

## MINIMUM HARMONIZATION AND THE INTERNAL MARKET

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### 1. Introduction

Given the attention currently being lavished on the Treaty of Amsterdam's new Closer Co-operation provisions and their potential to revolutionize the nature of regulatory strategies within the European Union,<sup>1</sup> it might at first sight seem rather old-fashioned to ponder instead what is in many ways a familiar characteristic of the existing Community legal order. After all, minimum harmonization has been a standard quality of directives on a range of environmental, consumer and employee protection matters since the early 1970s, well before its institutionalization within the Treaty itself by the Single European Act and the Treaty on European Union. However, the argument presented by this paper is that the mere existence of minimum harmonization says something intensely significant about the developing economic and political character of the European Community and, moreover, that the full vocabulary of minimum harmonization as a legal expression of this ongoing evolution is far from exhausted.

To this end, Section 2 offers an overview of the now widespread occurrence of minimum harmonization within the Community legal order. Section 3 then examines the conceptual significance of this phenomenon in terms of the expanding functions of the Community and the changing legal and political environment in which those functions are pursued. In particular, it will be seen that minimum harmonization represents a partial solution to the dilemmas posed by an inchoate transformation in the Community's role from bastion of free trade to vanguard of citizens' welfare. The regulatory ideal of a Treaty-based "level playing-field" inherent in the drive for a single market

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1. E.g. Edwards and Philippart, "Flexibility and the Treaty of Amsterdam: Europe's new Byzantium", CELS Occasional Paper Number 3 (CUP, 1997); Constantinesco, "Les clauses de coopération renforcée", 33 RTDE (1997), 751; Kortenberg, "Closer cooperation in the Treaty of Amsterdam", 35 CML Rev. (1998), 833; Gaja, "How flexible is flexibility under the Amsterdam Treaty?", 35 CML Rev. (1998), 855; Ehlermann, "Differentiation, flexibility, closer co-operation: The new provisions of the Amsterdam Treaty", 4 ELJ (1998), 246; Tuytschaever, *Differentiation in European Union Law* (Hart, 1999).

has, by necessity, given way to a complex system of multi-level governance, characterized by a diversity of policies across the Member States and aimed at accommodating valuable and vulnerable but often variable social interests.

Nevertheless, this conceptual framework finds its limit when one attempts to define more clearly the relationship between minimum harmonization and the single market, i.e. precisely the tension between an economic and a social Community (and thus between a uniform and a differentiated normative landscape) which minimum harmonization was intended to help resolve. In particular, can more stringent domestic rules impede the free movement of goods and services which satisfy the basic standards required by Community legislation? Section 4 therefore approaches this task from another angle: Community institutional practice, including the jurisprudence of the Court of Justice, has the potential not only to clarify but also to shape the relative balance between the competing economic and social objectives of the Treaty, and between the competing roles of the Community and domestic authorities in their achievement. However, an analysis of the current position suggests that the responsible Community actors have yet to develop a clear and above all an integrated response. Section 5 therefore concludes that the ambiguities identified in this paper remain at best incompletely answered and at worst perhaps incapable of a satisfactory resolution, due to structural constraints imposed by the existing Treaty legal order itself.

## **2. The meaning and occurrence of minimum harmonization within the Community legal order**

The approximation of national law by the Community is often stereotyped in terms of a model of “total harmonization”.<sup>2</sup> The Community exhaustively regulates a given field, thereby pre-empting national competence to take independent action therein. Even if a novel and potentially undesirable development in scientific technology or market behaviour threatens the interests of the consumer or environment in a manner unforeseen by the Community

2. The true position is, of course, more complex: Slot, “Harmonization”, 21 EL Rev. (1996), 378; Vignes, “The harmonization of national legislation and the EEC”, 15 EL Rev. (1990), 358; Sauter and Vos, “Harmonization under Community law: The Comitology issue” in Craig and Harlow (Eds.), *Lawmaking in the European Union* (Kluwer, 1998). Consider, in particular, the practice of “partial harmonization”, coupled with the principle of “mutual recognition of equivalent domestic standards”, which underlay the Commission’s 1985 New Approach to Technical Harmonization: Pelkmans, “The new approach to technical harmonization and standardization”, 25 JCMS (1987), 249; Burrows, “Harmonization of technical standards: Reculer pour mieux sauter?”, 53 MLR (1990), 597; McGee and Weatherill, “The evolution of the Single Market – Harmonization or liberalization”, 53 MLR (1990), 578.

legislature, regulatory adaptation is in principle to be achieved by the Community authorities, not the Member States.<sup>3</sup> As such, total may be contrasted with minimum harmonization. In the latter case, Member States are permitted to maintain and often to introduce more stringent regulatory standards than those prescribed by Community legislation, for the purposes of advancing a particular social or welfare interest, and provided that such additional requirements are compatible with the Treaty. National competence is not completely ousted: the applicable Community legislation sets a floor, the Treaty itself sets a ceiling and the Member States are free to pursue an independent domestic policy between these two parameters.<sup>4</sup>

Minimum harmonization has become an increasingly common characteristic of Community regulation. Indeed, since the Single European Act it has been “institutionalized” through express incorporation into the Treaty itself. General minimum harmonization clauses are now found in respect of the Community’s competences to pursue policies on the environment,<sup>5</sup> consumer protection<sup>6</sup> and social policy,<sup>7</sup> as well as the more restricted legislative powers available in respect of public health.<sup>8</sup> Even Article 95 (ex 100a) EC contains a limited minimum harmonization facility in respect of measures adopted under that legal basis for the completion of the internal market and which themselves fail to make provision for more stringent domestic standards.<sup>9</sup>

But well before these Treaty amendments were enacted, minimum harmonization clauses were familiar flourishes to be found in secondary legislation. That tradition continues despite the general provisions now enshrined in primary Community law, and particularly where socially valuable Community action is being pursued through legal bases such as Articles 94 and 95 (ex 100 and 100a) EC rather than under the more specifically welfare-orientated policy Chapters. Minimum harmonization clauses are therefore common in

3. E.g. Case 60/86, *Commission v. United Kingdom*, [1988] ECR 3921; Cases C-129–130/97, *Chiciak and Fol*, [1998] ECR I-3315.

4. An image used by Weatherill, “Beyond preemption? Shared competence and constitutional change in the European Community” in O’Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Wiley, 1994). This includes the competence to make only partial use of a derogation provided under the relevant harmonization measure: Case 228/87, *Pretura unificata di Torino v. X*, [1988] ECR 5099.

5. Art. 176 (ex 130t) EC, in respect of measures adopted under Art. 175 (ex 130s).

6. Art. 153(5) EC, in respect of measures adopted under Art. 153(3)(b) and (4) (ex 129a).

7. Art. 137(5) EC, in respect of measures adopted under Art. 137(2) and (3) (previously contained in the Agreement on Social Policy annexed to the Treaty through the Protocol on Social Policy).

8. Art. 152(4)(a) (ex 129) EC.

9. Art. 95(4)-(9) EC.

environmental directives,<sup>10</sup> and standard in measures dealing with consumer policy<sup>11</sup> and employee protection.<sup>12</sup>

Finally, minimum harmonization need not be provided for explicitly. The Court of Justice has on several occasions held Community measures to constitute non-exhaustive standards by process of implication. This is well illustrated by the judgment in *R v. Secretary of State for Health, ex parte Gallaher*.<sup>13</sup> Directive 89/622/EEC on the labelling of tobacco products required that cigarette packets carry warnings about the health risks associated with smoking, covering "at least" 4% of the relevant surface area of the packet.<sup>14</sup> The United Kingdom enacted rules stipulating that the relevant coverage was to be 6%. The Court held that this was compatible with the Directive, which had sought to establish only minimum standards.<sup>15</sup>

### 3. The significance of minimum harmonization within the Treaty system

What is the significance of such a widespread utilization of minimum harmonization within the Community order? In this section, it will be argued that minimum harmonization is the legal expression of fundamental tensions in the Community's wider economic and political evolution. I will attempt to outline this evolution through the consideration of two main axes. The first concerns the changing policy agenda of the Treaty – in particular, its progress from the quest to facilitate economic expansion through trade liberalization to the acquisition of competence equally to advance the social

10. E.g. Art. 7(2) Bathing Water Directive 76/160/EEC O.J. 1976, L 31/1; Art. 9 Shellfish Waters Directive 79/923/EEC O.J. 1979, L 281/47; Art. 16 Drinking Water Directive 80/778/EEC O.J. 1980, L 229/11; Art. 4(3) Directive 88/609/EEC on the limitation of emissions of certain pollutants into the air from large combustion plants O.J. 1988, L 336/1.

11. E.g. Art. 8 Doorstep Selling Directive 85/577/EEC O.J. 1985, L 372/31; Art. 15 Consumer Credit Directive 87/102/EEC O.J. 1987, L 42/48; Art. 8 Package Travel Directive 90/314/EEC O.J. 1990, L 158/59; Art. 8 Unfair Contract Terms Directive 93/13/EEC O.J. 1993, L 95/29; Art. 11 Timeshare Directive 94/47/EC O.J. 1994, L 280/83; Art. 14 Distance Selling Directive 97/7/EC O.J. 1997, L 144/19.

12. E.g. Art. 5 Collective Redundancies Directive 98/59/EC O.J. 1998, L 225/16; Art. 7 Acquired Rights Directive 77/187/EEC O.J. 1977, L 61/26; Art. 9 Insolvency Directive 80/987/EEC O.J. 1980, L 283/23; Art. 7 Conditions of Employment Directive 91/533/EEC O.J. 1991, L 288/32; Clause 4(1) Framework Agreement on Parental Leave annexed to Directive 96/34/EC O.J. 1996, L 145/4; Clause 6(1) Framework Agreement on Part-Time Work annexed to Directive 97/81/EC O.J. 1998, L 14/9.

13. Case C-11/92, [1993] ECR I-3545.

14. O.J. 1989, L 359/1.

15. Also: Case C-222/91, *Philip Morris Belgium*, [1993] ECR I-3469; Case C-128/94, *Hans Höning*, [1995] ECR I-3389; Case C-389/96, *Aher-Waggon*, [1998] ECR I-4473; Case C-376/90, *Commission v. Belgium*, [1992] ECR I-6153.

welfare of ordinary European citizens. The second axis concerns the regulatory strategies employed by the Treaty system to achieve these shifting policy goals – in particular, the trend away from an ideal of normative uniformity across the entire Community towards the toleration and even encouragement of differentiated legal environments as between the various Member States.

### 3.1. *The first axis: an economic versus a social Community*

The first axis concerns what might be termed the Community's "horizontal" expansion, i.e. the growth in its powers to legislate in different policy sectors. The immediate objective of the original Treaty of Rome was to stimulate economic integration among the Member States: the creation of a "common market" in which goods, persons, services and capital could move freely across the Member States; and of a "level playing-field" whereby enterprises could operate under equal conditions of competition. Within this scheme, social actors were seen as the ultimate but indirect beneficiaries of the Community's primarily economic achievements: a free market and increased competition would stimulate prosperity, in turn raising the standard of products and services offered to the public, of wages paid to workers etc.<sup>16</sup> But such blind faith in the philanthropic benefits of the liberal capitalist model soon passed as the Community looked beyond the narrow objective of securing market integration to embrace new policy competences in fields such as environmental protection, consumer rights, social policy, education and vocational training, culture and public health.<sup>17</sup>

The development of new Community policies was, in part, a necessary incident of the ongoing process of economic integration itself: for example, in interpreting directly effective Treaty provisions, the Court of Justice could not assess the validity of domestic rules without forming some idea of what sort of interests the latter could legitimately advance and of the appropriate balance to be struck with the objective of free trade;<sup>18</sup> similarly, when adopting harmonization measures intended to replace national rules tolerated under the

16. There were limited Treaty references to more welfare-orientated concerns, e.g. Art. 141 (ex 119) EC on equal pay for men and women.

17. There are many sectoral accounts of the development of the Community's social competences. On environmental policy, e.g. Jans, *European Environmental Law* (Kluwer Law International, 1995); Ziegler, *Trade and Environmental Law in the European Community* (Clarendon, 1996). On consumer policy, e.g. Weatherill, *EC Consumer Law and Policy* (Longman, 1997); Howells and Wilhelmsson, *EC Consumer Law* (Dartmouth, 1997). On social policy, e.g. Barnard, *EC Employment Law* (Wiley, 1996); Nielsen and Szyszczak, *The Social Dimension of the European Union* (Handelshøjskolens Forlag, 1997).

18. E.g. in the context of free movement for goods, under the express Treaty derogations provided by Art. 30 (ex 36) EC, or the "mandatory requirements" developed through the *Cassis de Dijon* case law (Case 120/78, [1979] ECR 649).

Court's jurisprudence, the Community legislature was required to decide not merely to approximate but to do so at a particular pitch, taking account of the competing societal concerns which had prompted the original domestic action now being pre-empted.<sup>19</sup> But the willing elaboration of such "flanking policies" also reflected growing concerns that the Community was indeed too economic in its orientation and appeal. The creation of a "Europe with a Human Face" became a genuine political ambition in the early 1970s, encouraged by the belief that the language of individual rights combined with a broader conception of the Community's social mandate would provide an essential legitimizing force for the evolving but still rather aloof Treaty system.<sup>20</sup>

Initially, both the "flanking policies" and the potential for social change and broader integration which they presented were constrained by the lack of any independent legal basis within the Treaty. Action was possible only through provisions such as Article 94 (ex 100) and, after the Single European Act, Article 95; its form was therefore closely related to the requirements of economic integration which justified the exercise of legislative power thereunder. Nevertheless, subsequent changes heralded the Community's competence to pursue a variety of social imperatives independently of their single market surrogate. In particular, successive Treaty revisions provided explicit bases for the Community's policies, for example, on the environment (Single European Act), consumers (Treaty on European Union) and employee protection (Treaties on European Union and of Amsterdam).<sup>21</sup> Henceforth, such initiatives could be pursued not only through the old "internal market" harmonization articles but also through their own legal bases and according to their own framework of principles and institutional procedures.<sup>22</sup>

19. E.g. adopted under Art. 94 or 95 (ex 100 or 100a) EC.

20. E.g. Declaration by the Heads of Government of the Member States meeting in Paris in 1972 (Bull. EC 10-1972: *The First Summit Conference of the Enlarged Community* 19–20 Oct. 1972). Cf. Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States on the Programme of Action of the European Communities on the Environment O.J. 1973, C 112/1; Council Resolution concerning a social action programme O.J. 1974, C 13/1; Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy O.J. 1975, C 92/1. In similar spirit, e.g. the report on the promotion of "A People's Europe" commissioned and approved by the European Council in the mid-1980s: Supplement 7/85 – Bull. EC: *A People's Europe: Reports from the ad hoc Committee*.

21. These developments were encouraged and consolidated by the ECJ. E.g. Case 240/83, *ADBHU*, [1985] ECR 531: environmental protection is one of the Community's "essential objectives" and therefore legitimate subject-matter for secondary legislation; this validation of expanding Community activities pre-dated the formal introduction of a Treaty Title on environmental policy.

22. Cf. Art. 6, 153(2) and 152(1) (ex 3c, as introduced by the Treaty of Amsterdam, 129a and 129) EC: the Community must integrate environmental, consumer and health concerns

As a result, it is clear that the Community no longer dances to the tune of the internal market alone. Instead, and as even a cursory glance through Articles 2 and 3 confirms, the Treaty sanctions the simultaneous pursuit of a range of policies, the demands of which may well conflict with the traditional economic motif of “open markets and equal competition”. Indeed, the trend discerned by many commentators has been towards the gradual adoption by the Community of a breadth of responsibilities for the provision of social welfare more usually associated with the Member (nation-)States than an international organization.<sup>23</sup> By expanding the Community’s activities to cover diverse aspects of daily life, the architects of European integration have certainly encouraged changing perceptions of the Treaty project. Far from being a shallow front for rampant free-market capitalism, the Community has become the focus of an increasing sense of expectation of social and political change in Europe.<sup>24</sup>

### 3.2. *The second axis: a uniform versus a differentiated Community*

The second relevant axis in the Community’s development is the opposition between uniformity and differentiation in the normative elaboration of the

into the pursuit of other policy objectives. It must also base approximation of law proposals under Art. 95 on high levels of protection for each of these interests: Art. 95(3) EC. On social policy, cf. Case C-67/96, *Albany International*, Judgment of 21 Sept. 1999, ny, paras. 52–60 and Cases C-270–271/97, *Deutsche Post v. Sievers*, Judgment of 10 Feb. 2000, ny, paras. 53–57.

23. E.g. Wessels, “An ever closer fusion? A dynamic macropolitical view on integration processes”, 35 JCMS (1997), 267; and “The growth and differentiation of multi-level networks: A corporatist mega-bureaucracy or an open city?” in Wallace and Young (Eds.), *Participation and Policy-Making in the European Union* (Clarendon, 1997). Cf. Caporaso, “The European Union and forms of state: Westphalian, regulatory or post-modern?”, 34 JCMS (1996), 29.

24. Cf. the results of a Community-wide survey of public opinion conducted before the 1999 European Parliament elections: “L’autre Europe que veulent les Européens”, Le Monde, 1 June 1999. This trend took a new step forward with the creation of “citizenship of the Union” by the Maastricht Treaty. E.g. A.G. Jacobs in Case C-274/96, *Bickel and Franz*, [1998] ECR I-7637: the introduction of the notion of citizenship “was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union” (para 23 Opinion). Further: O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer, 1996); Everson, “The Legacy of the market citizen” in Shaw and More (Eds.), *New Legal Dynamics of European Union* (Clarendon, 1995); Wiener and Della Sala, “Constitution-making and citizenship practice – Bridging the democracy gap in the EU?”, 35 JCMS (1997), 595; Shaw, “The interpretation of European Union citizenship”, 61 MLR (1998), 293. Cf. Annex IV to the Presidency Conclusions of the Cologne European Council of 3 and 4 June 1999: European Council Decision on the Drawing Up of a Charter of Fundamental Rights of the European Union (full transcript and related materials are available at the EU website <http://www.europa.eu.int>).

Treaty's expanding policy objectives. It was remarked above how the regulatory ideal of the common market consisted in the creation of a "level playing-field" on which all economic actors could operate under equal competitive conditions, and across which goods, persons and services could be exchanged unhindered. This implied the approximation of divergent national regimes so as to conform as closely as possible to a single uniform standard set by the Community institutions, and the pre-emption of Member State competence to maintain or introduce new domestic provisions that might thenceforth distort the Treaty paradigm. In short, a model of total harmonization.

However, the steady expansion of Community powers so as to cover not only a wider range of economic matters (most significantly, those related to the third stage of Economic and Monetary Union) but also a panoply of social-welfare responsibilities (such as environmental, consumer and employee protection, education, culture and public health) means that harmonization is now performing very different functions from those it did traditionally. This is true to a certain extent of Article 94 or 95 EC measures, which must elaborate a Community conception of what consumer or environmental protection means and how far it should restrain the full manufacturing and marketing capabilities of the entrepreneurial class. But it is even more true of measures adopted under the new welfare-orientated Treaty legal bases, where harmonization more clearly promotes common values about the quality of life Europeans are entitled to enjoy, values which merely interface with rather than serve the economic demands of the single market.<sup>25</sup>

On the one hand, it is arguable that once the Community legislature has acted to protect the relevant social-welfare interests, national competence should still be pre-empted, diverse domestic rules dismantled and a "level playing-field" restored. This "level playing-field" may not necessarily be pitched at a level conducive to optimal economic efficiency, but there is no reason in principle why a "social Community" cannot still be a "uniform Community" and thus designed to accommodate important welfare interests within a regulatory framework supporting a continuing commitment to free movement and equal competitive conditions. On the other hand, this expectation has not proved possible to sustain in practice. In some respects this was nothing novel: Community secondary legislation often contained "safeguard clauses" permitting the Member States to take exceptional and temporary measures to protect important social interests when the Community legislat-

25. Cf. the related issues analysed by Dehoussé, *Integration v Regulation? Social Regulation in the European Community*, European University Institute Working Paper LAW No 92/23 (EUI, 1992).

ive process could not be trusted to adapt with the required degree of urgency.<sup>26</sup> But minimum harmonization presents diversity of a very different character and on a very different scale, and to understand fully its significance one must thus consider not only the “horizontal” expansion of the Community’s powers but also the impact of an additional group of factors which ensure that harmonization is not only performing new functions but is doing so in a changing legal and political environment which renders uniformity an unattainable ideal.<sup>27</sup>

The first such factor is the strengthening of Community powers “vertically”, i.e. so as to penetrate deeper into the domestic legal orders. The chief tenets of this trend derive from the jurisprudence of the Court of Justice: the direct effect of Community rules within the national legal orders, their supremacy over any conflicting domestic provisions (even those of a constitutional nature) and the ability of Community legislative regimes to oust entirely the competence of each Member State to regulate in respect of that matter for the future.<sup>28</sup> The Treaty’s potential to impinge upon national competence in not only a broader but also a deeper manner, obviously posed problems for those Member States which already possessed well-developed regulatory regimes in the relevant areas and were wary of replacing them with a harmonized Community norm.

Secondly, such concerns were exasperated by the Community’s success in extending membership to other European nations.<sup>29</sup> A consistent process of geographical expansion testifies to the perceived benefits of being in the “Treaty club”, but has at the same time undermined the solidarity of six relatively homogenous Member States in favour of the increasing diversity of ten, twelve, fifteen. The presence of countries with very different and often conflicting cultural and political visions both of the appropriate intensity of social regulation on any given matter, and of the acceptable degree of Community involvement in the realization thereof, has reduced drastically the chances of attaining regulatory consensus such as would facilitate the uniform realization of the Treaty’s traditional economic and emergent social policies. For example, Member State A might enjoy a tradition of strong employee protection legislation whereas Member State B believes that the

26. Cf. Art. 15 and 95(10) (ex 7c and 100a(5)) EC. Further: Dehoussé et.al., *Europe After 1992 – New Regulatory Strategies*, European University Institute Working Paper LAW No 92/31 (EUI, 1992).

27. Also: Weatherill, “On the depth and breadth of European integration”, 17 OJLS (1997), 537; and “Flexibility or fragmentation: Trends in European integration” in Usher (Ed.), *The State of the European Union: Structure, Enlargement and Economic Union* (Longman, 2000).

28. Case 26/62, *Van Gend en Loos*, [1963] ECR 1; Case 6/64, *Costa v. Enel*, [1964] ECR 585; Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125; Case 106/77, *Simmenthal*, [1978] ECR 629.

29. On the Community’s geographical expansion: Preston, *Enlargement and Integration in the European Union* (Routledge, 1997).

imposition of similar standards on its employers would fatally undermine their economic competitiveness by imposing excessive labour costs. Finding a harmonized Community norm to suit both preferences would be a difficult task, particularly if the end result supplants the possibility of supplementary or derogating domestic rules.

Thirdly, recall the impact of institutional changes which favour a more supranational rather than intergovernmental style of decision-making within the Treaty's legislative processes, and in particular the trend to replace unanimity with majority voting in the Council, extenuating the ability of individual Member States to resist the will of the Community even when they feel serious questions of national policy to be at stake.<sup>30</sup> In the past, the Member States had accepted the horizontal and vertical expansion of Community power because they enjoyed the prerogative of acquiescence in both.<sup>31</sup> Now, however, Member State A might find itself alone in the Council in defending the virtues of strong labour protection, then obliged by the demands of total harmonization to lower its own existing standards of regulation for the sake of complying with the majority's preference for a minimalist Community norm. Conversely, if Member State B were to be outvoted, its concerns over the competitiveness of domestic industry could be sacrificed to meet the demands of traditional Community-wide regulatory techniques.

This combination of factors (the horizontal, vertical and geographical growth of the Community's powers; coupled with institutional changes which reduce the ability of the Member States to control its day-to-day operation) helps to explain why the recent history of the Community has been dominated not only by the continuing expansion of Treaty powers but also by attempts to define more clearly their relationship with pre-existing national competences, and in particular to accommodate those Member States who wish to retain a greater degree of control over their own policy-making prerogatives.<sup>32</sup> These factors also throw light on the rising tide of differentiation within the Community legal order. Traditional regulatory techniques such as total harmonization have not single-mindedly been maintained, precisely because it

30. That is, the EC Treaty's legislative processes. In the context of the other pillars of the European Union, intergovernmental is preferred to supranational styles of decision-making.

31. Further: Weiler, "The Community system: The dual character of supranationalism", 1 YEL (1981), 267.

32. E.g. Art. 5 (ex 3b) EC setting out the principles of attributed powers, subsidiarity and proportionality; also the Protocol on the application of the principles of subsidiarity and proportionality introduced at Amsterdam. Further: Dashwood, "The limits of European Community powers", 21 EL Rev. (1996), 113; and "States in the European Union", 23 EL Rev. (1998), 201. Cf. the discussion of the principle of supremacy by Weiler and Haltern, "Constitutional or international? The foundations of the Community legal order and the question of judicial Kompetenz-Kompetenz" in Slaughter, Stone Sweet and Weiler (Eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart, 1998).

became necessary to balance the Community's original objective of maintaining a genuinely "level playing-field" for the purposes of the common market against its more recent mandate to operate a welfare-orientated policy agenda; and, in doing so, to accommodate the desires of the various Member States for differing levels of social provision where legislative compromise was difficult to achieve and majority voting to outflank the detractors was either unavailable or simply politically impossible to sustain. Regulatory differentiation represents a pragmatic solution to this impasse, i.e. by permitting both the Community and its various Member States to participate in the realization of common goals but not necessarily by completely common means.

"Closer co-operation" may be the most prominent legal manifestation of this tension between "integration" and "disintegration".<sup>33</sup> But it is not the only example. The widespread occurrence of derogations from the substantive obligations enacted by Community regulations and directives seeks to accommodate those Member States which are unable or sometimes merely unwilling to attain the more ambitious standards agreed upon by the rest of the Community. Similarly, the widespread preference for minimum harmonization which has emerged in both secondary and primary Treaty rules can thus be seen as a device for satisfying those Member States determined to maintain their own high standards of environmental, consumer or employee protection in the face of a less ambitious Community harmonization proposal.

### *3.3. Minimum harmonization within the Treaty system: some open questions*

At first sight, therefore, the utilization of minimum harmonization in secondary legislation and its institutionalization within the Treaty itself, support the drift away from a Community dominated by the capitalist impulses of the internal market towards a more multi-faceted Union which combines economic integration with high standards of social protection for those relatively vulnerable groups and interests which interface with the ambitions of the internal market, and whose objectives can, if necessary, be achieved through "shared competence" and "regulatory differentiation" between the Member States rather than "exclusive competence" and "uniformity" across the entire territory of the Community. The potential for minimum harmonization to produce more diverse welfare policies within each relevant sector of Community activity is well illustrated by reference to the Commission's report

33. Further: Shaw, "European Union legal studies in crisis? Towards a new dynamic", 16 OJLS (1996), 231. Also: Dehouze, "Le Traité d'Amsterdam, reflet de la nouvelle Europe", CDE (1997), 265.

on the operation of the Consumer Credit Directive 87/102/EEC.<sup>34</sup> Although adopted under Article 94 EC with a view to reducing those discrepancies between the relevant national regimes which impeded the proper functioning of the common market, Article 15 of the Directive provides that the measure "shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty". Observing the considerable extent to which the Member States had taken advantage of this facility to improve on the level and scope of substantive protection guaranteed by the Directive, and the variety of their reactions, the Commission remarked that, as a result, the measure had only a modest impact on the original objective of harmonization.<sup>35</sup>

This scope for diversity has, moreover, been reinforced by the general approach adopted by the Court of Justice. For example, the Court has held that "minimum" harmonization does not mean merely "minimalist", such as would reserve to the national authorities the preponderance of regulatory competence in, say, employment regulation.<sup>36</sup> But nor does the Community's commitment to pursuing "high standards" of environmental protection mean "the highest possible", such as would leave little room for independent domestic initiatives.<sup>37</sup> In reaching this conclusion, the Court referred expressly to the Article 176 (ex 130t) EC minimum harmonization clause: high Community standards cannot mean the highest possible precisely because the Treaty envisages that the Member States may set more stringent safeguards at the national level.<sup>38</sup> The incidental effect of these decisions is to affirm the legitimate right of Member States to put clear blue water between the Community and the domestic legal orders, and to do so for the sake of improving citizens' welfare as an objective supported by the Treaty but not necessarily guaranteed by it alone.

Nevertheless, the full capacity of minimum harmonization to act as a vehicle for higher and if necessary differentiated standards of social-welfare protection remains unclear. The trite formulation of minimum harmonization clauses generally found in both the Treaty and secondary legislation does not answer all the questions raised by multi-level regulation in a multi-faceted Community, questions which concern in particular the full impact of minimum

34. O.J. 1987, L 42/48 (as amended by Directive 90/88/EEC O.J. 1990, L 61/14; now also by Directive 98/7/EC O.J. 1998, L 101/17).

35. COM (95) 117 final.

36. Case C-84/94, *UK v. Council*, [1996] ECR I-5755, paras. 17 and 56.

37. Case C-284/95, *Safety Hi-Tech v. S&T*, [1998] ECR I-4301, para 49; Case C-341/95, *Bettati v. Safety Hi-Tech*, [1998] ECR I-4355, para 47. Also: A.G. Saggio in Case C-232/97, *Nederhoff*, Judgment of 29 Sept. 1999, ny (para 30 Opinion).

38. Further: Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, para 48; A.G. Jacobs in Case C-6/98, *ARD v. PRO Sieben Media*, paras. 52–60 Opinion delivered on 24 June 1999, ny.

harmonization upon free movement and equal competition within the single market.

Take Article 176 EC on environmental policy by way of illustration:

“The protective measures adopted pursuant to Article 175 [ex 130s] shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission”.

These parameters do in themselves describe some essential features of the Member State’s competence to pursue independent action. On the one hand, it is clear that minimum harmonization necessarily distorts at least to some extent the ideal of equality of competition between economic actors within the European market: in particular, producers and service-providers established in a Member State which has enacted more stringent protective standards may be burdened by more onerous costs than their rivals established in Member States which prescribe the Community norm alone.<sup>39</sup> On the other hand, it is equally apparent that national measures which disrupt the functioning of the internal market in goods or services for primarily economic reasons remain contrary to Community law: protectionism is still protectionism, despite the existence of a minimum harmonization clause in the Treaty or applicable directive.<sup>40</sup>

But these twin parameters do not provide all the answers about just how far minimum harmonization may result in distorted conditions of competition, or in the maintenance of barriers to intra-Community trade. In particular, can higher national standards be applied to foreign as well as to domestic products/services?<sup>41</sup> And if so, can any obstacles to free movement created by the more stringent national provisions be justified, in principle, by the “mandatory” or “imperative requirements” established by judicial decision, as well as by the derogations expressly provided for under the Treaty? Additional problems arise when attempting to draw a coherent line between the application of “general” (and therefore relatively ambiguous) minimum harmonization clauses such as Article 176, and the much more specific and restrictive regime on more stringent domestic rules established in the context of Article 95 EC.

Such questions create enough space to support the covert continuation of hostilities between rival agendas for the ongoing development of the Com-

39. E.g. Case C-11/92, *R v. Secretary of State for Health, ex parte Gallaher* [1993] ECR I-3545, para 22; Case C-128/94, *Hans Höning*, [1995] ECR I-3389, para 17; A.G. Cosmas in Case C-389/96, *Aher-Waggon*, [1998] ECR I-4473, para 15 Opinion; A.G. Jacobs in Case C-6/98, *ARD v. PRO Sieben Media*, para 84 Opinion delivered on 24 June 1999, nyd.

40. E.g. Case C-203/96, *Dusseldorf*, [1998] ECR I-4075, paras. 43–44.

41. Or, in the context of exportation, to goods/services destined for the Community as well as the domestic market?

munity's regulatory activities. Is minimum harmonization to be interpreted strictly, as an exception to the traditional economic ideals of a Community-wide "level playing-field" and therefore so as to restrain as far as possible the demands of the emergent "social Europe" and/or the worst excesses of the policy differentiation apparently required to support it? Or is it to be viewed as a perfectly valid model for the allocation of policy-making competence in a Community characterized by overlapping priorities and differing national outlooks, in particular as regards the provision of vital welfare services? A more detailed examination of these issues will help determine whether some more clearly defined balance has yet been reached.

#### **4. Minimum harmonization and free movement: clarifying the boundaries?**

##### *4.1. The application of more stringent domestic welfare standards to Community goods, services etc. entering the national territory*

"Total harmonization" presents few problems for free movement within the single market. Such Community-level regulation pre-empts concurrent national competence in respect of the subject-matter in question, barring the Member State from introducing any further requirements in respect of either domestic production or foreign imports. By implication, recourse to either the express exceptions provided for by the Treaty or the "mandatory requirements" developed by the Court as a means of justifying the exercise of domestic regulatory competence is ruled out.<sup>42</sup> However, the position is more complicated in the case of a Community measure providing merely for minimum harmonization. After all, national competence is not ousted altogether and the traditional understanding does not appear applicable. A new approach to the relationship between domestic welfare provision and free movement within the single market is required, and its basis is the principle that "more stringent domestic standards must be compatible with the Treaty". Leaving aside the blatantly protectionist and thus obviously unlawful measure, can additional national standards otherwise apply to goods/services operating on the Community as well as on the purely domestic market? And if so, can the resultant barriers to free movement be justified by the Court of Justice's "mandatory" or "imperative" requirements as well as by the express Treaty derogations?

42. E.g. Case 148/78, *Ratti*, [1979] ECR 1629. More recently, e.g. Case C-315/92, *Clinique*, [1994] ECR I-317; Case C-77/97, *Unilever v. Smithkline Beecham*, [1999] ECR I-431; Case C-220/98, *Estée Lauder v. Lancaster Group*, Judgment of 13 Jan. 2000, ny.

The solution to this problem lies largely in the degree of detail with which the Community legislature has defined its particular minimum harmonization clause. For example, a measure might allow the Member States to adopt more stringent standards in respect of both domestic and imported goods/services etc., as long as those requirements are justified by reference to specified objectives.<sup>43</sup>

Alternatively, a measure may provide explicitly that more stringent national standards can be applied only to domestic goods/services etc, but not so as to impede the free movement of Community imports which satisfy the specified basic requirements. This will often be the case with regard to measures enacted under internal market legal bases such as Articles 94 or 95 EC and in respect of which the Community legislature was keen strictly to confine the impact of minimum harmonization upon the process of economic integration.<sup>44</sup> A minimum harmonization clause which is explicitly circumscribed by such a free movement/mutual recognition clause therefore results in a situation of “reverse discrimination”.<sup>45</sup> Two qualifications should be noted. First, it remains the case that, even in respect of domestic producers or service-providers, more stringent national measures must respect primary Treaty rules on free movement *from* the Member State’s territory.<sup>46</sup> Secondly, it is possible that the pursuit of independent national welfare policies may be restrained *de facto* as well as *de jure* by the operation of a “competition between legal orders”: Member States may be reluctant to make use of the facility presented by minimum harmonization when the result of doing so is to place national producers/service providers/investors at a competitive disadvantage as compared to those located in other Member States which impose lesser regulatory burdens; this is particularly likely to be the case where more stringent national standards are incapable of being applied to imported as well as to domestic goods and services; the scope for additional social-welfare protection supposedly afforded by a minimum harmonization facility is therefore doubly checked as economic pressure forces the regimes of individual Member States to remain as close as possible to the basic Community

43. The most prominent example of this situation is Art. 95(4)-(9) EC, which will be considered in greater detail below. There are also examples in the secondary legislation, e.g. Case C-241/89, *SARPP*, [1990] ECR I-4695; Case 5/77, *Tedeschi*, [1977] ECR 1555.

44. A good example is the “Television Without Frontiers” Directive 89/552/EEC O.J. 1989, L 298/23 (as amended by Directive 97/36/EC O.J. 1997, L 202/60): compare Cases C-34-36/95, *De Agostini*, [1997] ECR I-3843 with Case C-412/93, *Leclerc-Siplec*, [1995] ECR I-179. Also: Case C-11/92, *R v. Secretary of State for Health, ex parte Gallaher*, [1993] ECR I-3545; Case C-222/91, *Philip Morris Belgium*, [1993] ECR I-3469.

45. A situation which is compatible with Community law: Case 355/85, *Driancourt v. Michel Cognet*, [1986] ECR 3231; Case 98/86, *Arthur Mathot*, [1987] ECR 809.

46. Cases C-320, 328–329 and 337–339/94, *RTI*, [1996] ECR I-6471; Case C-6/98, *ARD v. PRO Sieben Media*, Judgment of 28 Oct. 1999, ny.

provisions. "Competition between legal orders" is a deeply controversial proposition, especially given the absence of extensive empirical research.<sup>47</sup> For present purposes, suffice to note that this is an important potential factor in determining the contours of differentiated regulatory practice under minimum harmonization regimes.<sup>48</sup>

The most difficult situation is where the Community measure in question makes no particular provision to govern the relationship between minimum harmonization and free movement. This is the case with the minimum harmonization clauses found in the primary Treaty provisions on environmental, consumer and employee protection; it is also common with regard to secondary measures adopted under more internal market-orientated provisions such as Articles 94 and 95 EC.

Academic discussion of the point seems to be fairly limited (at least in the English-language literature), but it is nevertheless possible to discern several divergent opinions. For example, Bernard has argued that, even in the absence of specific legislative provisions, more stringent national standards may apply only to domestic, not to imported goods/services etc. which satisfy the minimum standards set by Community law.<sup>49</sup> In effect, one simply extends the principles of mutual recognition and reverse discrimination (together with the qualifications relating to free movement out of the national territory and the possible impact of any "competition between legal orders") to the status of a general presumption. This stance is defended on the grounds of protecting the single market against the barriers to free movement inherent in the enactment of more stringent domestic regulatory regimes, in other words, from a policy perspective which seeks as far as possible to preserve

47. For a flavour of this debate: Reich, "Competition between legal orders: A new paradigm of EC law?", 29 CML Rev. (1992), 861; Pelkmans and Sun, "Regulatory competition in the Single Market", 33 JCMS (1995), 67; Van den Bergh, "Subsidiarity as an economic demarcation principle and the emergence of European private law", 5 MJ (1998), 129; Barnard, "Social dumping and the race to the bottom: Some lessons for the European Union from Delaware?", 25 EL Rev. (2000), 57. Cf. Editorial Comments, "Are European values being hoovered away?", 30 CML Rev. (1993), 445.

48. Note that A.G. Mischo in Case C-2/97, *Borsana*, [1998] ECR I-8597 suggested a possible third limit to the Member State's powers under a minimum harmonization clause, i.e. whereby regardless of any impact on free movement, all more stringent national standards must comply with the general principle of proportionality (paras. 35–47 Opinion). However, this suggestion seems to have been rebuffed by the Court, which denied its own competence to assess the compatibility of more stringent domestic rules with the principle of proportionality, save where this requirement was implicit in safeguarding fundamental Treaty freedoms whose exercise the Member State sought to restrict (para 40 Judgment).

49. Bernard, "The future of European Economic law in the light of the principle of subsidiarity", 33 CML Rev. (1996), 633 at 646–7.

the “economic-uniformity” character of the Treaty system in the face of the “social-differentiation” alternative.<sup>50</sup>

Alternatively, Slot has suggested that higher national requirements should be applicable to both domestic and foreign cases alike, but has expressed reservations about whether the mandatory requirements should be available in addition to the Treaty derogations so as to justify the continued existence of obstacles to free movement.<sup>51</sup> These reservations are explained primarily on the consideration that the mandatory requirements are available only “in the absence of common rules”, whereas if there is a harmonization measure there must be common rules. Even if based on doctrinal concerns, adopting this view would nevertheless have serious consequences for the substantive role and significance of minimum harmonization: many of the societal interests which underlie the development of Community objectives on environmental and consumer protection and which are the focus of minimum harmonization measures find no place in the Treaty’s express derogations and their effectiveness would depend on the possibility, in principle, of judicial recognition. For example, additional national safeguards intended to benefit the consumer but incidentally restricting the free movement of goods contrary to the Treaty ceiling set by Article 28 (ex 30) would have to further “the protection of the health and life of humans” under the derogations provided for by Article 30 (ex 36); this would exclude safeguards intended to protect the consumer’s economic well-being. Such a position would seem particularly unsatisfactory as regards measures adopted under Articles 175 or 153 (ex 129a), i.e. where minimum harmonization can only have been intended to protect environmental and general consumer interests; to say that additional national requirements may restrict free movement but only on the basis of express Treaty derogations would thus seem contrary to the contemporary spirit of the integration project.

What light does the Court of Justice’s case law shed on the matter? On the one hand, there are several cases which support the proposition that more stringent national standards adopted pursuant to a minimum harmonization clause can be applied both to domestic and to foreign goods and services (even if the latter complies with basic Community requirements) *and* that any resultant obstacles to the free movement of goods, services etc. can in principle be defended under the mandatory requirements as well as the

50. Cf. Martin, “Le droit social communautaire: droit commun des Etats membres de la Communauté européenne en matière sociale?”, 30 RTDE (1994), 609, who argues that modern Community social policy remains no more than an instrument for achieving the common market, and thus subordinate to the principles of free movement and equal competitive conditions upon which the success of that common market is postulated.

51. Slot, “Harmonization”, 21 EL Rev. (1996), 378 at 385.

Treaty derogations.<sup>52</sup> The advancement of the Community's social-welfare objectives and increasingly differentiated regulatory strategies for their realization might thereby seem to have attracted judicial support. For example, *Buet* concerned the compatibility with Article 28 EC of a French prohibition on canvassing for the sale of educational materials at private dwellings.<sup>53</sup> Community secondary legislation exists to protect the consumer in cases of doorstep selling, but it does not prevent Member States "from adopting or maintaining more favourable provisions to protect consumers in the field which it covers".<sup>54</sup> It was held that the French prohibition constituted an obstacle to the importation of teaching materials from other Member States, but was justified by the need to satisfy mandatory requirements concerning the protection of vulnerable consumers against being induced to make ill-considered purchases.<sup>55</sup>

In the light of the revision of the Court of Justice's case law initiated by the judgment in *Keck*, there are serious doubts as to whether cases like *Buet* would be reasoned in the same manner were they to come before the Court again today: such rules would probably constitute "certain selling arrangements" and thus fall outside the scope of Article 28 altogether.<sup>56</sup> But *Buet* still serves as authority for the proposition that stricter national rules can, in principle, be applied to imports *and* justified by mandatory requirements. Indeed, that proposition seems to have been affirmed in the case of *Aher-Waggon*.<sup>57</sup> Under Article 3(1) of Directive 80/51/EEC, each Member State must ensure that certain categories of civil aeroplanes comply with requirements which are *at least* equal to the Community's noise emission limitation standards when being registered for the first time within the national territory.<sup>58</sup> Germany took advantage of this provision to establish stricter standards than those laid down in the Directive, even for the first registration within the national territory of aircraft previously registered in another Member State where they complied with the basic requirements of the Directive. The Court of Justice observed that Article 3(1) indeed laid down only minimum requirements, allowing the Member States to impose stricter noise emissions limits on imported as well as domestic aircraft, provided they did not infringe the ceiling set

52. A proposition which has also attracted academic support, e.g. Weatherill, *op. cit. supra* note 4, pp. 23–25; Oliver, *Free Movement of Goods in the European Community*, 3rd ed. (Sweet & Maxwell, 1996), pp. 376–378; Whelan, "Fundamental principles of EU environmental law", 8 IJEL (1999), 37; Stuyck, "European consumer law after the Treaty of Amsterdam: Consumer policy in or beyond the internal market?", 37 CML Rev. (2000), 367.

53. Case 382/87, [1989] ECR 1235.

54. Art. 8 Doorstep Selling Directive 85/577/EEC O.J. 1985, L 372/31.

55. Also: Case C-241/89, *SARPP*, [1990] ECR I-4695.

56. Cases C-267–268/91, *Keck and Mithouard*, [1993] ECR I-6097 and their offspring.

57. Case C-389/96, [1998] ECR I-4473.

58. O.J. 1980, L 18/26 (as amended by Directive 83/206/EEC O.J. 1983, L 117/15).

by Article 28 EC. While the German legislation constituted an obstacle to intra-Community trade, it could be justified by the imperatives of public health and environmental protection (the latter, of course, being a mandatory requirement rather than a Treaty derogation). According to Advocate General Cosmas, “[i]f... it were accepted that an aircraft which is already registered in one Member State and meets the minimum Community requirements may be registered in another Member State even though it does not satisfy the stricter national requirements in that State, the power to adopt stricter national noise limits which the Directive clearly grants would effectively be removed”.<sup>59</sup>

On the other hand, a number of judgments seem to contradict the proposition supported by cases like *Aher-Waggon*. Consider, for example, the decision in *Gourmetterie Van den Burg*.<sup>60</sup> Directive 79/409/EEC prohibits the sale of wild birds whose conservation the measure seeks more generally to promote. In the case of the red grouse, however, this prohibition did not apply where the birds had been lawfully killed in accordance with the terms of the Directive.<sup>61</sup> Dutch law banned the importation of red grouse into the Netherlands from the United Kingdom, even if the birds had been lawfully killed there. Could this quantitative restriction on imports contrary to Article 28 EC be justified by reference to Article 30 as regards the protection of the health and life of animals? The Court observed that recourse to Article 30 was precluded by the existence of a Community measure fully harmonizing national legislation in the relevant sector. In this regard, Article 14 of the Directive authorized the Member States to introduce stricter protective measures than those provided for by Community rules. However, the Court stated that the scope of the discretion conferred by this provision had to be defined by reference to the “principal objectives” of the Directive as a whole. In particular, the Community legislature had introduced a special system of protection in respect of migratory species and seriously endangered species

59. *Aher-Waggon*, para 12 Opinion. Another example of more stringent national measures restricting free movement but capable, in principle, of being justified by the imperative requirement of environmental protection: Case C-232/97, *Nederhoff*, Judgment of 29 Sept. 1999, ny. Similarly, by the imperative requirement of consumer protection: Case C-410/96, *André Ambry*, [1998] ECR I-7875; discussed by Huglo, “Liberté d’établissement et libre prestation de services”, 35 RTDE (1999), 729. Cf. Case C-203/96, *Dusseldorf*, [1998] ECR I-4075: the ECJ appeared sympathetic to claims that more stringent domestic rules adopted pursuant to Art. 176 EC and restricting the free movement of goods contrary to Art. 29 EC could be justified, in principle, by considerations of environmental protection as well as the express derogations in Art. 30 EC; however, the Dutch law in question was distinctly applicable and thus, according to established case law, incapable of objective justification by reference to the imperative requirements. Contrast the views of A.G. Jacobs in *Dusseldorf*, paras. 89–90 Opinion with Case C-2/90, *Commission v. Belgium*, [1992] ECR I-4431; note by Notaro, 36 CML Rev. (1999), 1309; Van Calster, 24 EL Rev. (1999), 178.

60. Case C-169/89, [1990] ECR I-2143.

61. O.J. 1979, L 103/1.

of birds. Article 14 authorized the Member States to adopt stricter measures to ensure that these categories of bird were protected even more effectively. The Member States could adopt stricter standards in respect of other species covered by the Directive only if they occurred within the national territory. Since the red grouse was neither migratory nor seriously endangered and did not naturally occur within Dutch territory, the national rule at issue was contrary to Community law and could not be justified by reference either to the minimum harmonization clause in Article 14 of the Directive or to the derogation in Article 30 EC.

The decision in *Gourmetterie* is difficult to interpret. There was nothing in the wording of Article 14 to hint at the sort of limitations the Court was able to read into it. Moreover, the reasoning employed by the Court in doing so is rather ambiguous. The reference to the Directive's "principal criteria" suggests that for the purposes of assessing the relationship between a basic minimum harmonization clause and free movement within the single market, one should seek to establish a hierarchy of provisions within the Community legislation at issue, some permitting the restriction not only of domestic but also of intra-Community trade while others permit only reverse discrimination. But the widespread application of such an approach would be a recipe for disaster in terms of legal certainty: the judgment offered no guidance as to how the "principal criteria" of a regulation or directive should be defined, and it is hard to imagine how any clear and predictable test could be applied to the myriad of Community acts dealing with a vast range of issues to which minimum harmonization now applies.

In the light of these difficulties, *Gourmetterie* might appear to be an unstable foundation on which to construct a vision of the Court of Justice as the champion of the economic rights of importers as against the regulatory competence of the Member States to pursue legitimate social-welfare objectives, and as such might probably seem best confined to its own very particular facts. However, Advocate General Van Gerven's Opinion offers an alternative explanation which may partially rehabilitate the authority of *Gourmetterie*. In his view, the case concerned an attempt by one Member State (the Netherlands) to adopt legislation for the protection of interests (the protection of the red grouse) located entirely in another Member State (the United Kingdom). The Advocate General believed that Article 30 EC should not be capable of such extra-territorial application.<sup>62</sup> In short, *Gourmetterie* was not about restricting the social imperatives advanced by minimum harmonization as against the economic imperatives guaranteed by free movement, but instead about defin-

62. *Gourmetterie*, paras. 7–10 Opinion. Also: Scott, *EC Environmental Law* (Longman, 1998), pp. 79–85. Cf. in the context of Art. 49 (ex 59) EC: Case C-384/93, *Alpine Investments*, [1995] ECR I-1141.

ing the appropriate territorial limits of the welfare interests accommodated by Article 30.

Consider also in this regard the judgment in *R v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming*.<sup>63</sup> Directive 91/629/EEC laid down certain Community-wide standards for the humane rearing of calves. However, according to Article 11(2), “Member States may, in compliance with the general rules of the Treaty, maintain or apply within their territories stricter provisions for the protection of calves than laid down in the directive”.<sup>64</sup> The UK prohibited the “veal crate” system of calf-rearing in respect of farms within its national territory, though this system remained compatible with the basic provisions of the Directive and was lawfully practised in other Member States. Among the questions considered by the Court of Justice was whether the UK might rely on Article 30 EC (protecting the health or life of animals) to justify a ban on the export of calves to other Member States in which the veal crate system was permitted, a restriction which would otherwise be contrary to Article 29 (ex 34) EC outlawing quantitative restrictions on exports. The Court observed that recourse to Article 30 was no longer possible if the Directive had harmonized the measures necessary for the protection of the health of calves. In this regard, Article 11(2) permitted more stringent national measures only if: first, they were limited to strictly territorial boundaries and thus related only to cattle-farms falling within the jurisdiction of the Member State in question; and secondly, they complied with the general rules of the Treaty. Member States were therefore only entitled to adopt stricter measures for the protection of calves applying within their own territory; a ban on exports imposed on account of conditions prevailing in other Member States which nevertheless complied with the terms of the Directive fell outside the scope of Article 11(2). Indeed, such a ban “would strike at the harmonization achieved by the Directive”.<sup>65</sup> So construed, the minimum harmonization facility provided for by Article 11(2) did not prevent the Directive from exhaustively regulating the powers of the Member States in the field of the protection of calves; as such, there could be no recourse to Article 30 to justify a possible ban on exports from the UK.

As with *Gourmetterie*, CIWF saw a *prima facie* rather ordinary minimum harmonization clause in a Community directive interpreted so as to limit the power of the Member States to disrupt free movement by improving levels of social protection through regulatory differentiation. But again, it is possible to explain this decision by reference to the purported extra-territorial application of the relevant national policy interests, i.e. by the prospect of

63. Case C-1/96, [1998] ECR I-1251 (hereafter: *CIWF*).

64. O.J. 1991, L 340/28.

65. *CIWF*, para 62.

the UK prohibiting the export of calves from its territory so as to protect them from less stringent animal welfare standards operating in other Member States. As regards the extra-territorial application of Article 30 EC, the Opinion of Advocate General Léger is particularly clear. As in the previous case of *R v. MAFF, ex parte Hedley Lomas*, he argued that Article 30 was a derogation from a fundamental freedom guaranteed by Community law and as such should be interpreted restrictively, so as to prevent a Member State from hindering exports on account of circumstances which do not affect the protected interests within the national territory.<sup>66</sup> At least for present purposes, such an approach seems sensible: after all, the rationale for tolerating regulatory differentiation within the Community legal order is to respect legitimate domestic diversity in the social/welfare spheres, even if this comes at the cost of maximum economic freedom; but to recognize the extra-territorial pursuit of one Member State's policy choices would permit one national identity to force itself upon other Member States which have chosen to adopt an alternative stance, on threat of economic sanction through the imposition of barriers to trade where the latter refuse to tow the line. Such a possibility would seem to undermine not only the rationale for regulatory differentiation but also the basic principles of equality and solidarity upon which the integrity and acceptability of the Community system depends. Adopting this interpretation of *Gourmetterie* and *CIWF* would, moreover, resolve the potential conflict with cases like *Aher-Waggon*: it is in principle possible for more stringent national standards to restrict the intra-Community free movement of goods/services etc, provided that this possibility does not in any case extend to the extra-territorial application of the social objectives which those more stringent national standards seek to promote.

However, there are two difficulties with this interpretation. First and foremost, in defining the appropriate territorial scope of the United Kingdom's discretion to enact more stringent standards for the protection of calves, the Court of Justice made no reference to Article 30 EC, choosing instead to reason on the basis of Article 11(2) of the Directive alone. The fact that the Member States could apply more stringent domestic standards "within their territories" meant that such measures could relate only to cattle-farms falling within the jurisdiction of the country in question, and were thus limited not merely in physical application to the domestic territory but also in terms of the social imperatives which prompted the relevant national action in the first place. Since the UK had already applied within its territory stricter provisions than those found in the Directive by banning British cattle-farms from using the veal crate system, the policy focus of any export ban would be cattle-

66. *CIWF*, paras. 74–94 and 113–120 Opinion; Case C-5/94, *R v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas*, [1996] ECR I-2553, paras. 22–38 Opinion.

farms in Member States which still permitted that system and therefore fall beyond the permissible limits of the UK's discretion as described in Article 11(2). The Court was clearly reluctant to commit itself on the question of the extra-territorial application of Article 30.<sup>67</sup> But taking this approach at its face value does make it more difficult to assess the precise implications of the decisions in *Gourmetterie* and *CIWF* for defining the boundary between minimum harmonization and free movement. The *Aher-Waggon* approach might remain good as a general principle, but instead of any clear or general limitation thereon, it seems that only the particular structure or precise wording of the relevant Community measure can determine the exact extent of the Member States' residual competences.

Secondly, even Advocate General Léger's comments on the extra-territorial scope of Article 30 were delivered on the assumption that additional Member State measures for the protection of calves were adopted in the period of partial harmonization which subsisted during the Directive's transitional period, rather than pursuant to the broader minimum harmonization facility provided by Article 11(2). Indeed, as regards the latter provision there is a dictum in the Opinion which actually complicates matters still further. If *CIWF* was really about establishing the legitimate territorial limits of Article 30 of the Treaty or of Article 11(2) of the Directive, and not about restricting the scope of minimum harmonization provisions per se, then there is no reason in principle why the Member State should not be competent to apply its higher national standards to imported goods. After all, if a product enters the national territory, then it enters the legitimate domain of domestic social concerns and of the higher standards enacted to advance them. But the Advocate General insisted that in applying Article 11(2), "*there can be no effect on intra-Community trade*".<sup>68</sup> Does this imply that any restriction on imports into the national territory would also have been contrary to Community law? If so, Article 11(2) would be restricted to the creation of reverse discrimination and one would be faced with fresh uncertainty about the status of the *Aher-Waggon* proposition.

One explanation for the Advocate General's apparently more restrictive approach to the relationship between Article 11(2) and intra-Community trade (and indeed for the *CIWF* judgment as a whole) is to turn attention away from the sort of detailed linguistic analyses thus far conducted and focus instead on the wider regulatory landscape to which the Calves Directive itself belongs. As the Court of Justice stressed, the Directive was introduced under Article 37 (ex 43) EC as part of the common organization of the

67. As in Case C-5/94, *R v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas*, [1996] ECR I-2553. Further: Jarvis, *The Application of EC Law by National Courts: Free Movement of Goods* (Oxford, 1998), pp. 281–288.

68. *CIWF*, para 60 Opinion (emphasis added).

market in beef and veal already established by Community regulations.<sup>69</sup> This common organization is based on principles of free movement similar to those found in the Treaty, but the discretion of the Member States is much more limited than if the matter were governed by primary Community law alone. In particular, unilateral national action cannot undermine or create exceptions to the common organization, or interfere with its proper functioning, even if the matter in question has not been exhaustively regulated by Community rules.<sup>70</sup> A ban on the export of calves from the UK would have a considerable impact on the formation of market prices and therefore interfere with the proper functioning of the common organization.<sup>71</sup> And while the Directive did seek to promote the interests of animal protection, that imperative had nevertheless to be reconciled with the needs of the common organization of the market in calves.<sup>72</sup> In short, the wider context of Article 11(2) was one in which free movement and regulatory uniformity, rather than social welfare and regulatory diversity, were thought to demand primary consideration. Limiting minimum harmonization to the territorial extent of the particular Member State and perhaps even to situations of reverse discrimination would be concordant with this policy.

If this alternative interpretation of *CIWF* is correct, it would suggest that the relationship between a minimum harmonization clause and the demands of the internal market cannot be answered on the basis of an abstract assessment of the specific measure at issue. Instead, one must conduct a contextual analysis to determine whether the relative emphasis of Community policy falls on free movement and regulatory uniformity, or on social protection and differentiation. Where minimum harmonization occurs within a common organization of a market, the Community legislature must implicitly have conceived of its potential impact in the least economically disruptive terms possible and to have viewed the attainment of the relevant welfare imperatives as a goal entrusted primarily to the Community rather than the Member States (*CIWF*). By contrast, measures adopted under the specific Treaty bases on consumer or environmental protection are concerned primarily with social regulation, not economic integration, and one might expect that the Court would take a more serious view of the need for high standards of welfare protection and a correspondingly more generous approach to the role of the Member States in attaining it, interpreting their rather trite minimum

69. In particular, Regulation 805/68 O.J. 1968, Special English Edition, p. 187.

70. E.g. Case 31/74, *Galli*, [1975] ECR 47; Case 5/79, *Buyt, Pesch, Dullieux and Denkavit*, [1979] ECR 3203.

71. *CIWF*, paras. 41–44.

72. *CIWF*, para 53.

harmonization clauses accordingly.<sup>73</sup> Between these two extremes, cases like *Buet* suggest that welfare will prevail over free movement even as regards approximation directives adopted under Articles 94 or 95 EC, at least where they pursue valuable social objectives and the Community legislature has not explicitly constricted the role minimum harmonization is permitted to play.<sup>74</sup>

*Aher-Waggon* also supports such a contextual analysis: Directive 80/51/EEC was adopted under Article 80(2) (ex 84(2)) EC within the framework of the Common Transport Policy. As Advocate General Cosmas observed, however, the measure pursued a singularly environmental objective, with no parallel ambitions of an economic or commercial nature as regards the removal of barriers to intra-Community trade; this consideration was obviously an important factor in persuading him that Germany's more stringent noise emission limits were in principle capable of binding imported aircraft.<sup>75</sup> But even if a contextual approach to the case law offers some fresh insights, it cannot offer a comprehensive explanation. After all, the Wild Birds Directive was adopted under Article 308 (ex 235) EC to advance the Treaty's objectives of improved standards of living and balanced economic expansion that respected protection of the European environment; nevertheless, the Court in *Gourmetterie* seemed prepared to protect the free movement of goods over the maximum possible protection of the red grouse.<sup>76</sup>

The overall impression generated by this body of case law thus remains one of confusion. Should more stringent domestic measures be applied to

73. Note Case C-203/96, *Dusseldorf*, [1998] ECR I-4075 as a possible example of this approach with regard to measures adopted under Art. 176 EC.

74. Also: Case C-241/89, *SARPP*, [1990] ECR I-4695; Case C-410/96, *André Ambry*, [1998] ECR I-7875; Case C-232/97, *Nederhoff*, Judgment of 29 Sept. 1999, nyrr.

75. *Aher-Waggon*, para 8 Opinion.

76. Also: in several cases where the ECJ adopted a generous approach to the existence/scope of a minimum harmonization clause, the Court observed that the measure in question was intended merely as a "first step" in the full programme of harmonization envisaged by the Community legislature, e.g. Case C-128/94, *Hans Höning*, [1995] ECR I-3389. This suggests that the Court's approach to the relationship between minimum harmonization and free movement may be informed by not only a *contextual* but also a *temporal* dimension: where the relevant Community measure occupies a relatively early position within a broader multi-step harmonization enterprise, the Court will be more likely to permit more stringent domestic standards to impede free movement; where the legislation joins an already mature system of Community-level regulation, the Court may feel more inclined to protect the internal integrity of that regime rather than defer to a national competence which has already been significantly eroded. However, insofar as any such temporal factor may be at work, one should recall that multi-step harmonization need not necessarily imply a progressively more restrictive approach to national competence or to social-welfare regulation. E.g. in the context of company law, it has been argued that the Community's evolving harmonization programme has become less uniform/prescriptive, and more differentiated/flexible: Woods and Villiers, "The Legislative Process and the Institutions of the European Union: A Case Study of the Development of European Company Law" in Craig and Harlow (Eds.), *Lawmaking in the European Union* (Kluwer, 1998).

Community as well as national situations? Neither the legislature nor the Court of Justice seem to have formulated the question with any such clarity, let alone considered the policy framework and extant legal authorities in any systematic way, let alone reached any really satisfactory solution. In the meantime, it is submitted that neither the position adopted by Bernard nor that suggested by Slot can unreservedly be endorsed. This is true primarily for want of persuasive legal authority. But it is also supported by more general policy considerations of the sort suggested in Section 3 above: in the light of the continuing development of the Community's social-welfare policy agendas and an increasingly differentiated allocation of responsibilities for their realization, either such approach appears unduly restrictive in its conception of Member State discretion to enact more protective regulatory standards.

Against this background, it is instead suggested that the case law can perhaps best be explained as follows. A) In the absence of more explicit legislative provision, more stringent domestic standards can restrict the free movement of goods and services, if either objectively justified or saved by a Treaty exception. B) This general principle may be subject to one or both of the following provisos: 1) that the Member State must not attempt to project its particular policy preferences outside the national territory (for example, by restricting the export of goods or services to other Member States which display alternative policy choices); 2) that the wider regulatory context of the measure in question does not demonstrate that the Community legislature implicitly intended free movement to prevail over stricter domestic social-welfare regulation (as might be the case, for example, in the context of a common organization of the market in a particular agricultural product). Such an approach reflects insofar as it is possible to do so the current state of the case law. It also balances more evenly the needs of economic integration on the one hand and the value of decentralized social regulation on the other, i.e. those imperatives which have been identified as underlying the existence of minimum harmonization, and a satisfactory resolution of the tension between which is essential for clarifying the role of minimum harmonization within the Community legal order.

#### *4.2. Minimum harmonization under Article 95 EC: the problem of legal basis revisited*

The next difficulty concerns the relationship between the general minimum harmonization clauses found in the environmental, consumer and social policy Titles of the Treaty and the more specific provision found in respect of measures adopted under Article 95 EC, the main internal market legal basis.

The original Article 100a(4) was introduced into the EC Treaty by the Single European Act as a trade-off with Member States against the introduction of

majority voting for measures passed under the new Article 100a: instead of a right of veto, and in the absence of any more specific indication in the relevant secondary legislation that it intended only to effect a minimum harmonization, the Member States were given a limited ability to “derogate” from a Community harmonization measure so as to provide for more stringent domestic levels of protection.<sup>77</sup>

This innovation was greeted by a cacophony of academic speculation,<sup>78</sup> though its very limited use in practice has rendered the threat to the proper functioning of the internal market allegedly posed by ex Article 100a(4) a largely theoretical concern.<sup>79</sup> But the post-Amsterdam provisions still raise several questions. In effect, the new Article 95(4)-(9) constitutes an advanced form of Treaty-based minimum harmonization clause as compared with the trite formulations offered in respect of, say, environmental, consumer and social policy. Probably because Article 95(4)-(9) EC is so closely related to the realization and functioning of the internal market, the possibility of Member States adopting stricter national standards thereunder has explicitly been rendered much narrower than is the case with Articles 137, 153 or 176 (ex 118, 129a or 130t) EC.<sup>80</sup>

First, it seems clear that more stringent protective measures maintained by the Member States pursuant to Article 95(4) can be applied to imported as well as to domestic goods etc.<sup>81</sup> However, such measures can only be justified on the grounds specified, i.e. the matters referred to in Article 30 EC, plus protection of the environment and working environment. The wider category of mandatory requirements in general (including, say, protection of consumers’ economic interests or of workers’ rights outside the sphere of health and safety) is not available. In any case, the difficulties identified above concerning the Court’s attitude in cases like *Aher-Waggon*, *Gourmetterie* and *CIWF* do not apply if Article 95(4) EC is the relevant legal basis for the domestic measures in question. Secondly, whereas the general minimum harmonization clauses draw no distinction between maintaining and introducing higher protective standards, new Article 95(5) makes the introduction of additional national measures much more difficult by stipulating a series

77. E.g. A.G. Tesauro in Case C-41/93, *France v. Commission*, [1994] ECR I-1829, para 4 Opinion.

78. E.g. Jacqué, “L’Acte unique européen”, 22 RTDE (1986), 575; Ehlermann, “The internal market following the Single European Act”, 24 CML Rev. (1987), 361; Flynn, “How will Article 100A(4) Work? A comparison with Article 93”, 24 CML Rev. (1987), 689; Pescatore, “Some Critical Remarks on the ‘Single European Act’”, 24 CML Rev. (1987), 9.

79. Only a few instances of Member State action under the old Art. 100a(4) are extant, e.g. Commission Decisions 94/783/EC O.J. 1994, L 316/43 and 96/211/EC O.J. 1996, L 68/32.

80. Cf. Case C-41/93, *France v. Commission*, [1994] ECR I-1829, para 24.

81. A view shared by Oliver, *Free Movement of Goods in the European Community*, 3rd ed. (Sweet & Maxwell, 1996), pp. 365–366.

of onerous requirements which must be fulfilled.<sup>82</sup> Thus, such domestic provisions must be based on new scientific evidence relating to the protection of the environment or working environment, on grounds of a problem both specific to that Member State and arising after the adoption of the Community harmonization measure. By implication, measures relating to issues such as consumer protection or public policy are excluded; so too problems whose existence pre-dates the relevant Community legislation or transcends national frontiers.

Thirdly, Article 95(4)-(9) EC provides for a much more elaborate control procedure than that found under Articles 137, 153 or 176.<sup>83</sup> The latter require merely that the Member States notify the Commission of any stricter domestic rules enacted in the relevant field. This obligation is binding only as between the Member States and the Commission; it has no effect on the validity within the national legal order of rules which have not been notified and in particular on their enforcement as against private individuals.<sup>84</sup> By contrast, Article 95(4)-(9) EC requires the Member States to notify their actions to the Commission, which is then obliged to investigate the legality of the notified measures and, if appropriate, to examine whether to amend the applicable Community harmonizing measure. It is clearly established that, as a matter of intra-institutional relations actionable before the Court of Justice, the Member States are not authorized to apply more stringent national rules until after they have been confirmed by the Commission.<sup>85</sup> It now seems that a Member State's failure to comply with this obligation to notify and then to receive Commission confirmation will also render the domestic rules in question unenforceable as against individuals otherwise able to rely upon the direct effect of the relevant but unimplemented Community secondary legislation.<sup>86</sup> The distinction drawn by the Court of Justice between the legal effects of failing to comply with the obligation to notify more stringent domestic measures as provided for by the general minimum harmonization clauses on the one

82. Some commentators have doubted whether this will ever be a realistic possibility, e.g. Krämer, *EC Treaty and Environmental Law* (Sweet & Maxwell, 1998), pp. 135–137.

83. And under much of the secondary legislation establishing a minimum harmonization facility.

84. By analogy: Case 174/84, *Bulk Oil*, [1986] ECR 559; Case 380/87, *Enichem Base*, [1989] ECR 2491; Case C-235/95, *François Dumon*, [1998] ECR I-4531. Also: A.G. Mischo in Case C-2/97, *Borsana*, [1998] ECR I-8597, paras. 50–52 Opinion; Weatherill, “Compulsory notification of draft technical regulations: The contribution of Directive 83/189 to the management of the internal market”, 16 YEL (1996), 129 at 181.

85. Case C-41/93, *France v. Commission*, [1994] ECR I-1829, paras. 24–30.

86. Case C-319/97, *Kortas*, Judgment of 1 June 1999, ny. As with a failure to notify under Directive 98/34/EC O.J. 1998, L 204/37 (previously Directive 83/189/EEC O.J. 1983, L 109/8) laying down a procedure for the provision of information in the field of technical standards and regulations: Case C-194/94, *CIA Security International*, [1996] ECR I-2201; cf. Case C-226/97, *Martinus Lemmens*, [1998] ECR I-3711.

hand and by Article 95(4)-(9) EC on the other hand, demonstrates vividly the exceptional character assigned to the latter facility in view of its delicate relationship with the economic imperatives of the internal market. Indeed, so strong is the attachment of the Court to the principle of free movement within the Community over the possibility of additional social-welfare regulation at the national level within the context of Article 95 EC, that even when the Commission failed in its obligation of sincere co-operation under Article 10 (ex 5) EC by refusing to exercise due diligence in examining a Member State's notification of more stringent health protection legislation pursuant to Article 95(4) EC, it was held that this could not be allowed to affect the full application of the Community directive in question. The appropriate means of recourse for the aggrieved Member State was to bring an action against the Commission under Article 232 (ex 175) EC.<sup>87</sup>

In short, there are least several significant differences between the competence of Member States to enact higher standards than those set by Community law, depending on the legal basis upon which the Community measure in question was adopted and therefore upon the relative balance between social-welfare provision and free movement defined by the Treaty. In itself this is unproblematic. The difficulty arises because: first, Community legislative initiatives often pursue overlapping policy objectives, for example, encouraging trade liberalization whilst raising standards of environmental, consumer or employee protection across the Community; and secondly, the task of distinguishing between the various legal bases available, and thus between the various opportunities for adopting and justifying additional domestic regulation, can take on an almost arbitrary character.

It is settled case law that the choice of legal basis for a Community legislative measure must be based on objective factors amenable to judicial review, and in particular the aim and content of the measure. Ideally, measures which simultaneously promote two or more Community policy objectives should be based on both the relevant legal bases, but this is often not possible: the most familiar objection is that there are irreconcilable differences in their respective legislative procedures, for example, in terms of the consultation or co-decision of the European Parliament, or the unanimous or majority voting requirements within the Council; but this might equally be the case in the light of the different types of provision made for stricter national standards of social-welfare protection. In such cases, the Court of Justice has established that the applicable legal basis for a measure must correspond to its principal objective, even if it has ancillary effects on another sphere of Community

87. Case C-319/97, *Kortas*, Judgment of 1 June 1999, ny. There is now a time limit within which the Commission must reach a decision, failing which the national measures shall be deemed to have been confirmed: new Art. 95(6) EC.

activity. So, a directive which is chiefly concerned with environmental, consumer or employee protection must be based on Articles 175, 153 or 137, respectively. It should not be based on Articles 94 or 95, even though it has some incidental impact on the functioning of the internal market, for example, by creating more uniform conditions of competition.<sup>88</sup>

This approach to the relationship between the Community's traditional economic and more recent social competences has rightly been considered a milestone in establishing the independence of the latter as against the former.<sup>89</sup> However, it must nevertheless be admitted that the test for legal basis now applied by the Court of Justice creates serious problems of legal certainty: the only way to be sure whether a measure which pursues both economic and social imperatives has been adopted under the correct legal basis is to ask the Court. Moreover, while the cases suggest that the Court will strive to carry out a thorough review of the objective context and content of the disputed act, there is still a degree to which subjective institutional preferences might be incorporated into that assessment.<sup>90</sup> Some commentators have suggested that, in the past, the Court preferred wherever possible to side with a legal basis which maximized the participation of the European Parliament and therefore the democratic credentials and supranational character of the Community legislative process.<sup>91</sup> It is equally possible that in a dispute over the validity of additional national regulation which turns ultimately on the correct legal basis of the relevant Community secondary legislation, the Court may be faced with a choice between advancing the internal market by encouraging uniformity (in which case it might prefer Article 95 as a legal basis), and protecting vulnerable social interests by permitting regulatory diversity (in which case one of Art. 137, 153 or 175 would seem more appropriate).

88. Case C-155/91, *Commission v. Council (Waste Directive)*, [1993] ECR I-939; Case C-187/93, *Parliament v. Council (Waste Regulation)*, [1994] ECR I-2857; Case C-84/94, *United Kingdom v. Council (Working Time Directive)*, [1996] ECR I-5755; Case C-233/94, *Germany v. Parliament and Council (Deposit Guarantee Schemes Directive)*, [1997] ECR I-2405.

89. Particularly when compared to the previous position in Case C-300/89, *Commission v. Council (Titanium Dioxide)*, [1991] ECR I-2867. Further: Chalmers, "The Single Market: From prima donna to journeyman" in Shaw and More (Eds.), *New Legal Dynamics of European Union* (Clarendon, 1995); Dashwood, "The Working Time Judgment in a wider perspective" in *The ECJ's Working Time Judgment: The Social Market Vindicated*, CELS Occasional Paper Number 2 (CUP, 1997).

90. Barents, "The internal market unlimited: Some observations on the legal basis of Community legislation", 30 CML Rev. (1993), 85; Emiliou, "Opening Pandora's Box: The legal basis of Community Measures before the Court of Justice", 19 EL Rev. (1994), 488; Geradin, "Trade and environmental protection: Community harmonization and national environmental standards", 13 YEL (1993), 151; Debroux, "Le choix de la base juridique dans l'action environnementale de l'Union européenne", CDE (1995), 383.

91. Case C-300/89, *Commission v. Council (Titanium Dioxide)*, [1991] ECR I-2867, para 20.

It is likely that legal base challenges concerning the choice between the various Community legislative procedures will decrease in frequency due to the greater consistency brought about by the Treaty of Amsterdam. By extending both co-decision between Council and Parliament and majority voting within Council across many of the Treaty's policy sectors (e.g. single market and consumer protection, and most of environmental and social policy), past disputes between the institutions concerning their legislative prerogatives have lost much of their relevance.<sup>92</sup> However, one might equally anticipate that the focus of the legal basis debate may now shift from being primarily "horizontal" (the balance of power between the Community institutions) to become more "vertical" (the tension between the growth of Community competence on the one hand and the preservation of Member State discretion on the other). Such a "vertical" legal basis dispute could well arise from the fact that single market harmonization regimes adopted under Article 95 EC permit additional Member State measures intended to protect social-welfare interests only under carefully regulated circumstances, whereas the related Treaty bases on environmental, social and consumer protection permit the Member States to supplement harmonized Community regimes in a much wider range of cases. It is thus possible to envisage a situation in which a national rule aimed at protecting consumers is challenged as being contrary to a single market directive, but the Member State argues that the directive itself was incorrectly adopted under Article 95 on the single market (with its restricted grounds of justification for the national rule) rather than, say, Article 153 EC on consumer protection (with its more permissive grounds of justification). Conversely, a Community trader might try to prise open a domestic market presently characterized by additional rules aimed at maximizing environmental protection, by arguing that the relevant directive should have been based on Article 95 instead of Article 175 and therefore that in the absence of notification and approval as provided for by Article 95(4)-(9) the national rules are inapplicable. Particularly in borderline cases, the Court may thus be called upon to display an institutional preference for either free movement or maximum welfare regulation.

Indeed, the problem identified here need not be limited to the overlapping policy relationship between legal bases such as Articles 95 and 175. Another example might be the relationship between Article 175 on the environment and

92. On the other hand, overlapping policy areas with contrasting legislative procedures persist and can cause problems even post-Amsterdam. This is well-illustrated by two recent legal basis cases, decided under the pre-Amsterdam Treaty but which could equally have arisen post-May 1999: Case C-42/97, *Parliament v. Council*, [1999] ECR I-869; Cases C-164-5/97, *Parliament v. Council*, [1999] ECR I-1139. Further: Cullen and Charlesworth, "Diplomacy By other means: The use of legal basis litigation as a political strategy by the European Parliament and Member States" 36 CML Rev. (1999), 1243.

Article 37 (ex 43) on the Common Agricultural Policy. Imagine a directive regulating a matter of joint agricultural and environmental interest which fails to provide for minimum harmonization: if the directive is based on Article 175 the Member State will still have the opportunity to adopt more stringent national standards under Article 176; but if the directive is correctly interpreted as an Article 37 measure, there will be no minimum harmonization facility at all. Indeed, if the interpretation offered above in respect of the judgment in *CIWF* proves to be correct, i.e. whereby the effect of a minimum harmonization clause depends not only on its express terms but also on the limits implied by virtue of the wider regulatory context in which it is located, it is possible that even if our hypothetical directive did make express provision for the Member State to adopt more stringent domestic rules, the impact of those rules on intra-Community trade would still depend on the choice of legal basis between Article 175 – domestic rules can apply to imported goods, and Article 37 – reverse discrimination only.

In short, any attempt to develop a coherent approach to the relationship between minimum harmonization and free movement within the internal market is complicated by the fact that the relevant Community legislation may itself pursue overlapping policy objectives, that the available legal bases may provide differing opportunities for creating or justifying additional national regulations, and that the test for determining the correct choice of legal basis is too abstract and potentially subjective to make the solution either consistent or predictable. The underlying regulatory infrastructure of the Treaty system thereby places inherent limits on the realization of a more clearly defined relationship between minimum harmonization and the internal market.

## 5. Conclusion

There has been a definite shift in the character of the Community, away from the domination of the internal market and its concomitant ideal of a uniform legal regime embracing all the Member States, and in favour of a broader range of potentially conflicting economic and social-welfare policy agendas with the obligation to accept a greater degree of legal diversity if each is to be addressed successfully within a more challenging political and institutional environment. This paper has attempted to examine some of the implications of this development, in particular, by assessing the impact of minimum harmonization on the principle of free movement for vital market factors such as goods and services. Conclusive answers have been difficult to formulate, but this in itself is indicative of a worrying state of affairs. It seems that neither the Treaty framers, the Community legislature nor the Court of Justice have yet developed a clear or an integrated approach towards the impact of differentiated social-welfare concerns on the operation of fundamental Treaty guarantees of free trade within the single market.

Thus, although the general idea of minimum harmonization is enshrined in the Treaty and accepted by the Court, its full implications do not seem to have been thought out. The Treaty failed to address several important questions about the permissible scope of more stringent national measures; the Court does not yet offer a systematic solution to aid in their resolution; in any case, the complex boundaries of the Community's diverse policy mandate as manifested in the Treaty text and adjudicated over by the Court mean that the opportunities for and character of minimum harmonization are to some degree innately difficult to describe with any great precision. As a result, the full potential of minimum harmonization to consolidate the Community's commitment to citizens' welfare even at the expense of economic integration remains unresolved.

Viewed in its wider context, one might also recall that minimum harmonization is just one aspect of the trend towards increased regulatory differentiation of which the Closer Co-operation provisions now stand at the pinnacle. The Community may soon be faced with the prospect of social, consumer or environmental policies which no longer consist of a body of common provisions applicable throughout all the Member States, albeit shaped by sometimes higher, sometimes lower national standards. Instead, it is possible that entire Community measures and even initiatives will apply only in certain countries while others retain their own domestic policies. One can thus envisage the emergence of ever-more complex regulatory patterns: instruments applying throughout the whole Community lay down certain common but not identical standards, while additional layers of obligation are added by new measures, each embracing different combinations of Member States and each in turn laying down certain common but not identical standards. Such a scenario would have serious implications for many established assumptions within the Treaty order, not only as regards the operation of the internal market,<sup>93</sup> but also concerning the efficient functioning and democratic legitimacy of the entire integration project.<sup>94</sup> Insofar as the conclusions reached by this article might prove indicative of a more general trend, they further reinforce the apparent need for the Community institutions more thoroughly to address the challenges posed by the changing nature of governance within a "differentiated Europe".

93. As regards which Art. 11 (ex 5a, as introduced by the Treaty of Amsterdam) EC spells out certain but not all of the parameters. Further: Weatherill, "If I'd Wanted You to Understand I Would Have Explained it Better: What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?" in O'Keeffe and Twomey (Eds.), *Legal Issues of the Amsterdam Treaty* (Hart, 1999).

94. E.g. Shaw, "The Treaty of Amsterdam: Challenges of flexibility and legitimacy", 4 ELJ (1998), 63; Walker, "Sovereignty and differentiated integration in the European Union", 4 ELJ (1998), 355.