

Chapter 10

Internal Market: Goods II

1. Harmonization Competences: General Issues

- (a) The Concept of “Approximation” or “Harmonization”
- (b) The “Establishment” or “Functioning” of the Internal Market

2. Relationship to “Sectoral” Legislative Competences

3. “Opting Up”: Derogation Clauses in Article 114

4. Tax Harmonization, in particular: Article 113

Conclusion

Introduction *

The gradual integration of national markets into a “common” or “internal” market can be achieved by two complementary mechanisms. First, the Treaties may themselves “negate” certain national barriers to intra-European trade. For the free movement of goods, this form of negative integration was discussed in the previous Chapter. A second constitutional technique is “positive integration”. The Union here adopts positive legislation to – partly or exhaustively – remove the diversity of national laws. The idea of integration through legislation stands behind Article 26 TFEU. It states:

The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

Legislative competences for positive integration are often found within the specific policy areas of the Union. However, the Treaties also contain a number of horizontal harmonization competences that allow the Union to create an “internal market”. These “internal market” competences can be found in Chapter 3 of Title VII of the TFEU. They have been the bedrock of the Union’s positive integration programme. Articles 114 and 115 here provide the Union with a harmonization competence “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*”.

These two general harmonization competences apply to all four fundamental freedoms. They are complemented by more “specific” harmonization

* All footnotes omitted.

competences. With regard to fiscal measures, Article 113 allows the Union to harmonize legislation on “forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and functioning of the internal market and to avoid distortions of competition”. By contrast, Article 116 specifically targets distortions of competition, while Article 118 empowers the Union “[i]n the context of the establishment and functioning of the internal market” to “establish measures for the creation of European intellectual property rights”.

This Chapter explores the legal principles and constitutional limits governing positive integration in the context of the free movement of goods. Section 1 analyses the scope and nature of the general harmonization competence(s): Articles 114 and 115 TFEU. We shall see there that the Union has an – almost – unlimited competence to harmonize national laws that affect the establishment or functioning of the internal market. Section 2 looks at the relationship between Article 114 and other legislative competences within the Union legal order. Section 3 investigates the extent to which Member States can derogate from harmonized Union standards; and, finally, Section 4 is dedicated to a specific area of Union harmonization: tax harmonization.