

# INTERPRETING EU INTERNAL MARKET POWERS IN LIGHT OF ARTICLE 9 TFEU SOCIAL OBJECTIVES: IMPLICATIONS FOR THE ATTRIBUTION OF COMPETENCES

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*Abstract: The inclusion of the so-called 'horizontal social clause', namely Article 9 TFEU, in EU primary law imposes on the EU legislator an obligation to balance the objectives of a specific policy area with the social interests contained therein. For instance, when adopting internal market measures pursuant to Article 114 TFEU, the EU legislator would need to reconcile free trade aims and social interests. At the same time, this process also has consequences on the scope of EU competences. Hence, this article analyses which implications related to the scope of EU competences stem from the obligation to read Article 114 TFEU in light of Article 9 TFEU. In addition, it accounts for the consequences that this process entails for the division of powers between the EU and the Member States. The main argument proposed is that the obligation to read internal market powers in light of Article 9 TFEU not only influences the use of EU competences to pursue certain social objectives, but also leads to an expansion of EU harmonising powers in domains that remain of national competence. Thus, the division between EU and Member State competences becomes increasingly blurred. The Court of Justice of the EU has favoured this tendency by recognising on many occasions the possibility for the EU to rely on Article 114 TFEU, while developing a restrictive interpretation of the limitations of EU competences in social fields enshrined in the Treaties.*

*Keywords: EU competences, internal market, Article 9 TFEU, horizontal clauses, Article 114 TFEU, social market economy.*

## 1 Introduction

The Treaty of Lisbon had many ambitious goals, including to better clarify the division of powers between the European Union (EU) and the Member States (MSs) and to give increasing attention to social aspects of the integration process. The Constitutional Treaty had already

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attempted to address the issue of competences.<sup>1</sup> Indeed, the Laeken Declaration mentioned the need ‘to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union’.<sup>2</sup> To tackle these challenges, the Treaty of Lisbon classified EU competences into three categories, namely exclusive, shared, and coordinating and complementary competences. Moreover, it included various provisions limiting EU powers in a series of fields that remain under the control of the MSs.<sup>3</sup> At the same time, Article 3(3) TEU emphasises the EU social dimension by stating that the EU should develop a ‘social market economy’, as well as by recognising the binding value of the EU Charter of Fundamental Rights, which includes rights that can be considered social rights.<sup>4</sup> Finally, the TFEU now includes some horizontal provisions requiring the EU to consider certain social values in all its actions and policies. The most relevant provision in this regard is Article 9 TFEU, also known as the horizontal social clause, which requires the EU to consider high levels of employment, social protection, social inclusion, education and training, and health protection in all its actions and policies.<sup>5</sup> At the same time, the Treaty of Lisbon has not attributed further competences in social policy to the EU.<sup>6</sup>

On the one hand, the issue of EU competences and the division of powers between the EU and the MSs are recurring topics in academic literature.<sup>7</sup> On the other hand, different scholars have analysed the role of Article 9 TFEU, trying to assess its capacity to reinforce the social

<sup>1</sup> Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 155–158.

<sup>2</sup> Annex I to the Presidency conclusions. European Council meeting in Laeken [2001] SN 300/1/01 REV 1, 19.

<sup>3</sup> Loic Azoulay, ‘The “Retained Powers” Formula in the Case Law of the European Court of Justice: EU Law as Total Law?’ (2011) 4 *European Journal of Legal Studies* 192, 196.

<sup>4</sup> See, for instance, Bruno de Witte, ‘The Trajectory of Fundamental Social Rights in the European Union’ in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005).

<sup>5</sup> Some of these objectives are also mentioned in other provisions of the Treaties referring to specific social policies.

<sup>6</sup> Maria Eugenia Bartoloni, ‘The Horizontal Social Clause in a Legal Dimension’ in Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2014) 83.

<sup>7</sup> Takis Tridimas, ‘Competence after Lisbon. The Elusive Search for Bright Lines’ in Diamong Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012); Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2013) 21 *European Law Journal* 2; Loic Azoulay (ed), *The Question of Competence in the European Union* (OUP 2014); Robert Schütze, ‘EU Competences: Existence and Exercise’ in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015); Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (OUP 2017); Roberto Cisotta, ‘Rigidità e flessibilità del sistema delle competenze dell’UE alla luce della prassi recente’ (2022) 3 *Diritto pubblico* 703.

dimension of EU integration.<sup>8</sup> Legal scholarship has mainly dealt with the division of competences between the EU and the MSs and the role of horizontal clauses separately.<sup>9</sup> However, taking into account social values mentioned in Article 9 TFEU might actually affect the scope of EU action and the division of competences. Hence, the implications that horizontal clauses such as Article 9 TFEU could have on EU competences deserve further attention. Some recent developments are especially enlightening in this regard.

Therefore, this contribution explores the obligation to consider Article 9 TFEU when adopting internal market legislation and the implications for the scope of EU competences stemming from this duty. Such an analysis takes into account the consequences that this re-orientation of the internal market legal basis has on the division of powers between the EU and the MSs. The expansion of EU powers deriving from the broad interpretation of Article 114 TFEU is well known. However, this article explores the specific effects and dynamics that might take place when reading EU internal market competences in light of horizontal social objectives.

Two elements restrict the scope of this research. First, Article 9 TFEU represents an example of a horizontal clause capable of influencing the direction taken by EU action. Indeed, this provision pushes the EU to use its competences in ways that are conducive to the attainment of social objectives. Second, this analysis focuses exclusively on the competences attributed to the EU for the development of the internal market and especially Article 114 TFEU. Other legal bases enabling the EU to intervene to develop specific economic freedoms will also be considered when relevant to inform the discussion. The choice to focus primarily on Article 114 TFEU stems from the fact that the exercise of EU internal market powers can notoriously interact with other policy areas, giving

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<sup>8</sup> Bartoloni (n 6); Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (OUP 2012); Catherine Barnard and Geert de Baere, 'Towards a European Social Union. Achievements and Possibilities under the Current EU Constitutional Framework' (2014) Euroforum Policy Paper; Václav Šmejkal, 'The Horizontal Social Clause of Art 9 TFEU and Its Potential to Push the EU towards Social Europe' (2016) Prague Law Working Papers Series 2016/III/1 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2896894](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896894)> accessed 6 June 2024; Ane Aranguiz, 'Social Mainstreaming through the European Pillar of Social Rights: Shielding "the Social" from "the Economic" in EU Policy Making' (2018) 20 European Journal of Social Security 341; Karl-Peter Sommermann, 'Article 9 [Social Aims]' in Herman-Joseph Blanke and Stefano Mangiameli (eds), *Treaty on the Functioning of the European Union: A Commentary* (Springer 2021); Evangelia Psychogiopoulou, 'The Horizontal Clauses of Arts 8–13 TFEU Through the Lens of the Court of Justice' (2022) 7 European Papers 1357; Sybe de Vries and Rik de Jager, 'Between Hope and Fear: The Creation of a More Inclusive EU Single Market Through Art 9 TFEU' (2022) 7 European Papers 1405.

<sup>9</sup> One exception to this approach can be found in Eleftheria Neframi (ed), *Objectifs et compétences dans l'Union Européenne* (Bruylant 2013).

rise to so-called competence creep.<sup>10</sup> At the same time, the considerations elaborated in this article might inform the discussion about the use of other legal bases in ways that allow various objectives of the EU to be taken into account.<sup>11</sup> In other words, the exercise of the powers deriving from Article 114 TFEU constitutes a case study that is useful to determine more generally how considering Article 9 TFEU in all EU actions and policies can influence the relation between EU and MSs' powers. However, not all the considerations elaborated in this paper would be applicable if other horizontal clauses were to inform the exercise of EU competences.<sup>12</sup> Indeed, the analysis especially accounts for the specificities of social policy in the EU legal order. These areas are politically highly charged and are especially sensitive for the MSs since they are closely connected to the welfare functions traditionally performed at the national level. EU primary law also envisages explicit safeguards in favour of the MSs in these domains that are not present in other policy fields. Finally, since the paper attempts to understand how interpreting Article 114 TFEU in light of Article 9 TFEU shapes the attribution – and not the exercise – of competences, the principles of subsidiarity and proportionality governing the exercise of EU powers are not considered.

The main argument of this article is that reading Article 114 TFEU in light of Article 9 TFEU influences the use of EU internal market competences to pursue certain social objectives, thus questioning the correspondence between EU powers and objectives. In addition, it leads to an expansion of EU harmonising powers in domains that remain a formal national competence. While it has already been acknowledged that recourse to EU internal market powers contributes to blurring the division between EU and MSs' competences, this article demonstrates that Article 9 TFEU and the recent case law of the Court bring about two novelties in this regard. First, considering social interests when adopting internal market legislation becomes an obligation and not just a mere possibility for the EU. This would give the EU more occasion to integrate social objectives into its internal market legislation. Second, when Article 9 TFEU is taken into consideration, EU action might 'creep' towards areas of

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<sup>10</sup> Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1; Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3 Review of European Administrative Law 5; Sacha Garben, 'Competence Creep Revised' (2019) 57 Journal of Common Market Studies 205.

<sup>11</sup> Among others, Article 9 TFEU or other horizontal objectives could influence the use of the competences attributed to the EU for the definition of its budget. For instance, the use of legal bases aimed at defining the EU budget in light of the objective of protecting the rule of law has been examined in Marco Fisicaro, 'Protection of the Rule of Law and 'Competence Creep' via the Budget: The Court of Justice on the Legality of the Conditionality Regulation' (2022) 18 European Constitutional Law Review 334.

<sup>12</sup> These clauses are those contained in Articles 8–13 TFEU.

social policy where the Treaties expressly envisage various limitations to EU intervention. Thus, a potential clash between the need to respect the principle of conferral and the obligation stemming from Article 9 TFEU could arise. A particular understanding of the principle of conferral elaborated by the Court of Justice of the EU (CJEU), which is more concerned with authorising the use of internal market powers than respecting the limitations of EU competences in social fields enshrined in the Treaties, makes this phenomenon possible. Finally, due to the political salience of decisions taken in social fields, such a new reading of Article 114 TFEU might also raise issues connected to the legitimacy of the EU.

This article is structured as follows. The second section introduces Article 9 TFEU, especially its significance and the roles it can play in the case law of the CJEU. The third section analyses how an understanding of Article 114 TFEU, and more generally of EU internal market powers, has evolved both before and after the introduction of Article 9 TFEU. The fourth section identifies different dynamics that can lead to an extension of the scope of EU competences when Article 114 TFEU is read in light of Article 9 TFEU. The final section of the paper recalls the main findings and deals with the legitimacy problem that could arise from this expansion.

## **2 An introduction to Article 9 TFEU**

### **2.1 The significance of Article 9 TFEU in the EU legal order**

Article 9 TFEU reads as follows:

[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Before moving to an analysis of the central issues of the paper, it seems appropriate to offer a brief overview of such a provision. Its aim is to contextualise this clause, both in light of the adoption of the Lisbon Treaty and of more recent developments, as well as to understand the functions mainly played by Article 9 TFEU in the case law of the CJEU.

Article 9 TFEU is a clause applicable in a horizontal manner, meaning that it should not be considered only in a specific field of EU action.<sup>13</sup> Hence, the provision imposes an obligation on the part of the EU to consider the social objectives listed therein in all its actions and policies.<sup>14</sup> In

<sup>13</sup> The 'cross-cutting' nature of Article 9 TFEU was underlined in Case C-515/08 *Santos Palhota and Others* ECLI:EU:C:2010:245, Opinion of AG Cruz Villalon, para 51.

<sup>14</sup> Psychogiopoulou (n 8) 1365.

other words, Article 9 TFEU promotes the mainstreaming of social values in EU law.<sup>15</sup>

This provision also establishes connections with Article 3(3) TEU requiring the EU to develop a 'social market economy',<sup>16</sup> since it aims to balance the traditional economic objectives of the EU integration process with other social goals.<sup>17</sup> It has been argued that defining a list of social objectives in EU primary law gives them the same status as economic fundamental freedoms.<sup>18</sup> However, the practical application of Article 9 TFEU through the promotion of social values in EU law encounters two main obstacles: first, its vague wording does not allow us to clearly identify which obligations stem from it;<sup>19</sup> and second, EU competences in social fields remain limited.<sup>20</sup>

The European Social Pillar proclaimed in 2017<sup>21</sup> renewed the attention given to social objectives in the process of EU integration. The Pillar has a close relationship with Article 9 TFEU. On the one hand, the Pillar clarifies the content of Article 9 TFEU by identifying a series of social principles that should guide EU and MSs' actions. On the other hand, the horizontal social clause constitutes the legal foundation of the obligation to include the social principles mentioned in the Pillar in all EU actions.<sup>22</sup>

In practice, impact assessments are the instruments used to consider the objectives listed in Article 9 TFEU when the EU adopts binding legislation. Indeed, they allow for an evaluation of the positive and negative consequences of EU interventions, risks, opportunities and possible alternatives.<sup>23</sup> In particular, the social impact assessment tool is a relevant instrument to ensure that the objectives listed in the horizontal social clause are taken into account in EU actions.<sup>24</sup>

<sup>15</sup> This expression is used in Aranguiz (n 8).

<sup>16</sup> See Alfred Müller-Armack, 'The Social Market Economy as an Economic and Social Order' (1978) 36 *Review of Social Economy* 325. For a discussion, see, for instance, Catherine Barnard and Sybe de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) 15 *Utrecht Law Review* 47.

<sup>17</sup> Sommermann (n 8) 279.

<sup>18</sup> Valerie Michel, 'Les objectifs à caractère transversal' in Neframi (n 9) 202–204.

<sup>19</sup> De Vries and de Jager (n 8) 1422–1424.

<sup>20</sup> Loïc Azoulay, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for Its Realization' (2008) 45 *Common Market Law Review* 1335, 1337.

<sup>21</sup> Interinstitutional Proclamation on the European Pillar of Social Rights [2017] OJ C428/10.

<sup>22</sup> Aranguiz (n 8) 352–353.

<sup>23</sup> *ibid* 347.

<sup>24</sup> However, it can be difficult to quantify the effects of social policies. See Mark Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics' (2016) 53 *Common Market Law Review* 1209, 1224–1236.



Finally, it should not be overlooked that, when taking into account Article 9 TFEU, the EU is still subject to the constitutional constraints imposed by the Treaties, including the principle of conferral. Indeed, the objectives contained in the horizontal social clause should not be considered ‘an independent source’ of powers for the EU, but as interests that inform the exercise of the competences attributed to it.<sup>25</sup> Hence, Article 9 TFEU objectives can be ‘pursued only to the extent and in the forms and procedures provided for in the specific Treaty rules related to the competences of the EU and its institutions’.<sup>26</sup> In this respect, the relation between the principle of attributed powers enshrined in Article 5 TEU and horizontal objectives is regulated by Article 7 TFEU. This provision requires the EU to ‘ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’. This confirms that pursuing the objectives listed in Article 9 TFEU should take place within the powers attributed to the EU. Conversely, these objectives do not justify the conferral of new competences to the EU.

## **2.2 The interpretative value of Article 9 TFEU in the case law of the CJEU**

Article 9 TFEU can perform different functions in the EU legal order. If one looks at the CJEU case law, this provision plays a twofold role. First, it serves to justify restrictions to economic freedoms and fundamental rights and, second, it guides certain interpretations of EU law provisions. These two functions are examined in turn to demonstrate the capacity of the horizontal social clause to restrict other interests protected in the EU legal order.

Both the MSs and the EU itself might adopt restrictions to economic freedoms and fundamental rights. According to the CJEU, the interests listed in Article 9 TFEU have ‘precedence over economic considerations, the importance of [these objectives] being such as to justify even substantial negative economic consequences’.<sup>27</sup> In particular, Advocate General Cruz Villalon maintained that the introduction of Article 9 TFEU required a modification of the traditional understanding that restrictions to EU law should be interpreted narrowly.<sup>28</sup> He held in particular that a

<sup>25</sup> Joris Larik, ‘From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’ (2014) 63 *International & Comparative Law Quarterly* 935, 953–954.

<sup>26</sup> Sommermann (n 8) 277.

<sup>27</sup> Case C-452/20 *PJ v Agenzia delle dogane e dei monopoli e Ministero dell'Economia e delle Finanze* ECLI:EU:C:2022:111, para 50.

<sup>28</sup> *Santos Palhota* (n 13) para 53.

broad interpretation of the social interests justifying restrictions to economic freedoms should be a crucial factor in assessing the proportionality of the measure at stake.<sup>29</sup> While discussing this assertion is out of the scope of this contribution, it suffices here to mention that the Court has not followed this suggestion in its subsequent case law. Nonetheless, it has accepted that the objectives mentioned in Article 9 TFEU can justify restrictions to economic freedoms, also noting that national authorities have broad discretion in deciding the most appropriate means to pursue a certain social objective.<sup>30</sup>

In addition, the Court has referred to Article 9 TFEU to justify measures adopted at the EU level that restrict fundamental rights, such as the right to private and family life, the right to property and the freedom to conduct business.<sup>31</sup>

The second function performed by Article 9 TFEU is to require an interpretation of EU law that ensures the protection of the social objectives mentioned therein. For instance, health protection was the objective of the directive examined in *Léger*, concerning quality and safety standards or the collection, testing, processing, storage and distribution of human blood and blood components. This requires interpreting the provisions of the said directive to give effect to health protection interests.<sup>32</sup> In another case, it has been deemed an element to be considered when assessing the proportionality of the Italian sanctioning regime applicable to punish the selling of tobacco products to minors.<sup>33</sup> Other objectives listed in Article 9 TFEU, such as the safeguarding of levels of employment and the social protection of workers, supported the reasoning of the Court in other instances. These interests were considered as prohibiting discriminatory treatment enacted by a State that envisaged a less protective regime for certain categories of workers.<sup>34</sup> In other circumstances, the protection

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<sup>29</sup> *ibid.*, paras 53 and 55. In contrast, it has been argued that such an approach would be in contrast with the general rule that requires interpreting limitations to fundamental freedoms in a restrictive way. This rule should not be questioned by the relevance of the interests protected in Article 9 TFEU. See also Michel (n 18) 205.

<sup>30</sup> Case C-201/15 *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972, paras 71 and 78. However, the Court has found that the measure could not be considered compatible with EU law since it was not proportionate to the objective pursued.

<sup>31</sup> Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* ECLI:EU:C:2012:526; Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* ECLI:EU:C:2015:823; Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* ECLI:EU:C:2016:325; Case C-477/14 *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health* ECLI:EU:C:2016:324.

<sup>32</sup> Case C-528/13 *Léger* ECLI:EU:C:2015:288, para 57.

<sup>33</sup> *PJ* (n 27) paras 49–51.

<sup>34</sup> Case C-389/20 *CJ v Tesoreria General de la Seguridad Social* ECLI:EU:C:2022:120, para 55.



of a high level of employment was considered to justify discriminatory treatment based on age.<sup>35</sup>

In conclusion, Article 9 TFEU supports interpretations of EU law that accord relevance to social objectives *vis-à-vis* economic freedoms and other interests. In practical terms, the horizontal social clause protects measures restricting economic freedoms and fundamental rights adopted at the EU and national level. While this interpretative function is of utmost relevance in the following discussion, the next paragraphs will show that these are not the sole roles that Article 9 TFEU can play.

### **3 The EU internal market powers in light of Article 9 TFEU**

#### **3.1 *Limitations and possibilities related to the exercise of EU internal market competences before the introduction of Article 9 TFEU***

As Article 4(2)(a) TFEU states, the EU has been conferred shared competence in the field of the internal market. In addition, Article 26 TFEU reaffirms that one of the objectives of the Union is to establish and ensure the functioning of the internal market. This constitutes an area where the four fundamental freedoms – free movement of goods, persons, services, and capital – are guaranteed. As mentioned in the introduction, the most important legal basis that EU institutions use to intervene in the internal market is Article 114(1) TFEU. This provision allows the Parliament and the Council to adopt ‘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>36</sup>

The objective of the following discussion is to recall how the Court has not only limited the possibilities for the EU legislature to resort to Article 114 TFEU, but it has also allowed it to consider certain non-economic interests listed in Article 114(3) TFEU, namely a high level of protection of health, safety, the environment and consumers, in defining the measures to be taken.<sup>37</sup> This reconstruction is fundamental because the main rules set out in the case law mentioned below continue to be applicable, despite the adoption of the Lisbon Treaty and the introduction of Article 9 TFEU.

<sup>35</sup> Case C-511/19 *AB v Olympiako Athlitiko Kentro Athinon* ECLI:EU:C:2021:274, para 39.

<sup>36</sup> Article 115 TFEU performs a similar function. However, it is not usually used since it would require unanimity to adopt measures.

<sup>37</sup> For a broader discussion, see Sybe de Vries, ‘Recent Trends in EU Internal Market Legislation’ in Tom Van Den Brink and Virginia Passalacqua (eds), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing 2024) 27.

The first element to be discussed is under which conditions EU institutions should be able to resort to Article 114 TFEU to legislate. As the CJEU put it in the leading *Tobacco Advertising* case, Article 114 TFEU does not attribute to the EU a 'general power to regulate internal market' since that would run counter to the principle of conferral.<sup>38</sup> Indeed, certain minimum conditions established by the Court should be fulfilled before the EU could legitimately rely on its internal market powers.<sup>39</sup> In the same judgment, the CJEU for the first time struck down an act adopted on the basis of, *inter alia*, what is today Article 114 TFEU.<sup>40</sup> The case derived from an action for annulment promoted by Germany against Directive 98/43/EC, which prohibited certain means of promoting and advertising tobacco products. In that judgment, the Court clarified that Article 114 TFEU confers on EU institutions only the power to adopt measures that 'genuinely have as [their object] the improvement of the conditions for the establishment and functioning of the internal market'.<sup>41</sup> Hence, the presence of differences in MS legislations and hypothetical obstacles to the exercise of fundamental freedoms or competition were not sufficient to justify the adoption of EU legislation based on Article 114 TFEU.<sup>42</sup> On the contrary, the CJEU held that this legal basis could be relied upon only if the actual aim of the adopted measures was establishing the internal market.<sup>43</sup> The judgment also specified that Article 114 TFEU can be used to contrast the emergence of future obstacles to trade between the MSs only when they are 'likely and the measure in question must be designed to prevent them'.<sup>44</sup> On the other hand, EU measures can only be enacted when the distortion of competition is appreciable.<sup>45</sup>

However, in subsequent cases, the CJEU has usually deemed that the contested measures fulfilled the conditions laid down in *Tobacco Advertising*.<sup>46</sup> Two developments facilitated such a result. First, the Court

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<sup>38</sup> Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)* ECLI:EU:C:2000:544, para 83.

<sup>39</sup> Respecting these conditions has been defined as a 'threshold requirement'. See Bruno de Witte, 'A Competence to Protect. The Pursuit of Non-market Aims through Internal Market Legislation' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 36.

<sup>40</sup> Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2010) 12 *German Law Journal* 827.

<sup>41</sup> *Tobacco Advertising* (n 38) paras 83–84.

<sup>42</sup> *ibid*, para 84.

<sup>43</sup> *ibid*, para 85.

<sup>44</sup> *ibid*, para 86.

<sup>45</sup> *ibid*, para 106.

<sup>46</sup> See Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* ECLI:EU:C:2002:741; Case C-210/03 *The*

has relaxed its standard of review. In this regard, it suffices to mention here that it admitted that the EU could adopt harmonising measures in situations having only a potential, and not actual, link with cross-border trade, as well as measures aimed at defining common rules that would facilitate cross-border economic activities and that would not exclusively remove obstacles to trade.<sup>47</sup> Second, the EU legislator has come to follow the 'drafting guidance' provided by the case law to ensure that the CJEU would validate its legislative choices.<sup>48</sup> As a consequence, while *Tobacco Advertising* imposed certain requirements on EU action, subsequent judicial developments demonstrate that these conditions have been interpreted in ways that offer broad leeway to the EU legislator to rely on Article 114 TFEU as a legal basis.

When the Court finds that EU legislation can be adopted on the basis of Article 114 TFEU, it has generally confirmed that such acts might aim at safeguarding other interests too. Indeed, even if in that specific case the EU could not rely upon that legal basis, since the *Tobacco Advertising* judgment, the Court has recognised that the EU is not prevented from adopting internal market measures 'on the ground that public health protection is a decisive factor in the choices to be made'.<sup>49</sup> In other words, provided that the EU can legitimately resort to Article 114 TFEU because a connection with the internal market exists, the use of this legal basis is possible even when a non-economic interest overrides the internal market purpose of a certain EU measure. This interpretation characterises the 'competence enhancing element' of the *Tobacco*

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*Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* ECLI:EU:C:2004:802; Case C-154/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health (C-154/04)* and *The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* ECLI:EU:C:2005:449; Case C-380/03 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising II)* ECLI:EU:C:2006:772; Case C-301/06 *Ireland v European Parliament and Council of the European Union* ECLI:EU:C:2009:68; Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* ECLI:EU:C:2010:321; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625; Case C-358/14 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2016:323; *Pillbox* (n 31); *Philip Morris* (n 31); Case C-220/17 *Planta Tabak-Manufaktur Dr Manfred Obermann GmbH & Co KG v Land Berlin* ECLI:EU:C:2019:76.

<sup>47</sup> See Derrick Wyatt, 'Community Competence to Regulate the Internal Market' (2007) Oxford Legal Studies Research Paper 9/2007, 36 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=997863](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997863)> accessed 7 June 2024.

<sup>48</sup> Weatherill (n 40) 843.

<sup>49</sup> *Tobacco Advertising* (n 38) para 88. It must be noted that this is appropriate only when there are no other provisions that could serve as legal bases, thus rendering the 'centre of gravity doctrine' not applicable. See de Witte, 'A Competence to Protect' (n 39) 35–36.

*Advertising* ruling, which accompanies its ‘competence restrictive elements’ examined before.<sup>50</sup>

The use of internal market legal competences to pursue other non-economic aims was deemed possible in *Tobacco Advertising* since health protection was considered a cross-cutting objective in what is now Article 168(1) TFEU and was also expressly referred to in the current formulation of Article 114(3) TFEU.<sup>51</sup>

While a deeper analysis on this point would go beyond the scope of this study, it suffices here to mention that the Court also accorded broad discretion to the EU legislator in deciding the intensity of the measures adopted, using a ‘conspicuously light touch’ in evaluating the proportionality of its intervention.<sup>52</sup> Indeed, as already mentioned in the previous section, the protection of these non-economic objectives can strongly limit the fundamental freedom at stake. This is evident from the content of the measures adopted, which might also include bans on the trade of certain products.

### **3.2 A new interpretation of EU internal market competences by the CJEU after the introduction of Article 9 TFEU**

As the previous analysis has demonstrated, the functional character of Article 114 TFEU allows the EU to adopt measures hypothetically in any field, provided that there is a link with the establishment and functioning of the internal market.<sup>53</sup> In the field of the internal market, this legitimises an extensive interpretation of Article 114 TFEU. The possibility to use Article 114(1) TFEU to pursue non-economic interests was supported in the case law analysed by the explicit obligation to take into account certain goals. Indeed, Article 114(3) TFEU enshrines a duty to consider different objectives, including a high level of health protection, in the legislative process. The introduction of Article 9 TFEU imposes on the EU legislator the obligation to consider the social objectives listed therein, including when adopting legislative acts. In particular, one of the main innovations that this provision has brought to the EU legal order is that it has expanded the set of non-economic interests that EU

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<sup>50</sup> Wyatt (n 47) 22–23.

<sup>51</sup> For a critique to this approach, see, for instance, Gareth Davies, ‘The Competence to Create an Internal Market: Conceptual Poverty and Unbalanced Interests’ in Garben and Govaere (n 7) 84–85, who argues that pursuing non-economic values ‘within the trade-promoting project’ disguises the real objectives of certain measures, thus risking to harm legitimacy in the EU.

<sup>52</sup> Weatherill (n 10) 17.

<sup>53</sup> Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 154.

institutions should take into account beyond those mentioned in Article 114(3) TFEU, adding a host of social objectives to this list.

In light of these considerations, this section examines how the Court has recognised the obligation stemming from Article 9 TFEU. This analysis aims to understand which consequences derive from such a duty. These implications affect especially the balance between different objectives, namely those of liberalising the internal market and the need to protect social interests, and the relation between the competences and powers of the EU. To do so, it is worth looking beyond Article 114 TFEU and considering other provisions related to the establishment and functioning of the internal market. These legal bases concern the free movement of workers (Articles 46 and 48 TFEU),<sup>54</sup> the freedom of establishment (Articles 50 and 53 TFEU), the freedom to provide services (Article 56 and 59 TFEU) and the free movement of capital (Articles 64 TFEU). Indeed, two connected decisions that the CJEU delivered in 2020, namely Cases C-620/18 *Hungary v Parliament and Council*<sup>55</sup> and C-626/18 *Poland v Parliament and Council*,<sup>56</sup> dealt with the possibility for the EU to rely on Articles 53(1) and 62 TFEU and are particularly enlightening on how the Court conceives the obligation deriving from Article 9 TFEU. These cases stem from two actions for annulment brought by Hungary and Poland against Directive (EU) 2018/957 which revised a previous Directive on the posting of workers. The two MSs contested the use of Articles 53(1) and 62 TFEU as legal bases for the adoption of the Directive. More specifically, they argued that these two articles confer on the EU the competence to adopt measures that facilitate the exercise of the freedom to provide services and not hamper it. Indeed, the two MSs maintained that the main objective of the Directive at stake was increasing social protection for posted workers and, by so doing, making the transborder provision of services more costly.

In the two judgments *Hungary v Parliament and Council* and *Poland v Parliament and Council*, the CJEU stated that the EU was allowed to update existing acts when circumstances had changed, especially taking into consideration the social objectives mentioned in Article 9 TFEU. In this regard, the introduction of the horizontal social clause should be considered a modification in EU primary law that the EU legislator must take into consideration.<sup>57</sup> The crucial point made by the CJEU was that,

<sup>54</sup> It must be recalled that Article 114(2) TFEU excludes the free movement of persons and the rights of employed persons from the scope of this legal basis.

<sup>55</sup> Case C-620/18 *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2020:1001.

<sup>56</sup> Case C-626/18 *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2020:1000.

<sup>57</sup> *Hungary v Parliament and Council* (n 55) para 41.

even when the EU exercises its internal market competences, it should also safeguard other social interests.<sup>58</sup> Indeed, the introduction of Article 9 TFEU requires the partial modification – or ‘updating’<sup>59</sup> – of how economic fundamental freedoms are conceptualised to account for the objectives stated in the horizontal social clause. In other words, the internal market should not only be construed as “free” but also as “fair”.<sup>60</sup> As a consequence, such an interpretation also binds EU institutions when adopting legislative measures.<sup>61</sup>

Similar reasoning was already adopted in the *Pillbox* judgment delivered in 2016. That case stemmed from a preliminary ruling questioning the validity of certain provisions of Directive 2014/40 on the approximation of national legislations on tobacco and related products. In that judgment, the Court clarified that when scientific evidence demonstrates that new products might cause risks to human health, the EU legislator is ‘required to act’, as envisaged also by Article 9 TFEU.<sup>62</sup> Mentioning that under certain circumstances the EU is required to act taking into account non-economic interests, this passage already suggested an obligation on the part of EU institutions to consider these objectives in their legislative functions.<sup>63</sup>

Hence, the Court recognises that Article 9 TFEU not only enables but also requires an interpretation of EU internal market powers in ways that allow for a series of horizontal social objectives to be taken into account and ultimately to be safeguarded. In this respect, the two judgments on the Posted Workers Directive explicitly acknowledge the existence of a duty to interpret EU internal market powers in a new and more ‘social-friendly’ way. As stated at the beginning, this reading of EU internal market competences presents some consequences that should be considered.

First, Article 9 TFEU could be construed as imposing an obligation to balance and to reconcile different interests. For the purposes of this work, this would mean balancing the need to foster the internal market and protect social objectives. In other words, Article 9 TFEU objectives should be considered in a way that preserves the essence of those

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<sup>58</sup> *ibid*, para 48.

<sup>59</sup> This term is used in Davide Diverio, ‘Il distacco nella giurisprudenza della Corte di giustizia: quale equilibrio fra libera circolazione dei servizi e tutela dei lavoratori?’ (2022) 3 *Rivista del Diritto della Sicurezza Sociale* 489, 499.

<sup>60</sup> Herwig Verschueren, ‘The CJEU Endorses the Revision of the Posting of Workers Directive’ (2021) *ERA Forum* 557, 565.

<sup>61</sup> Diverio (n 59) 498.

<sup>62</sup> *Pillbox* (n 31) para 116.

<sup>63</sup> Bartoloni (n 6) 87.



provisions conferring powers on the EU to undertake specific actions in particular fields.<sup>64</sup> This idea squares with the *Tobacco Advertising* legacy, which clarified that Article 114 TFEU can be used to pursue other interests only when the legislation at stake also has a connection with the internal market.

Second, EU political institutions must enjoy discretion when deciding the result of such a balancing test.<sup>65</sup> Indeed, recognising the obligation to consider the objectives listed in Article 9 TFEU does not impose on the EU a specific way to act to protect and promote these interests since the EU legislator should exercise its political discretion in choosing the measures to be taken. Moreover, a minimum standard of protection of Article 9 TFEU objectives is difficult to determine since this provision does not impose any obligation of result. However, it is reasonable to assume that the EU would fail in its duties if it adopted measures that completely disregarded Article 9 TFEU social objectives,<sup>66</sup> without adequately stating the reasons on which they are based, as required by Article 296 TFEU.<sup>67</sup> Hence, it could be argued that the EU is subject to at least two minimum requirements of a substantive and procedural nature, respectively. First, by analogy with the case law concerning health risks, at least the same level of protection existing at the time of the adoption of the legislation should be maintained.<sup>68</sup> Second, the EU legislator must take into account all the relevant circumstances that can inform its decision and it should be able to demonstrate which elements such a decision is based upon.<sup>69</sup>

Finally, Article 9 TFEU does not attribute new powers to the EU but requires it to exercise its competences differently. Thus, while this clause does not formally extend EU powers, it gives greater nuance to the relation between EU competences and objectives. This demonstrates that the issue of EU competences should be approached by moving away from the simple parallelism between competences and objectives.<sup>70</sup> The introduction of horizontal clauses in the EU legal order, such as Article

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<sup>64</sup> Michel (n 18) 185–187.

<sup>65</sup> Aranguiz (n 8) 345.

<sup>66</sup> Psychogiopoulou (n 8) 1365.

<sup>67</sup> Maria Dolores Ferrara, 'Il futuro dell'Europa sociale e le dimensioni del social mainstreaming' (2023) 1 Lavoro e diritto 129, 141.

<sup>68</sup> Delphine Misonne, 'The Importance of Setting a Target: The EU Ambition of a High Level of Protection' (2015) 4 Transnational Environmental Law 22. Reference is made to Case C-601/11 P *French Republic v European Commission* ECLI:EU:C:2013:465, para 110.

<sup>69</sup> Case C-310/04 *Kingdom of Spain v Council of the European Union* ECLI:EU:C:2006:521, para 122.

<sup>70</sup> Eleftheria Neframi, 'Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'union européenne' in Neframi (n 9) 11.

9 TFEU, confirms that a certain competence no longer corresponds unequivocally to a specific objective.<sup>71</sup> Such an interpretation questions some assumptions on the relation between EU competences and objectives. In particular, the claim that Article 114 TFEU attributes to the EU a ‘purposive’ competence requires further consideration. According to this view, EU internal market powers would be constrained by the need to pursue a specific objective, namely liberalising trade between MSs, which in turn creates problems of legitimacy for the EU.<sup>72</sup> However, the recent case law on the Posted Workers Directive offers a new understanding of Article 114 TFEU, which should be perceived as having different purposes, not only economic goals. While enhancing cross-border exchanges constitutes one of these purposes, social objectives also become relevant goals. Indeed, considering social interests when exercising its internal market competence is not merely a choice for the EU but has become an obligation due to the introduction of Article 9 TFEU.<sup>73</sup> In addition, as the case law examined demonstrates, the broad discretion of the EU legislator recognised by the CJEU allows it to adopt measures that restrict economic freedoms, when justified by the need to safeguard social objectives. It is undeniable that the EU can still rely on Article 114 TFEU only when there is some connection with cross-border exchanges. However, this is reduced to a condition allowing the EU to resort to its internal market legal basis, and the liberalisation of the internal market has become one of the multiple interests that could and indeed should guide the EU legislator in its decisions. As the final discussion will better illustrate, such a new understanding of Article 114 TFEU solves, at least partially, the EU legitimacy problems.

#### **4 The impact of Article 9 TFEU on EU internal market competences**

##### **4.1 *The expansion of the scope of EU action to fields in which MSs retain competences***

In addition to questioning the parallelism between EU competences and objectives, Article 9 TFEU influences the scope of EU powers. This is no novelty in the internal market. Indeed, as legal scholarship has already shown, EU institutions may easily rely on Article 114 TFEU, thus using their powers to regulate the internal market, to intervene in areas

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<sup>71</sup> Bartoloni (n 6) 89.

<sup>72</sup> This argument is proposed in Gareth Davies, ‘Democracy and Legitimacy in the Shadow of Purposive Competence’ (2015) 21 *European Law Journal* 2.

<sup>73</sup> This partially contradicts what is claimed in *ibid* 9–11.

where the EU would otherwise have limited competences.<sup>74</sup> Despite not equating to formally attributing new competences to the EU, the effect produced by interpreting Article 114 TFEU in light of Article 9 TFEU can nonetheless be considered *de facto* as a possibility for the EU to expand its powers beyond those conferred on it in the Treaties. The issues that arise are not in EU law, but they might occur more often after the Court has explicitly mentioned that the EU internal market powers should be used not only to remove obstacles to trade but also to ensure due consideration to social objectives in the creation of the internal market. The next sections elaborate further on how such expansion takes place when the EU considers Article 9 TFEU objectives in exercising its internal market competence. In particular, this final section has a twofold goal. First, it aims to identify three possible dynamics that can influence the scope and nature of EU powers due to this new reading of Article 114 TFEU. Its second objective is to understand how such an expansion of EU powers in areas where EU intervention is explicitly limited can be considered compatible with the principle of conferral. Indeed, in social policy areas that might be touched upon when the EU relies on Article 114 TFEU in light of Article 9 TFEU, the Treaties attribute some powers to the EU, but they also restrict its possibilities to intervene through different constraints.

As a preliminary remark, it should be recalled that when Article 9 TFEU interests are considered, certain fields might be particularly affected by EU actions.<sup>75</sup> In particular, those policy areas are employment, social security, education and training, and public health. In all these sectors, certain clauses present in the TFEU explicitly require respect for national competences. Such limitations are contained, for instance, in Article 147(1) TFEU concerning employment, in Article 153(5) TFEU about social security, in Articles 165(1) and 166(1) TFEU dedicated respectively to education and training, and in Article 168(7) TFEU on public health. Some of these provisions exclude EU actions with regard to specific issues, such as rules on pay, the right of association and the right to strike and to impose lock-outs,<sup>76</sup> 'content of teaching and the organisation of

<sup>74</sup> See Garben (n 10) 207-208; Robert Schutze, 'Limits to the Unions' "Internal Market" Competence(s): Constitutional Comparisons' in Azoulai (n 7) 215-233. For a critique to this approach, see, for instance, Vincent Delhomme, 'Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health' (2020) 11 European Journal of Risk Regulation 747.

<sup>75</sup> Further reflections could be elaborated by analysing those fundamental rights corresponding to Article 9 TFEU interests contained in the Charter, considering that according to Article 6(1) TEU protection of fundamental rights does not extend the EU competences. On the interaction between fundamental rights and competences, see Edouard Dubout, 'The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logic' in Azoulai (n 7) 193-212.

<sup>76</sup> Article 153(5) TFEU.

education systems and their cultural and linguistic diversity',<sup>77</sup> 'content and organization of vocational training',<sup>78</sup> and various aspects of health-care policy.<sup>79</sup> In these areas where the Treaties explicitly prevent the EU from interfering with national choices, the powers of the MSs have been defined as 'reserved competences'.<sup>80</sup>

When the EU exercises its legislative competences under Article 114 TFEU taking Article 9 TFEU into account, it can adopt measures that have an impact on how these goals are safeguarded in all the MSs. In turn, taking social interests into consideration narrows down MSs' room for manoeuvre in social areas by means of measures that regulate the internal market.

In light of the foregoing, the question arises of how the Court dealt with the relation between possibilities to adopt internal market legislation, on the one hand, and restrictions to EU action in areas of MSs' retained competences, on the other hand. On various occasions, the MSs have claimed that resorting to Article 114 TFEU to adopt certain acts influencing fields of reserved competences would constitute undue interference with their sovereign competences. More specific indications have been provided by the Court in cases concerning the revised Posted Workers Directive. The main bone of contention was that the new rules introduced would, among other things, ensure that posted workers receive remuneration that is in line with that of workers of the hosting MS. This was considered by Hungary and Poland as an unlawful intrusion in decisions regarding remuneration that should pertain to the national level. However, the Court did not share that view. First, it specified that the Directive at stake merely established a framework to coordinate different national legislations.<sup>81</sup> Second, it claimed that the limitation contained in Article 153(5) TFEU, which prohibits EU interventions in the matter of pay,<sup>82</sup> had not been violated. Indeed, this prohibition is applicable only when the legal bases enshrined in the rest of that provision

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<sup>77</sup> Article 165(1) TFEU.

<sup>78</sup> Article 166 TFEU.

<sup>79</sup> Article 168 TFEU reads: 'Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood'.

<sup>80</sup> Bruno de Witte, 'Exclusive Member State Competences – Is There Such a Thing?' in Garben and Govaere (n 7) 59–61.

<sup>81</sup> *Hungary v Parliament and Council* (n 55) para 79.

<sup>82</sup> The paragraph establishes that '[t]he provision of [Article 153] shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'.

are relied upon, whereas this clause does not restrict EU actions taking place through the use of other powers conferred on the EU, such as those in the field of the internal market.<sup>83</sup> Similar conclusions had already been reached by the Court in the *Tobacco Advertising* case with regard to Article 129(4) EEC Treaty.<sup>84</sup> The restrictive interpretation of these prohibitions confirms the possibility for the EU to intervene in areas that remain a national competence using its internal market legislative powers.

As a last point, the wording of the two above-mentioned provisions, ie Articles 153(5) TFEU and 129(4) EEC Treaty, might support the interpretation given by the Court in the two cases. Indeed, they require that EU actions in the areas of social policies and public health do not interfere with certain national choices. However, it could be questioned whether in assessing compliance with other provisions that exclude EU action in more general terms, such as the current formulation contained in Article 168(7) TFEU, the Court would have provided a different interpretation. While this issue has not been addressed yet, the outcomes of the varied case law mentioned above make it difficult to argue that this could be the case. This assumption is reinforced by those judgments in which the Court maintained that while MSs retain sovereign powers in the field of social protection, they can be nonetheless required to adapt their legal order to ensure respect for fundamental freedoms.<sup>85</sup>

#### **4.2 The relation between EU action and the limits to EU harmonising powers**

A second limitation usually present in the fields mentioned above – namely employment, social security, education and training, and public health – is the prohibition to harmonise national legislations in these areas. These limitations are contained in Article 149 TFEU on employment, in Article 153(2)(a) TFEU with regard to social policy, in Article 165(4) TFEU and in Articles 166(4) referring respectively to education and training, and 168(5) TFEU concerning public health. In essence, all these provisions confer on the EU certain competences in these policy fields, provided that EU action does not amount to harmonisation of MSs' legislation. However, the very goal of Article 114 TFEU is to approximate rules applicable at the national level. Thus, a conflict can arise if the EU legislator relies on this latter legal basis to adopt acts that end up

<sup>83</sup> *Hungary v Parliament and Council* (n 55) para 80.

<sup>84</sup> This provision read '[c]ommunity action in the field of public health shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care'.

<sup>85</sup> See, for instance, Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* ECLI:EU:C:2006:325, para 147.

harmonising at the supranational level certain areas where EU primary law excludes such a possibility. In other words, the broad opportunities for harmonisation provided by Article 114 TFEU clash with the limitations envisaged in the Treaties as to the extent to which national legislations can be brought into line by interventions at the EU level. To make sense of this tension, one could argue that the two terms should be given a different meaning, and that harmonisation should be construed as a more limited process. In practice, distinguishing between the two concepts could be very complex, and thus it comes as little surprise that the Court has decided to take a different path.

Once again, it seems appropriate to move back to *Tobacco Advertising*. In that judgment, the Court recalled the limitation contained in the previous version of Article 168 TFEU, but it also specified that this clause should not prevent the EU from using other legal bases to adopt legislation influencing health protection.<sup>86</sup> Nevertheless, it recognised that the EU legislator cannot rely on other articles in the Treaties to circumvent the prohibition to harmonise MSs' legislation established in Article 168 TFEU.<sup>87</sup> This statement distinguishes two different situations, having two different legal consequences. When the EU institutions can legitimately resort to Article 114 TFEU because the conditions mentioned in section 3 are fulfilled, they are allowed to adopt legislation that pursues objectives other than the mere creation of the internal market.<sup>88</sup> However, when reliance on these provisions is not permitted, the EU is prevented from adopting measures that might have an impact on other non-economic interests. This appears as a consolidated rule of EU law since the Court has stopped explicitly mentioning this aspect in its more recent judgments.<sup>89</sup> It may seem that the Court is stating the obvious, namely that the EU can adopt internal market legislation only when the conditions authorising the adoption of internal market legislation are fulfilled. However, a deeper examination allows us to draw relevant considerations for the purposes of this study.

First, it appears that respecting the conditions mentioned above that allow the EU legislator to resort to Article 114 TFEU would be sufficient to respect the harmonisation prohibitions contained in the Treaties. Taking Article 168 TFEU as an example, it could be argued that the prohibition of harmonisation contained in that provision would preclude

<sup>86</sup> *Tobacco Advertising* (n 38) paras 77–78.

<sup>87</sup> *ibid*, para 79.

<sup>88</sup> de Vries and de Jager (n 8) 1418.

<sup>89</sup> Anatole Abaquesne de Parfouru, "Choking Smokers, Don't You Think the Joker Laughs at You": European Union Competence and Regulation of Tobacco Products Packaging under the New Tobacco Products Directive' (2018) 25 *Maastricht Journal of European and Comparative Law* 410, 418.



the use of EU powers attributed to it in the field of public health to adopt harmonising legislation in the health sector using the legal bases contained in Article 168 TFEU. Nevertheless, this would not prevent the adoption of similar measures if reliance on other legal bases, such as Article 114 TFEU, is allowed.<sup>90</sup> In this vein, the harmonisation prohibition would be set aside when recourse to this latter legal basis is admissible.<sup>91</sup> As already mentioned, the generous interpretation offered by the Court of Article 114 TFEU leads to the conclusion that this would be the case in many circumstances. This would also apply to other internal market legal bases due to the broad interpretation of fundamental freedoms.

Second, the Court grants broad discretion to EU institutions regarding the possibility and the manner in which they choose to consider and include social objectives in their internal market legislation. However, the CJEU also seems to warn that the promotion of Article 9 TFEU interests cannot be achieved when the Treaties do not envisage a legal basis that can be relied upon to adopt the relevant legislation. This confirms that these objectives do not allow for an extension of the powers of EU institutions when they have not been given the competences to enact certain measures.

Third, using internal market powers would not necessarily lead to harmonisation in any instance, since regulating the internal market would not always require standardising MSs' legislation. As the example of the revised Posted Workers Directive mentioned above illustrates, for the internal market to function properly, it can sometimes be sufficient to enact measures that coordinate different national rules. In the same vein, it should be remembered that Article 114(2) TFEU restricts to a certain extent the broad possibilities stemming from the EU internal market powers, since it excludes the possibility of relying on Article 114 TFEU to adopt measures concerning the free movement of people and the rights and interests of employed workers. Hence, analysing respect of the harmonisation prohibition should be conducted on a case-by-case basis, depending on the provisions contained in specific legislation.

#### **4.3 The impact on the nature of EU competences**

The third and last phenomenon that might occur when Article 9 TFEU is considered when relying on Article 114 TFEU concerns the nature of EU competences. The categorisation of various types of competences introduced with the Lisbon Treaty is closely connected to the

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<sup>90</sup> Bartoloni (n 6) 103.

<sup>91</sup> Schütze (n 7) 82.

principle of conferral and is designed to 'qualitatively limit' EU powers.<sup>92</sup> In this regard, another tension could emerge, namely the possibility for the EU to intervene through the approximation of national laws influencing areas where the action of the EU should be of a coordinating and complementary nature.<sup>93</sup> This has important consequences not only for the type of actions that the EU could undertake, but also for the division of powers between the EU and the MSs. The following analysis sheds further light on how this tension could be approached.

Indeed, according to the Treaties, the nature of EU competence in the internal market differs from the one it enjoys in the various social policy areas that might be affected when the legislator considers the objectives of Article 9 TFEU. As is well known, the EU has shared competences with the MSs in the internal market according to Article 4(2)(a) TFEU. Instead, it can only coordinate MSs' social and employment policies pursuant to Article 5(2) and (3) TFEU and, according to Article 6 TFEU, the EU has complementary powers in the areas of public health, education and training.<sup>94</sup> More specifically, the EU should support and complete MSs' actions in various fields concerning workers' protection, as well as social exclusion and social security. The adoption of minimum standards for the protection of workers is allowed, but only regarding certain issues, including, for example, health and safety at work, protection in the case of unemployment, and gender equality in labour matters.<sup>95</sup> The EU can also sustain, complement or coordinate MSs' actions in the field of occupation.<sup>96</sup> Similar competences are attributed to the EU in the fields of education and training.<sup>97</sup> Finally, powers have been conferred on the EU to ensure health protection, but they remain limited to certain issues such as the standardisation of certain products, cross-border health threats, and tobacco and alcohol legislation.<sup>98</sup> The types of measures that the EU can adopt in these fields where it only has supporting or coordinating competences also vary, but they exclude harmonisation.<sup>99</sup>

When Article 114 TFEU is read in the light of Article 9 TFEU, two interrelated issues arise. First, the EU could approximate national laws to

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<sup>92</sup> *ibid* 84.

<sup>93</sup> Tridimas (n 7) 67.

<sup>94</sup> As the following overview better explains, shared competences in social policies and public health have been conferred on the EU, but only with regard to specific issues (see Article 4(2)(b) and (k) TFEU).

<sup>95</sup> See Article 153(1) and (2) TFEU.

<sup>96</sup> Articles 147 and 149 TFEU.

<sup>97</sup> Articles 165 and 166 TFEU.

<sup>98</sup> Article 168 TFEU.

<sup>99</sup> Article 2(5) TFEU.

contribute to the functioning of the internal market. In turn, this would require MSs not only to coordinate but also to harmonise certain aspects of their social policies. In other words, the EU would intervene in these areas not only using complementary measures but also by approximating national laws.

In addition, the relation between EU and MSs' competences could also be affected. Pursuant to Article 2(2) TFEU, once the EU has adopted internal market legislation influencing these social policy areas, MSs should be prevented from adopting measures on the same matter, despite the fact that MSs' actions in the fields mentioned in Articles 5 and 6 TFEU should not be prohibited after the EU has exercised its competences.

This situation could be exemplified by recalling the so-called Patients' Rights Directive, which was based on Article 114 TFEU and established common rules to facilitate the cross-border provision of healthcare services while ensuring a high level of health protection.<sup>100</sup> Among other things, the Directive sets out shared principles for reimbursing the costs incurred by patients insured in one MS that received healthcare services in another MS, as well as common rules that MSs should follow when subjecting to prior authorisation certain healthcare treatments to be received in other MSs.<sup>101</sup> Despite the fact that Article 6 TFEU considers public health as an area where the EU has only complementary competences, when adopting the said Directive the EU legislator has required the MSs to harmonise certain aspects of their healthcare policies to facilitate the functioning of the internal market and has prevented national authorities from enacting measures that would regulate the same subject matter.

So far, the CJEU has not dealt explicitly with such a possible modification of the nature of EU competences arising when the EU uses its internal market powers to intervene in social policy areas. However, based on the previous analysis, it is reasonable to assume that this possible modification of the nature of EU competences should not constitute a problem when its institutions can legitimately resort to Article 114 TFEU to adopt legislation. This, for instance, was the case of the Patients' Rights Directive since the Court had already affirmed that the cross-border provision of healthcare services fell within the scope of EU provisions on the free movement of goods.<sup>102</sup> This reading is also confirmed by

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<sup>100</sup> Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L88/45.

<sup>101</sup> Detailed provisions in these areas are set out in Articles 7 and 8 of the Directive.

<sup>102</sup> This was affirmed for the first time in Case C-286/82 *Luisi and Carbone* ECLI:EU:C:1984:35, para 16. It should be noted that the Directive also introduced provisions on cooperation among MSs that were, instead, based on Article 168 TFEU.

previous judgments affirming that when the MSs are required to ‘make some adjustments to their national systems of social security’ to ensure that their functioning is compatible with economic fundamental freedoms, this would not deprive the MSs of their competences in these social policy areas.<sup>103</sup> The extent of the expansion of EU action in social policy areas would clearly depend on the specific measures adopted, and the acceptance of the act by the MSs would be based on the degree and type of harmonisation requested. Nonetheless, these reflections further confirm the close correlations between social policy and internal market regulation, making it impossible to define ‘watertight boundaries’ among different areas of EU intervention.<sup>104</sup>

## 5 Conclusions

This article has shed light on the capacity of Article 9 TFEU to modify the relation between EU competences and objectives, questioning a straightforward overlap between the two. In addition, the horizontal social clause contributes to blurring the dividing line between EU and MSs’ powers. In essence, this contribution has confirmed that the division of competences between the EU and the MSs as envisaged in the Treaty of Lisbon must be considered a dynamic process.<sup>105</sup> In particular, the obligation to consider Article 9 TFEU objectives when the EU legislates in the field of the internal market runs the risk of the EU regulating social policy areas reserved for the MSs, thus *de facto* expanding its competences. This tendency is set to continue since Article 114 TFEU is still used as a legal basis to adopt measures that might influence other policy areas. Many of these pieces of legislation would require the EU to reconcile different objectives, including those mentioned in Article 9 TFEU.<sup>106</sup>

This tendency has deep implications for the scope and nature of EU competences and their relation with powers that remain within the national sphere, since the EU will pursue Article 9 TFEU social objectives when using internal market legal bases, while respecting the principle of

<sup>103</sup> See, among others, Case C-385/99 *Müller-Fauré and van Riet* ECLI:EU:C:2003:270, para 102.

<sup>104</sup> Tridimas (n 7) 72.

<sup>105</sup> *ibid* 73; Sacha Garben and Inge Govaere, ‘The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future’ in Garben and Govaere (n 7) 10.

<sup>106</sup> This is, for instance, the case of the Commission proposal for a European Health Data Space, which is also based on Article 114 TFEU and tackles issues related to health protection. In a similar vein, an example of legislation that requires consideration of interests other than those mentioned in Article 9 TFEU is the so-called European Media Freedom Act, which has been adopted using Article 114 TFEU as a legal basis and which raises important questions of freedom of expression or plurality of the media.

conferral. While possible incompatibility between these duties has been underlined by the MSs interested in the annulment of EU legislation, the CJEU has not been greatly inclined to acknowledge it. In fact, it has solved this conundrum, offering a restrictive interpretation of the various limitations to EU competences in social policy areas. Vice versa, it has extended the opportunities to rely on Article 114 TFEU. In essence, as its approach evolved after the *Tobacco Advertising* case, it seems that the Court would consider the principle of conferral respected when internal market powers can be legitimately used to adopt a certain piece of legislation, even if the link of the act with free trade and competition in the EU is a weak one. When this is the case, other limitations to EU competences present in the Treaties should not interfere with such a possibility. Indeed, these limitations must be interpreted restrictively and should only apply when the EU resorts to the specific legal bases in the various social policy areas. In other words, the discussion boils down to a matter of perspective: depending on the policy area into which the matter falls, the EU would be able to enact different types of measures. If the issue is considered to be somehow connected to the internal market, the EU can use its harmonising powers. Instead, if the question is deemed to belong to social policy, EU intervention could be more limited. This would also lead to a different redefinition of the boundaries dividing EU and MSs' powers. The fact that there may be spillovers in social fields when Article 114 TFEU is used as a legal basis appears to be an inevitable consequence. In turn, this approach allows the Court to impose on the EU legislator the obligation to consider social objectives while ensuring it is given the necessary leeway to do so. This interpretation of existing legal bases is understandable since if the EU were not given the power to pursue its aims, the very reasons for its existence would be questioned.<sup>107</sup> This includes, for instance, the possibility of enacting internal market legislation oriented towards social aims. Such an interpretation of Article 114 TFEU further contributes to the practical implementation of the obligation contained in Article 9 TFEU, thus strengthening the role this provision might have in EU law.

From the substantive point of view, this new reading of EU internal market powers appears as another example of Article 9 TFEU's capacity to reinforce the social dimension of the EU integration process. This could be perceived as a positive development towards a more balanced understanding of economic and social objectives of the EU legal order. Indeed, as the two cases on the Posted Workers' Directive demonstrate, the Court has recognised that, in addition to removing obstacles to trade, the protection of Article 9 TFEU interests also constitutes an objective to

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<sup>107</sup> See Michel (n 18) 184.

be pursued when the EU legislator regulates the internal market. Hence, the horizontal social clause has the potential to be increasingly taken into account in ways that allow the EU to strive towards the establishment of the 'social market economy' envisaged in Article 3(3) TEU. The explicit recognition given by the Court to the obligation to consider social objectives stemming from Article 9 TFEU and the impetus given by the European Pillar of Social Rights reinforces this assumption.

Finally, this new understanding of Article 114 TFEU has important implications for the democratic and social legitimacy of the EU. As already underlined in the literature, various forms of competence creep can give rise to a democratic deficit, but the one deriving from the broad scope of Article 114 TFEU is the least problematic since the adoption of EU legislation requires the involvement of EU political institutions.<sup>108</sup> In addition, the fact that the Court has imposed on the EU legislator the obligation to consider Article 9 TFEU objectives when adopting internal market legislation could be deemed to further reinforce the social legitimacy of the EU. Therefore, this re-interpretation of Article 114 TFEU would question what has already been argued concerning the nature of EU action in the internal market, which has been considered 'value neutral' by some,<sup>109</sup> or having a neo-liberal orientation by others.<sup>110</sup> Indeed, as noted in the literature, it was precisely the functional nature of EU integration, which allows spillovers from one policy field to the other, that requires the inclusion of horizontal objectives in EU law.<sup>111</sup> Hence, the presence of objectives to be considered in a cross-cutting way legitimises understanding of the scope of a certain policy area and existing legal bases in broad terms.<sup>112</sup> For the purposes of the present discussion, considering Article 9 TFEU objectives would justify a broad interpretation of Article 114 TFEU since this would allow the EU legislator to take into account multiple interests that are not exclusively of an economic nature. In other words, reading Article 114 TFEU in light of Article 9 TFEU would provide the EU with more leeway to balance the need to ensure the liberalization of trade in the internal market and other interests, including those protected by the horizontal social clause.

<sup>108</sup> Garben (n 10) 213. However, the democratic legitimacy of the EU is hampered to a larger extent, for instance in the process of negative integration taking place due to the so-called 'overconstitutionalisation' of the EU legal order. See, in this regard, Dieter Grimm, 'The Democratic Cost of Constitutionalisation: The European Case' (2015) 21 *European Law Journal* 460, 470.

<sup>109</sup> Tridimas (n 7) 73.

<sup>110</sup> Davies (n 51) 84.

<sup>111</sup> Michel (n 18) 182.

<sup>112</sup> *ibid* 191.



Despite the fact that this process would enhance discussions of a political nature in the EU institutions, the outcomes could disappoint some of the actors involved. In particular, some MSs might oppose certain measures adopted by the EU legislator since they might not agree with the balance between different interests embodied in the act. This appears as an inevitable consequence when political decisions are taken, but these MSs could bring further cases before the CJEU, claiming that the EU does not have the competence to adopt such measures. While the Court has already solved various issues concerning the attribution of powers to the EU and the division of competences between the EU and the MSs, further use of Article 114 TFEU to pursue social objectives might give rise to contestation by the MSs.



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**Suggested citation:** S Giudici, 'Interpreting EU Internal Market Powers in Light of Article 9 TFEU Social Objectives: Implications for the Attribution of Competences' (2024) 20 CYELP 31.