures designed to improve the conditions for the establishment and functioning of the internal market. The Directive did not pass this test. The prohibition of advertising of tobacco products not only in magazines but also on posters, ashtrays and parasols would not facilitate cross-border trade in tobacco products. This was not market-making harmonisation but rather the advancement of harmonised rules governing public health policy, a matter which (what is now) Article 152(4) of the Treaty makes plain lies beyond the Community's competence.

There are, in short, two constitutionally fundamental questions. They arise out of Articles 5(1) and 5(2) EC. The first is: what is the scope of the competence to harmonise laws attributed to the Community by its Treaty? The second: what impact does the principle of subsidiarity exert on the exercise of the competence to harmonise laws?

1. Competence

On the first question, it is plain that harmonisation is not an EC competence *per se*. So the question is how to fix the limits of harmonisation pursuant to Articles 94 and 95, read in the light of Article 5(1). In this vein the *Tobacco Advertising* judgment has been usefully supplemented by *R v Secretary of State for Health ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*.[27] This is another 'tobacco case'—but whereas Directive 98/43, annulled by the Court in *Tobacco Advertising*, concerned advertising, the *British American Tobacco* case, decided by the Court in December 2002, concerns Directive 2001/37. That measure applies common rules governing tar yields and warnings on tobacco product packaging. It was based on Article 95 EC (and, in view of its impact on external trade, Article 133 EC). The Court, citing *Tobacco Advertising*, stated that measures of harmonisation must be 'intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition'.[28] It relied on both Articles 152(1) and 95(3) EC in support of the proposition that, in achieving harmonisation, a high level of protection of human health should be guaranteed—*provided* the conditions for recourse to Article 95 EC as a legal basis are otherwise fulfilled. Directive 2001/37 was put to this test. It survived. Differences between national provisions which created obstacles to trade within the meaning of Article 28 (and here the Court cited *Keck and Mithouard*) had already emerged, or were likely to emerge. The required 'market-making' contribution was therefore established. The Directive was valid.[29]

So the harmonisation programme is not dead. Indeed in *British American Tobacco* the Court went out of its way to leave considerable scope for legislative discretion in fixing the intensity of rules to which producers are subject. The legislature may take account of any new development based on scientific facts, but it must 'also take into account other considerations, such as the increased importance given to the social and

[27] Case C-491/01 judgment of 10 Dec 2002.
[28] Para 60.
[29] The Court concluded that Art 133 EC should not have been used as a second legal base but it treated this as a purely formal defect giving rise to no irregularity in the adoption procedure.

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political aspects of the anti-smoking campaign.' The Court also adopted a light touch when invited to scrutinise the measure for compliance with the principle of proportionality. What is, however, unavoidably required of the legislature is that it demonstrate an adequate contribution to improving the conditions for the establishment and functioning of the internal market.

One intriguing question is whether past practice truly conforms to these newly revealed limits on legislative harmonisation. Take the example of harmonisation of national measures designed to protect the economic interests of consumers. According to the Preamble of Directive 85/577 the practice of concluding contracts 'on the doorstep' is 'the subject of legislation which differs from one Member State to another'.[30] This is true. The Preamble continues to assert that 'Any disparity between such legislation may directly affect the functioning of the common market . . . it is therefore necessary to approximate laws in this field.' This is far from obviously true. And no evidence is presented. The reality is that the Council was unanimously in favour of developing a consumer protection programme for the Community at the time and, in the absence of a consumer protection Title in the Treaty, a deficiency made good only in 1993 on the entry into force of the Maastricht Treaty, the harmonisation legal base was 'borrowed'. It is plausible that past practice may come under fresh constitutional scrutiny, as litigants employ the vocabulary unveiled by the Court in *Tobacco Advertising*. In the meantime it is easy to track the perfectly proper anxiety of the Commission to advance proposals that are constitutionally durable in a post-*Tobacco Advertising* world. In its July 2001 Communication on European Contract Law the Commission calls explicitly for information on whether diversity between national contract laws 'directly or indirectly obstructs the functioning of the internal market, and if so to what extent', with a view to considering future targeted action.[31] The follow-up February 2003 Action Plan on a more coherent European Contract Law insists on having unearthed 'implications for the internal market' arising from legal diversity.[32] The Commission does not labour the point of competence in these documents but the shadow of *Tobacco Advertising* is unmistakable.

2. Subsidiarity

If there is competence to harmonise, how does the principle of subsidiarity control the exercise of that competence? This matter was left wholly untouched by the Court in *Tobacco Advertising*. Logically so. Adoption of the Directive was outwith Community competence, so subsidiarity scrutiny was superfluous. After all, Article 5(1) precedes Article 5(2) in the Treaty. The Court addressed the role of subsidiarity in its December 2002 ruling in *British American Tobacco*.[33] Article 5(2) applies the principle of subsidiarity only to areas that are *not* within the exclusive competence of the Community. But the Treaty fails to identify such areas. The Court, choosing not to follow the view expressed two years earlier by Advocate General Fennelly in *Tobacco Advertising*, concluded that harmonisation pursuant to Article 95 does not entail an 'exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning'. So the Directive was in principle capable of review for compliance

[30] OJ 1985 L372/31.
[31] COM (2001) 398, paras 23–33, 72.
[32] COM (2003) 68.
[33] Above n 27.

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with the principle of subsidiarity. But the Court then adopted an approach which makes it hard to imagine circumstances in which a harmonisation measure will be tripped up by the demands of subsidiarity. The Directive's objective is to eliminate the barriers raised by the differences between State laws. This objective cannot be sufficiently achieved by the Member States individually—indeed it is the variety of approaches taken that causes the problem! The matter therefore calls for action at Community level.

The Court has neatly sustained subsidiarity as a legal principle on paper while conceding much in practice to legislative discretion. In fact, the real work in braking expansion of EC activity that was expected to be done by the subsidiarity principle in Article 5(2) may now, as in *Tobacco Advertising*, be seen more properly to be done by the principle of attributed competence in Article 5(1). So whereas the above-mentioned Communication on European Contract Law asserts that subsidiarity 'serves as a guide as to how the Community powers are to be exercised at Community level'[34] and examines the question of a future EC contribution to contract law from the perspective of Article 5(2) EC, in fact it is Article 5(1), and the question of the very existence of relevant powers, that is the real issue.

STEPHEN WEATHERILL*

III. AGRICULTURE

A. Introduction

Since the last review in 2000, there have been dynamic developments in European Community agricultural law. This might appear surprising in that the Berlin Special European Council of March 1999 ('Berlin Summit') had seen agreement on major reforms to the common organisations of the market, including consolidation of existing legislation, and the drawing up of financial perspectives for the period 2000–2006. Accordingly, a degree of stability might have been expected. However, not long after agreement was reached at the Berlin Summit, Commissioner Fischler could emphasise that: 'Reforming farm policy is an ongoing process.'[1]

Two aspects of this ongoing process may be considered. First, there have been numerous developments outside the common organisations of the market, pursued with a view to implementing in concrete form a 'multifunctional' model of agriculture. Such matters as food safety, food quality, the protection of the environment, and animal welfare have become increasingly integral to agricultural policy; and, with the co-decision procedure being largely that applicable to such matters, the role of the European Parliament has been materially enhanced. Secondly, the agreement reached at the Berlin Summit itself contained the seeds of the next round of reform. For example, the decision was yet to be taken as to the final reduction in intervention price for cereals as from the 2002/3 marketing year;[2] and a mid-term review of the milk quota system was

[34] Above n 31, para 43.

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[1] Speech/01/10, *The CAP after Agenda 2000: The Achievements and Challenges*, Berlin, 18 Jan 2001.

[2] Council Regulation 1766/92, OJ 1992 L 181/21, Art 3(4), as amended by Council Regulation 1253/1999, OJ 1999 L 160/18.

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