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Harmonization of EU Contract Law adopted on the basis of Article 114 TFEU

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Table of content

Summary

Contract law has traditionally been regulated by national law which has raised certain problems in cross-border transactions caused by the divergences in domestic contract law among the Member States. Therefore, the diversity of national law has been increasing the challenges in practice for entrepreneurs which is causing a lack of legal certainty, uniformity and creates serious obstacles that hinder the well-functioning of the internal market.

There are relevant obstacles created by contract law. Concerning the pre-contractual stage, the notion of contract, validity and autonomy. During the contractual period often discrepancies occurs between EU law with national law and inconveniences regarding that the freedom of contract is limited by each Member States' rules which are different between them. Lastly, in the post-contractual stage, there are often barriers connected with the remedies for non-performance and nonconformity; enforcement, jurisdiction, and applicable law.

Accordingly, the rules and their scope are distinct in each Member States. This fact makes cross border transactions more expensive due to the obligation for the foreign undertakings to assume extra costs to get legal advice to ensure success in the cross border transactions. Furthermore, undertakings must assume the administrative cost in each jurisdiction involved in the transaction and their own jurisdiction in order to fulfill the different national requirements.

In consideration of the multiples barriers created by contract law that hinder the internal market, it is important to analyze whether the Union can act on contract law in the name of the internal market. Thence, the treaties lay down that Articles 4(2)(a), confers a shared competence of the internal market which means that the Union and the Member States can adopt measures to pursue this objective. Article 26 defines the internal market as the area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties, and Articles 114 TFEU and 115 TFEU confer the Union of the legislative power to adopt measures to ensure the well-functioning of the internal market.

The approximation of laws is a legal tool to help the market to function properly and is stated in Article 114 TFEU, which has a broad scope and also some constitutional limits to use it. Hence, firstly, Article 114 TFEU has a residual feature which means it is possible to use just if there are no other provisions available. Secondly, the approximation of the laws requires a multiplicity of national laws that hinders the well-functioning of the internal market. Thereby, the diversity itself is not a justification to use article 114 TFEU. It is a mandatory condition that the diversity of laws is causing obstacles for the internal market. Moreover, the approximation of laws refers to the harmonization of the existing national law which differs from the creation of new legal forms that fall in the scope of article 352 TFEU.

Thirdly, the measure to be adopted must have as a main objective the well-functioning of the internal market. It is not enough that the measure improves incidentally the functioning of the internal market. In addition, the measure to enact must identify clearly the current obstacles and/or the future obstacles that interfere with the internal market however the proposed measure shall be addressed to remove those identified obstacles. Lastly, the measure adopted on the basis of Article 114 TFEU shall comply with the subsidiarity and proportionality principles.

Other provisions that might be suitable as a legal basis of a future measure on contract law are Articles 81, 352, or 115 TFEU. A measure which uses as a legal basis Article 81 would be limited to cross border transactions excluding domestic transactions. In juxtaposition Article 352 TFEU might be is an appropriate legal basis as long as the measure to enact deal with the creation of news legal forms. Lastly, Article 115 TFEU is limited to enact directives and excluding the possibility of enacting regulations. Consequently, these articles have less probability to be used as a legal basis of a future harmonization of contract law due to its scope.

It is clear that Article 114 TFEU for its broad scope is the most optional provision to be used as a legal basis for a future measure on EU contract law. Thus, firstly regarding its residual feature, a future measure on EU contract law can fulfill these criteria due to there is not competence stated in the treaties regarding contract law and there is no other provision to be applicable.

Secondly, regarding the requirement that there shall be a multiplicity of national law that affects the internal market; undoubtedly contract law has been creating barriers that affect the functioning of the internal market. The numerous barriers created by contract law have been recognized by the Union. Thereby, an instrument to harmonize contract law can fulfill this requirement. Besides, the analysis of the future measure itself is required to determine if the measure is falling under the scope of harmonization (Article 114) or if it is falling under the scope of creation of a new legal form (Article 352 TFUE).

Thirdly, a measure that uses as a legal basis Article 114 TFUE shall identify the obstacles and the measure shall be addressed to remove these obstacles. This requirement can be satisfied by the future instrument that harmonizes contract law, taking into account that in this long evolution of EU contract law the Union has identified obstacles created by national contract law and recognizes that are significant for the internal market. Accordingly, it is likely that the measure to enact can satisfy this condition.

Lastly, regarding ensuring subsidiarity and proportionality principles, a future instrument on contract law is feasible to respect that subsidiarity and proportionality, on the ground that it is the Union who can achieve better the objectives pursued and it is unlikely that the measure goes beyond the strictly necessary to reach the aims.

However, the election of a legal basis will depend on the content and the objectives of the future measure to harmonize contract law. Notwithstanding, Article 114 TFEU would be the appropriate

legal basis. As long as the future measure on contract law satisfies the conditions to use Article 114 TFEU and observed the case law regarding the scope of Article 114 TFEU as a legal basis.

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Abbreviations

CESL	Common European Sales Law
CFR	Common Frame of Reference
Charter	Charter of Fundamental Rights of the European Union
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	The European Court of Justice
DCFR	Draft Common Frame of Reference
EC	The European Community
EU	The European Union
PECL	The Principles of European Contract Law
TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
The Commission	The European Commission
The Council	The European Council
The Parliament	The European Parliament
Unidroit Principles	Unidroit Principles of International Commercial Contracts
The Union	The European Union

1. Introduction

1.1. Background

The European Union (EU) has as an important objective to ensure the free movement of goods, services, capital and persons.[1] In 2001 The Commission expressed its concerns regarding ´*problems for the functioning of the internal market resulting from the co-existence of different national contract laws*´.[2] Thereby, the discussion arose regarding whether or not the Union shall intervene in private law in order to eliminate obstacles for the good functioning of the internal market.[3]

In 2003 the Commission and the study Group on a European Civil Code conducted a thorough examination of the main obstacles in contract law that entrepreneurs have to deal with during a cross border transaction and identified that the internal market is affected by divergences in contract law at least in four ways.[4]

The first identified obstacle regards the fact that mandatory rules are irreconcilable among the Member States. Thence, mandatory requirements in a Member State might be a non-mandatory requirement in another Member State and is increasing the costs for foreign entrepreneurs to fulfill new requirements. In many cases, this forces a party to give up being part of the business because of the impossibility to fulfill new requirements.[5]

The second identified obstacle is that foreign undertakings are obligated to assume costs that later on are passed on to the consumer.[6] Inter alia, obligation regarding the use of notaries or the use of the national language in the contract that implies paying for official translators.[7]

The third obstacle is the obligation for foreign undertakings to contract legal advice.[8] Hence, the lack of knowledge for the rules of other jurisdictions could affect business in itself. Such, there are requirements of form that can affect the validity of the contract.[9] Also, substantive laws that impact the performance of the business are often linked to consumers' rights. Thereupon, the undertakings must have followed procedural and substantive rules, otherwise, the contract could be declared void.

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[1] Article 26 TFEU.
[2] Commission ´Communication to the Council and the Parliament on European Contract Law. COM (2001) 398 final OJ C 255, (Communication on European Contract Law COM (2001)), para 72.
[3] Ibid, para 1.
[4] Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code Christian Von Bar (Osnabrück) And Ole Lando (Copenhagen) With Stephen Swann (Osnabrück) ´European Contract Law: European Review of Private Law Ch II. Obstacles to Exploitation of the Internal Market Created by Diversity in Contract Law in the Member States.
[5] Communication on European Contract Law COM (2001), paras 26-27.
[6] Common European Sales Law CESL (COM/2011/0635 final - 2011/0284 (COD) (2011) OJ N° 452, Explanatory Memorandum, point 1.
[7] Commission ´Communication from the Commission to the Parliament and the Council - A more coherent European contract law - An action plan´ COM (2003) 68 final OJ C 63 (Action Plan), para 35.
[8] Communication on European Contract Law. COM (2001), para 31.
[9] Action Plan, para 34.

Lastly, the study determined that there is a lack of legal certainty in EU contract law; the myriad of directives have arisen inconsistencies between them. As a result, many directives provide different rules for similar situations. For instance, the right of withdrawal in the directives on doorstep selling,[10] and distance selling of financial services[11] established different times and different methods to withdrawal an offer. Therefore, the lack of uniformity in EU contract law provokes fears in the entrepreneurs to trade abroad, affecting the internal market.

The Commission proposes diverse solutions to the problem. Such as, (i) EU does not need to interfere, and the market will regulate that by itself, the pressure exercised by the competitors, consumers, suppliers and sellers will fix the problem. (ii) Providing a non-binding common law, such as guidelines that complemented with broad information regarding mandatory requirements. (iii) Improve the exist contract law and enact new regulation or directives to regulate certain aspect that has not been regulated. (iv) Create a new legal instrument that might replace national regulation or might co-exist the law.[12]

The topic is highly controversial and the discussion encompasses different angles from the EU constitutional perspective which are also approached in this research. Firstly, the evolution on EU contract law, [13] the current limited EU approach on contract law, [14] and the analysis of whether or not the diversity national contract law represents an obstacle for undertakings in the exercise of the freedoms. [15] Secondly, regarding internal market and the scope of Article 114 TFEU focusing on the evolution of the internal market and the approximation of laws, the criteria to use Article 114 TFEU and its constitutional limitations. [16] Thirdly, the analysis of Article 114 TFEU as a plausible legal basis to be used in the harmonization of EU contract law, [17] focusing in the others provision that can be the legal basis of a future measure on contract law and Article 114 TFEU as the suitable legal basis to adopt a future measure to harmonize contract law.

1.2. Purpose and research questions

The aim of the thesis is to explore the constitutional foundation for more far-reaching European action on contract law, examining the feasibility of the approximation of laws on contract law according to the scope of Article 114 TFEU as a legal basis. Thus, the thesis seeks to answer the main research question:

[10] Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (1985) OJ L 372. It has been replaced by the consumer right Directive 2011/83 (2011) OJ 304/64 (Directive 85/577 on contracts negotiated away from business premises).
[11] Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services and amending Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (2002) OJ L 271.
[12] Communication on European Contract Law COM (2001), para 10.
[13] Communication on European Contract Law COM (2001), pt 5, 3.1, ch Existing legislation.
[14] Action Plan, ch 3. Identified problem areas.
[15] Action Plan, ch 3.2. Implications for the internal market.
[16] Case C-376/98 Federal Republic of Germany v Parliament and Council of the European Union (2000) I-08419 (Tobacco Advertising I)
[17] Communication on European Contract Law COM (2001), ch 4. Options for future EC initiatives in contract law, Action Plan, ch 4.2.To promote the elaboration of EU - wide standard contract terms, ch. 4. Need for Further-Reaching EC Action in the Area of Contract Law.

Whether or not Article 114 TFEU is the appropriate legal basis for a future measure of the harmonization on EU contract law

For the purpose of answering the main question, the following sub-questions will be examined:

(i) How can the differences among the Member States' contract laws impede the well-functioning of the internal market?
(ii) What is the constitutional foundation to ensure the internal market? and what is the scope of Article 114 TFEU to be used as a legal basis in an EU measure?
(iii) What are the provisions that can be used as a legal basis to pursue the harmonization on EU contract law?
(iv) What are the criteria to fulfill in order to use Article 114 TFEU as a legal basis for a future measure to harmonize EU contract law?

1.3. Method and material

The thesis is developed through a legal dogmatic method that is used when studying normative legal material. This method consists of clarifying the meaning and significance of the rule of law, proceeding from its own content.[18] In legal science, this method encompasses the analysis of the principles, structure, sources, concept of law dogma, legal model, legal technique and the doctrine of law.[19] Thereby, for the study of a possible harmonization on the basis of Article 114 TFEU is using traditional legal sources for examining EU primary law mainly the Treaty on European Union (TEU)[20] and Treaty on the Functioning of the European Union (TFEU)[21] to establish the competence and objectives of the Union linked with contract law. Also, secondary legislation is taken into consideration, mostly relevant directives that approached specific areas of contract law, inter alia, directives that regulated the notion of contract, requirements of validity or remedies for non-performance to point out the lack of uniformity in EU contract law. Moreover, the analysis of the case-law from CJEU is crucial in order to understand the scope under Article 114 TFEU and constitutional boundaries recognizing the controversies concerned that the Union harmonizes contract law in the name of the internal market.

[18] Alexander V. Petrov; Alexey V. Zyryanov, ´Formal-Dogmatic Approach in Legal Science in Present Conditions' (2018) Vol. 6, Journal of Siberian Federal University. Humanities & Social Sciences, 968 <http://elib.sfu-kras.ru/bitstream/handle/2311/71664/Petrov.pdf;jsessionid=75531C31D825685FCE87249268AA2284?sequence=1> Accessed 23/03/2020, Álvaro Núñez Vaquero, ´Five Models of Legal Science´ (2013) Revus international journal, <https://journals.openedition.org/revus/2449> Accessed 12/05/2020, Herman U. Kantorowicz and Edwin W. Patterson, 'Legal Science--A Summary of Its Methodology' (1928) Columbia Law Review, Vol. 28, No. 6. 679-707.
[19] Ibid,1.
[20] TEU (2012) OJ C326/47.
[21] TFEU (2012) OJ C326/47.

The debate of a possible harmonization on contract law has an economic and political decisive factor before the Union. Therefore, this thesis through the formal dogmatic approach can study the topic from a legal perspective, excluding considerations that deal with economics, politics, or others.[22]

In addition, it is using a systematic interpretation that includes grammatical interpretation, purpose, and context of the law. [23] For that purpose, this study used a diverse range of sources which are useful to gain a big picture of the discussion regarding the possibility to harmonize contract law on the base of Article 114 TFEU. A numerous official documents of the EU was taken into consideration to understand the evolution in the Union of contract law and the edges of the discussion. In addition, the study is based on literature that enlighten some point of views of scholars regarding the topic and the main barriers of the Union to take action in contract law.

This research is conducted according to the following manner:

Firstly, as a starting point, it is necessary to determine whether the multiplicity of national contract law can represent an obstacle for the well-functioning of the internal market. Thus, this study presents the evolution and the current state of European contract law. Moreover, the study highlights the challenges for undertakings on across border transactions that are an effect of the lack of harmonization on contract law, which generates costly transactions for foreign entrepreneurs that cause a negative impact on the exercise of the freedoms.

Secondly, the aim is to study the Internal market and Article 114 TFEU, through the research of the evolution of the internal market and the approximation of laws. The emphasis is the constitutional foundation to ensure the internal market and particularly, a close examination of the scope of the approximation of laws stated in Article 114 TFEU.

Thirdly, the thesis is focusing on Article 114 TFEU as the appropriate legal basis for the approximation of law in EU contract law. Therein, it explores to what extent a future measure on contract law could be based on other constitutional provisions as a legal basis. Finally, to conclude that the divergences on national contract law fulfill all the criteria to uses Article 114 TFEU as a legal basis for a future measure on the harmonization of EU contract law.

1.4. Delimitations

Due to the fact that the topic of this thesis is highly controversial, and can be approached by numerous angles, a narrow scope is required.

This thesis mainly applies the following two limitations. Firstly; contract law is regulated mainly by the Member States hence, this thesis does not aim to make an analysis comparative in contract law

[22] Petrov ´Formal Dogmatic Approach´ (n 18) 1.
[23] Marko Novak, Vojko Strahovnik, Modern Legal Interpretation: Legalism or Beyond (Cambridge Scholars Publishing, 2018) 98.

among the different domestic legal systems. In juxtaposition, this study selected specific topics in the process of the contract and its performing to point out the deficit of regulation or the clash or lack in specific areas in contract law that represent barriers to trade between the Member States.

Secondly, this thesis does not include an exhaustive analysis of all the directives enacted on contract law. Taking into account that there is a vast number of directives. In addition, some directives approached contract law with isolated aspects in its contents. Thereby, this study analyzed relevant directives concerning contracts that can provide examples regarding the lack of legal certainty in EU contract law and which are affecting the internal market.

1.5. Outline

The second chapter is regarding EU contract law includes the evolution of the EU contract law, the current state of EU contract law, and set up the relevant obstacles caused by national contract law during cross border transactions which affect the internal market

The third chapter concerning to the internal market and Article 114 TFEU approaches a brief evolution of the internal market and Article 114 TFEU, the constitutional foundation to ensure the internal market, the scope of Article 114 TFEU, in addition, the differences between the positive and negative harmonization; and minimum and maximum harmonization.

The fourth chapter deal Article 114 TFEU as a plausible legal basis to be used on the harmonization of EU contract encompasses the examination of different provisions that can used as a legal basis to extend the Union competence on contract law, subsequently, the study is focusing of the criteria to use Article 114 TFEU as a legal basis for a future measure on the harmonization of contract law, and overview of the legislative discretion of the Union under Article 114TFEU.

Lastly, the conclusions chapter contains the answer to the questions research and the main findings of the present paper.

2. EU Contract Law

2.1. The evolution on European contract law

Contract law is mainly regulated by national law.[24] Nevertheless, the creation and expansion of the EC triggered interaction between national and supranational law. Furthermore, the chain of European provisions impacted some areas of contract law.[25] Thus, the first time that European

[24] Lucinda Miller, The Emergence of EU Contract Law, Exploring Europeanization (Oxford University Press Publishing, 2011) 14-18.
[25] Reiner Schulze, New features in Contract Law (European Law Publishers, 2007) 11-13.

institution started their studies in contract law was the 1980s[26] which was the first stage for the creation of the Lando Commission´s group that was in charge of studies of European contract law.[27]

The Lando Commission's achievement was the Principles of European Contract Law (PECL). The PECL has part I, part II, part III published 1995, 1999 and 2002, respectively.[28] The PECL is a non-binding document that contents a set of rules in contract law, essentially the main principles or guides to follow. Thereupon, the PECL is the guideline for European contract law.[29] The project´s objective was to set out principles that underlie the contract law of all Member States.[30] That required comparative research of all the domestic law of the Member States, analyzing the best rules without undermining any jurisdiction in particular but seeking to promote the aim of the EU. Thereby, the PECL has been the cornerstone of the directives and regulation of European contract law. Furthermore, It has been recognized by CJEU and in national courts as an important tool to resolve the cases.[31] It was inspired by United Nations convention on contract for the CISG[32] and bears similarities to the UNIDROIT principles, but still there are some differences.[33] The PECL is founded on three pillars; freedom of contract, contractual certainty, and contractual fairness.[34] The PECL works as a guide at national and European level to fill gaps and to provide inspiration for national legislator when new measures are enacted or when existing ones are improved. The PECL might be considered as a precursor to European Contract code or any new document that will enact in the field.[35]

On 2001 the Commission through Communication [36] opened the debate regarding that the multiple contract law is hindering the smooth functioning of the internal market. This communication approached firstly, if the existing situation in contract law hinder the internal market and secondly, options for the future in contract law, it examined four scenarios, (i) no European Community (EC) action, (ii) promote the development of common contract law principles leading to more convergence of national laws, (iii) improve the quality of legislation already in place, (iv) adopt new comprehensive legislation at EC level.[37] The options could be combined between them to reach a better outcome.

[26] Parliament, ´Resolution on action into line the Private Law of the Member State´ (1989) OJ C158/400.
[27] Reiner Schulze and Fryderyk Zoll, European Contract Law (CH Beck, Hart, Nomos 2016) 5.
[28] PECL Parts I, II, and III, O Lando and H Beale (eds) Kluwer 2000; Principles of European Contract Law, Part III. O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.) Kluwer 2003.
[29] Schulze and Zoll, European Contract Law (n 27), 22.
[30] Hugh Beale, ´The Development of European Private Law and the European Commission's Action Plan on Contract Law' (2005) Juridica International. Law Review. University of Tartu, 4-16.
[31] The PECL. Preamble.
[32] CISG (2010.)
[33] Hugh Beale, Benedicte Fauvarque-Cosson, Jacobieb Rutgers and Stefan Vogenaurer, Cases, material and text on contract law (Third edition -Hart – Oxford 2019), 55.
[34] Benedicte Fauvarque –Cosson & Dennise Mazeaud, European Contract Law, (Sellier European Law Publishers, 2008) Page XXXIII.
[35] Christian Twigg-Flesner, The Europeanisation of Contract Law current controversies in law (Second edition, Routledge 2013) 114.
[35] Schulze, New features in Contract Law (n 25) 12-14.
[36] Communication on European Contract Law COM (2001), 1.
[37] Ibid 10 -15; Jens Karsten and Ali Sinai ´The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law´ Academic Journal, Journal of Consumer Policy, Vol. 26 Issue 2, 159-195, 37.

In 2003 the Commission brought an Action Plan for a more coherent European Contract Law [38] which continues the debate by identifying the problems related to business and consumers in the practical scenarios. The Action plan divides the matter into two areas; the lack of uniformity at the European level and matters that affect the internal market. This document proposed again to the measures that can help to remove the barriers. Firstly, increase the coherence of the community acquis, through CFR[39]. Secondly, promote the elaboration of EU-wide general contract terms. Thirdly, the analysis to review the need for an optional instrument. Fourthly, do nothing regarding the topic.[40] Thus, The Action Plan worked as a first step towards contract law at a European level. However, despite that the Action Plan pointed out huge problems that can constitute a barrier for the internal market and it flagged that the measures enacted were not sufficient to resolve the problems. Nevertheless the Commission concluded with the possibility that improving the acquis will be enough to handle the problem and it is not need of abandoning the sectoral approach.[41]

An important contribution of The Action Plan was anticipating the direction of the CFR and this proposal contained the principles and terminology in the area of contract law. This would be ensuring the coherence of existing and future acquis.[42] Moreover, the CFR provides a key regarding the common definitions in contract law and sets up the basic rules of contracts. The foundations and guide for the CFR were the PECL and Acquis Principles. It is important to point out the notion CFR was mentioned in the Action Plan as the first step to advance in the field. Further, the CFR serves as an orientation for the legislature when is enacting new measures or reviewing the existing ones, beyond that CFR represents the political discussion regarding a new instrument in contract law mentioned in the Action Plan. Besides, the CFR can be used as the foundation of this new optional instrument. [43]

Simultaneously with the work on the CFR, the Commission enacts the Communication European concerning to the way forward.[44] It is enacted on grounds of the Action Plan. Thence, The Way Forward Communication refers to the three options contained in the Action Plan.

Firstly, regarding the measure I of the Action Plan, points out that the CFR would be the best way to improving the present and future acquis and used as an example the consumer acquis to show what would be the practical exercise to review the acquis and the questions the reviewer shall be doing himself and regarding the legal nature of the CFR said that shall be non-binding document.

Secondly, regarding the measure II proposed in the Action Plan, *promoting the use of EU-wide standard terms and conditions (EU-wide STC)*, refers of the need to identify legislative obstacles to

[38] Action Plan, 63.
[39] CFR Gerhard Dannemann and Stefan Vogenauer. (Oxford OUP 2013, 789 + lxvii.) September 2012.
[40] Ibid.
[41] Ibid. Summary; Jens Karsten, (n 37).
[42] Action Plan, 59-62.
[43] Schulze, New features in Contract Law (n 25) 14-16.
[44] Commission ´Communication from the Commission to the Parliament and the Council European Contract Law and the revision of the acquis: the way forward' COM (2004) 651 final JO C/2005/14/6 (The Way Forward).

the use of EU-wide STC. Thereby, set out the importance to arrange a survey as a consultation with stakeholders on its content and structure of the EU-wide STC.

Lastly, regarding an optional instrument (Measure III of the Action Plan) refers that the sectoral approach shall not be removed because there is no evidence that the sectorial approach caused inconvenience.

Continuing with the process, The Lando-Commission, presented in 2009 the DCFR [45] that contains key definitions and general rules inter alia, invalidity, the formation of the contract and remedies for non-performance. It should be interpreted through the scope of the definition of the principles stated in PECL. The CFR was used as a guideline for the DCFR, but despite the similitude between CFR and DCFR there are differences, and some scholars think that is creating an ambiguous concept in contract law.[46]

The DCFR is an optional instrument and some academics think that the main purpose of the DCFR is serving the legislator to show the needs of new measures or to review the coherence of existing ones. Further, it might be the starting point in case the discussion moves forward to the need for a new instrument such it is mentioned in the Action Plan.[47]

On October 2011 the Commission presented the proposal for a Regulation on CESL. And, initiated the legislative process to enact this optional instrument. The objective was a set of rules to use in cross-border transactions for sales, supply digital content and services. Besides. It provides the possibility to other kinds the contract to selected these rules as the applicable law in the contracts to be governed for these rules.

The CESL adopted on the legal basis of Article 114 TFEU brought a serious discussion regarding the scope of Article 114 TFEU. Particularly, if Article 114 TFEU shall be use with the main objective to eliminate obstacles that hinders the internal market or deals with the appreciable distortion of competition is the CESL genuinely dealing with a distortion of the competition or CESL just is dealing with the divergence in the national law. Nevertheless, the Commission in the explanatory memorandum affirms that the difference in domestic law hinders traders and consumers in cross border transactions according to some surveys.[48] Moreover, the transaction is complex and more expensive when involving more than one jurisdiction. In addition, is difficult for the foreign to find the applicable law.[49] However, this optional instrument such as the proposed CESL will be able to give greater importance to future EU measures.

[45] DCFR Christian Von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale(Eds), (ISBN 978-3-86653-097-3 publishers GmbH, Munich 2009) DCFR.
[46] Twigg-Flesner, The Europeanisation (n 35) 114.
[47] Schulze, New features in Contract Law (n 25) 14-16.
[48] CESL, N° 452, Explanatory Memorandum, pt 1 fn 1.
[49] Kathleen Gutman, The Constitutional Foundation of European Contract Law (Oxford, 2014) ch. 6.4.4.

Private law is essentially developed by the Member States. Notwithstanding, trough time the Union has been aware of the obstacles that face the internal market by the divergences of contract national law. Hence, contract law has been the object of European legislative attention for decades, working to improve the situation and regulate with non-binding instruments the existing challenges caused by contract law exclusively when these challenges hinder the well-functioning of the internal market. It has not been an easy task to enact and developed a non-binding legal framework such as PECL, CFR, DCFR, and CESL, which is transforming the dynamic of the classic theory of private law. However, it has been through these non-binding legal frameworks that EU contract law has emerged and developed and turning part of the European policymaker.

2.2. Current state of EU contract law

The Europeanization of contract law is subject to an ongoing discussion and it has arisen a lot of concerns regarding how the Union should approach the topic. Since the beginning, the possibility to create a new instrument was mentioned in the Action Plan. Nevertheless, nowadays the debate is still going on and there is not any binding either unique document. Thereby, the current state on European contract law is that there exist a number of measures that directly or indirectly is affecting contract law. Most of the measures directly linking to contract law are to protect the consumer and fewer are regarding aspects that affect the substance of contract law. Accordingly, The Union is continuing with the sector-specific approach and addressed its attention to a specific field in contract law, usually to protect the weaker party.[50]

The approach of EU contract law has been fragmented considering the lack of exclusive competence on the field, limiting the Union intervention just to ensure the internal market. Thence, there is not a general harmonization on contract law. Over a period of more than 20 years, many measures has been adopted in the matter but with specific purposes and, as an outcome there is a patchwork of rules which does not match together well.[51] Thus, there have been enacted measures in particular issues in the field on contract law but with gaps, overlaps, and in general lack of coherence on contract law.

The same concern is shared for CJEU, which has been ruled specific matter without count with a general European legal framework. It has been a challenge for CJEU to give a proper answer without having the proper legal tools. That is the reason that the Court has been involved to give some rather strained reasoning. [52] In the current time, there are primary law, secondary law, and supplementary source of law on EU contract law which is addressed just to specific issues usually linking with avoiding an obstacle for the internal market.

[50] Beale, Cases, material and text (n 33) 11.
[51] Twigg-Flesner, The Europeanisation (n 35) 115.
[52] Ibid.

2.2.1. Primary Law

The supreme source of the European Union contract law is the primary law. In the top of the hierarchy of European legal order are the TEU and TFEU. As a main legal source, there is Article 114 TFEU which provide the legislative power of the Union to reach the purpose of the internal market.[53]

In general terms contract law is developed for national law and for the Principle of freedom of contract which plays an important role where the autonomy of the parties sets up their own rules for their own business.[54] Thereby, National law and free autonomy of the parties cannot undermine the EU rules, inter alia, by Article 28 TFEU which stated the free circulation of goods within EU territory; Article 56 free circulation of services neither represents an obstacle to reach the internal market.

2.2.2. Secondary law

Secondary law that developed contract law includes regulations, directives, opinions, and recommendations. In the particular encompassed a bulk of directives which has as the main goal to eliminate any hinder in the well-functioning of the internal market. The directives have been often used on topics regarding contract law in comparison with regulations that have been rarely used. [55]

The directives have enacted in specific matters, as it will show in the following general description, but always the common main aim of the directives are to ensure the internal market. It is clear that the most developed field on contract law is the protection of the consumers and specifically in the IT sector. Thus, it has been recognized by the Union that there is an aim in an increasingly technology-driven economy and promoting the Digital Single Market Strategy some of the relevant directives are (i) Directive 99/44 on the sale of consumer goods and associated guarantees which ensure the cross-border shopping; [56] (ii) Directive 93/13 on unfair terms in consumer contracts which the aim is to eliminate unfair terms from contracts drawn up between business for consumer.[57] (iii) Directive 85/577 on Contracts negotiated away from business premises. This set of rules is to protect consumers against dishonest business practices in connection with contracts negotiated in the distance.[58] (iv) Directive 97/7/ on distance contracts laying down a common set of minimum rules for consumers and suppliers when the contract is concluded using distance communication.[59] (v) Directive 85/374 regarding the liability for defective products this directive is a measure which the objective is striking a balance between a high level of consumer protection and a stable legal framework of liability for producers.[60]

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[53] See Ch. 3 Internal Market of this thesis.
[54] Schulze; Zoll, European Contract Law (n 27) 12- 15.
[55] Ibid.
[56] (1999) OJ L 171.
[57] (1993) OJ L 95
[58] (n10)
[59] (1997) OJ L 144
[60] (1985) OJ L 210 (Amended by Directive 1999/34/EC (1999) OJ L 141 (Liability for Defective Products)

Other topics that Union has put its attention on are electronic commerce some of the key directives are the Electronic Commerce Services Directive that are regarding the free movement of information society services between the Member States.[61] And, the Directive on Electronic Signatures in Contracts.[62]

There are several directives that conform the EU acquis also in the Action Plan is provided a guide with the relevant directives connected with contract law .[63] It is difficult to follow all the content in contract law at the European level, and, it has been becoming in the challenge in any cross border transaction which shall track EU regulation and national regulation from all the Member States involved in the business.

2.2.3. Supplementary sources of law

Supplementary sources in law have been used to develop EU contract law through the case law. Firstly, case-law of The CJEU has developed rules in specific issues connected to contract law. Inter alia, *Handte*[64] that approached freedom of contract, *Quelle*[65] that considered the supremacy of EU law over national law or Pammer[66] dealt with jurisdiction. There is a broad case law that provides specific ruling regarding contract matters which ends up becoming a valuable legal tool to fill the gaps and to be used as a guide not just for the national courts, but also for private parties when settling down a business.

Secondly, the general principles are included in supplementary sources.[67] Principles are unwritten sources of law, often developed by the case-law of the CJEU. Thereby, conferral, subsidiarity, proportionality, and freedom of contract or autonomy have been the key principles in the discussion regarding a future harmonization of contract law adopted on the basis of Article 114 TFEU.[68]

Lastly, international law has provided inspiration to EU contract law. Thereupon, instruments such as the CISG and Unidroit Principles has been taken into consideration to develop EU contract law.[69]

Therefore, despite the lack of binding regulation in contract law, the case law, the principles and international law have played an important role by providing guidelines for national courts and

[61] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (2000) OJ L 178. (Directive on electronic commerce)
[62] Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures (1999) OJ L 13 (Electronic Signatures)
[63] Action Plan; Schulze; Zoll, European Contract Law (n 27), 17-22.
[64] Case C-26/91 Jakob Handte & Co. GmbH (1992) I-03967
[65] Case C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände (Quelle) (2008) I-02685
[66] Cases C-585/08 and 144 /09 Joined cases Peter Pammer v Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v Oliver Heller respectively (Pammer) (2010) I-12527
[67] Ole Lando, ´Principles of European Contract Law: An Alternative or a Precursor of European Legislation´ (1992) Journal of Comparative and International Private Law, 56. Jahrg., H. 2, Alternativen zur legislatorischen Rechtsvereinheitlichung, 261-273.
[68] Alexander Wulf, ´Institutional Competition between Optional Codes in European Contract Law. A Theoretical and Empirical Analysis´ Springer Gabler, Wiesbaden, Online ISBN: 978-3-658-05801-2 (2014) 22-24.
[69] Beale, Cases, material and text (n 33), 28-34.

European Courts which are using these legal tool to fill lacunae and provide an uniform interpretation.

2.3. Main obstacles created by contract law that affected the internal market

2.3.1. Pre contractual stage

2.3.1.1. Notion of contract

The contract definition is an essential part of contract law. Moreover, that is the beginning of the discussion, nowadays there is not legal biding framework that lays down the legal concept of contract at the European level.

The definition of contract is connected in all Member States with the notion that individuals are able to provide a binding effect to their own rules. In this respect seeking to set duties and rights for each party in a business.[70] Nevertheless each Member State has its own scope of the definition of contract.

International contract approach contract which the parties have a connection with more of one Member State.[71] Moreover CISG stated that an international contract occurs when the parties concluding the agreement have their respective domicile in different country.

The DCFR defines the term contract as ´an agreement which is intended to give a rise to binding legal relationship or to have some parties some other legal effect. It is a bilateral or multilateral juridical act´.[72] Then in the paragraph of the same Article the DFCR provides the definition of the judicial act and said that it is ´any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral´.[73] In addition, the CESL stated that ´contract means an agreement intended to give rise to obligations or other legal effect and obligations means a duty to perform which one party to a legal relationship owes to another party'.[74] Nevertheless, DCFR either CESL are binding instruments. Consequently, it can be used just as an interpretative tool. A fact which is relevant is that even the influence of the DCFR in the new proposal CESL, the CESL does not adopt the definition of the juridical act.[75] Moreover, the diverse directives in contract law do not define the contract itself. Notwithstanding, the directives allow the understanding of the contract according to Article 2(a) CESL.

[70] Schulze, New features in Contract Law (n 25) 33.
[71] Unidroit Principles.
[72] DCFR. Book II. Ch. I General Provision II. – 1:101: Meaning of "contract" and "juridical act".
[73] Ibid.
[74] CESL, Article 2.
[75] Schulze; Zoll, European Contract Law (n 27) 33.

Such lack of binding definition has arisen discussions regarding which is the scope of the contract´s definition. Each jurisdiction laid down the definition of contract which time to time clash with the definition from other Member States. Thence, civil law and common law have a different scope in the definition of the contract. The main discussions are that while for England gifts fall out the scope of the definition of contract in most of the civil law countries gift falls within the scope of the definition of contract, on the other hand, authors point out that agree that gifts fall in contract definition is relevant for developed contract law. An identical situation exists with the act of bargain which for some countries it is part of the contract and other it is not part of the contract. Lastly, a common discussion is to address whether or not a unilateral act can be considered in the scope of the contract definition. Such as the promise to give a reward, it does not fall within the scope of the definition of a contract when is a unilateral act without acceptance. The PECL referrer this case as promise intended to be binding without acceptance.[76]

In conclusion, there is a lack of uniformity in the contract notion at the European level. Part of the problem is that the contract definition is not in a binding EU legal instrument. Despite that fact, cross-border transactions are possible to make, often the contract is defined in similar terms in most of the Member States which facilitate for the entrepreneurs make business. However, discussions regarding the scope are part of daily business life that trigger legal uncertainty. As a consequence, national court and private parties shall have broad interpretation and use legal tool that provides guides, such as optional instruments, international instruments, and case law.

2.3.1.2. Validity

There are no directives addressed to the validity. Notwithstanding, there are many EU rules that can affect the pre-contractual stage and shall be respected in order to a good development of the contract. For instance, the CJEU has been clear regarding the scope of unfair term in the contract, it settles down that the Directive[77] must be interpreted in which a contract concluded between a seller or supplier and a consumer cannot continue in existence after an unfair term has been deleted. That provision does not preclude a rule of national law enabling the national court to cure the invalidity of that term by substituting for it a supplementary provision of national law.[78]

Article 13 of the Commercial Agent Directive included a requisite for valid the contract which stated that each party must receive from the other a signed written document where stated all the term and conditions and the consequence of the lack of evidence in writing is that the agency can be declared invalid. [79]

[76] PCEL, Article 2.
[77] Directive unfair terms, Article 6(1).
[78] Case C-26/13 Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt (2013) OJ C 156.
[79] Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (1986) OJ L 382, Article 13

In the Electronic Commerce Directive laid down, the obligation of the Member States regarding ensuring that the contracts can be concluded with the use of electronic tools. Moreover, the Member States shall ensure that the legal requirements applicable to the contractual process do not create obstacles for the use of electronic contracts either such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic tools.[80] Nevertheless, these rules have many exceptions described in the directive mentioned. In addition, this directive does not set out how the Member State can accomplish this obligation either how can be adjusted domestic law to the new requirement.[81]

Those were a few specific examples of relevant requirements that might affect the validity of the contract. Nevertheless, there are many directives and each topic shall be studied in specific. However apart of these specific directives there some provision in the TFEU connected with competition law that might affect the validity of the contract. [82]

Article 101 TFEU laid down that the agreement that shall affect the validity would be agreements which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Such as fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment and other stated in the mentioned provision. In addition, any abuse of the dominant position through contracts will be void as it is stated in Article 102. Except because the agreement falls within the scope of the regulation of the block exception regulation 2790/1999 on vertical.

On the whole, the validity of a contract can be affected for the non-compliance of any provision of the directives or the breach of the treaties, not to mention that each Member States has its own rules that might threaten the contract as void.[83] The invalidity can be a sanction for non-fulfillment of substantive legal requirement or formalism who are involved in the different stages of the contract (pre-contractual, contractual and post-contractual).[84] Widely known public registration is mandatory when is involving the transferring of land;[85] some contract requires notarization such as transfer shares, leases, and gifts.[86] As aforementioned, gifts for its particular legal nature are treated distinctly while in civil law gift promises are valid if there is a notary record in common law all the promises are unenforceable.[87] Those were just a few examples of the numerous requirements that are demanded in each Member State according to the transaction. The Union has recognized that diversity of law regarding validity represents a barrier for the undertakings.[88] Thus, entrepreneurs that make cross-border business are aware of the serious risk that it can represent, often managed

[80] Directive on electronic commerce, Article 9(1).
[81] Twigg-Flesner, The Europeanisation (n 35) ch3.
[82] Ibid. ch 3.
[83] Kötz H, European Contract law (Second edition, Oxford University Press 2017) 80-84.
[84] Beale, Cases, Material and Text (n 33) 397.
[85] Kötz (n 83) 85
[86] Beale, Cases, material and text (n 33) 398.
[87] Kötz (n 83) ch 4.
[88] Action Plan, paras 33-37

the risk by getting legal advice ensuring success in the transaction, and that the contract does not fall in any cause for invalidity.

2.3.1.3. Autonomy

The autonomy of the parties is the foundation of the cross border transaction and the EU has a deep respect for it. The autonomy of the parties is also known as the principle of freedom of contract which is defined as the free election to choose with who negotiated and the terms and conditions that will regulate their relationship.[89] Hence, In the *Handte* case The CJEU settled down the freedom of the contract, emphasizing that each party is engaged with the scope of the obligation accepted in the contract. Consequently, a situation which falls out of the contract´s scope, there is no obligation by the party to assume duties without the free will to accept that before the occurrence. Also, it emphasized to whom the legal action shall be addressed. In the specific case, the action was relating to defects in goods or to their unsuitability for their intended purpose. In which the plaintiff is the sub-buyer of goods and the action is against the manufacturer, who is not the seller. In this scenario the action was not valid, taking into account there is a chain of contract and each contract establishes obligations of each part, therefore, the sub-buyer could not go directly to sue the manufactory.[90]

In the same line of reasoning, the CJEU using *Handte´*s case resolve the *Européenne´s* case and laid down that the party who got damages of their goods in a transport operation cannot seek the compensation from someone different than who is liable according to the bill lading covering the transport and not against the party whom the plaintiff believes is the current carrier.[91] It is clear that CJEU has a deep respect for the term and condition settled down in the contract and the parties which are involved. Thence, the Court holds a strict interpretation according to what was written in the contract with a close view regarding what was the will of the parties to establish the scope of the obligations for each party.

Nevertheless, the Union has intervened to established some limits of the freedom of the parties to establish their own conditions. Thereupon, despite there is a freedom of establishing or cease negotiations without any penalty. The CJEU considered that under the Unidroit principles might be a pre-contractual liability of the party who finished the negotiation without justification and acted in bad faith. And, as a consequence, the guilty party shall compensate for the loss of the other party.[92]

The *Sky´*s case laid down that the freedom of contract encompassed the election to whom do business. Also the freedom to establish price and the scope of the obligation which is closely linked

[89] Case C-334/00 Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS). (Tacconi) (2002) I-07357, Opinion of the Advocate General Geelhoed, para 55.
[90] Handte (n 63). Para 14-16.
[91] Case C-51/97 Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002. (1998) I-06511.
[92] Opinion AG Geelhoed (n 89), para 55.

with the freedom to conduct a business stated in Article 16 of the Charter.[93] This freedom has distinct kind of limitations when is regarded in the recognized that any State´s measure shall be proportional necessary and has as an objective a general interest. [94]

In spite of the autonomy of the parties and freedom of contract that are considered core principles. This freedom has constitutional boundaries. Fair terms are the most relevant limits to the autonomy of the parties. Consequently, any agreement that includes an imbalance in the parties and where one of the parties could not negotiate the contractual terms and its contrary to the requirement of good faith will be void.[95] Notwithstanding, the term which is negotiated for the parties will fall out of the scope of the directive.[96] The directive is addressing to control the general standard contract. Regulating situations where the weaker parties are a force to sign without individual negotiations. That might arise problems regarding the seller or supplier might hold that the terms were negotiated with the consumer prior to the signature, that implies that seller would have the burden to prove that the unfair terms were negotiated individually. [97]

2.3.2. Contractual stage

As a principle the parties are free to establish their own negations according to the need of the business, but this principle finds its limitation in EU rules. Despite the freedom of contract shall not be restrictive, there is a stream that runs through the directives and case law that settle down that the freedom of contract shall respect EU boundaries, such guarantee the free movement of goods, capital, services, and persons, consumers' rights or avoid unfair competition.[98]

The right of information for the consumer is usually protected in the multiple directives that approached contract law. Thereby, Distance Selling of Financial Services Directive contains as a consumer´s right the possibility to require at any time of their contractual relationship a copy of the terms and conditions on paper.[99] The same obligation has the organizer of the package travel contract.[100] It is easy to identify that in the myriad Directives this common provision that establishes the right of the information for the consumers.

Regarding the delivery, the Consumer Rights Directive set up a maximum term of 30 days for the trader to deliver the goods. Also, establish that the trader could not accomplish its obligation this term. Consumers and traders can negotiate a new term to deliver the goods according to their

[93] Charter (2012) OJ C 326.
[94] Case C283/11 Sky Österreich GmbH v Österreichischer Rundfunk (2013) C 201328, para 42.
[95] Directive on unfair terms, Article 3.
[96] Twigg-Flesner, The Europeanisation (n 35).
[97] Ibid.
[98] Gareth Davies, ´Freedom of Movement, Horizontal Effect, and Freedom of Contract´ (2013) Oxford Legal Studies Research Paper No. 23; Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford.
[99] Directive on distance marketing of consumer financial services, Article 5.3.
[100] Directive (EU) 2015/2302 of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004; Directive 2011/83/EU and repealing Directive 90/314/EEC (2017) OJ C 378 (2015) OJ L 326. Article 5

respective circumstances. And if the trader again fails to fulfill its obligation, the consumer can terminate the contract and trader shall reimburse all sums paid without delay. [101]

Regarding Guarantee Consumer Sales Directive deal with rules on the conformity of goods, remedies, and commercial guarantees.[102] It lays down some limits of the freedom of the contract, also settle down the seller´s or producer´s obligations to provide the guarantee of conformity, otherwise the guarantor shall reimburse the price paid, replace or repair. The time of the guarantee is depending on the advertising of the product or service.[103] In addition, the guarantee shall contain the scope, territory, duration the name and address of the guarantor and the use of comprehensible language and express the holder's rights. Nevertheless, the lack of any of the requirements will not interfere with the guarantee.[104] Further, there is a consumer´s rights to require the guarantee that cover their goods on a durable medium, such as writing.[105]

The conformity of goods deals with three main requirements, first, subjective, which are connected that the goods shall comply with the description, type, quality, possess the functionality according to the sales contract. Second, objectives, which are linking more with the comparison between goods, for instance, the analyses of the qualities durability, functionality between goods of the same type. Third, the lack of conformity can be for incorrect installation of the goods.[106]

The *Quelle case* discussed that under domestic German law it would be possible for the seller delivering a replacement for nonconformity of the goods may require from the consumer compensation for the use of those defective goods. This discussion went for a preliminary ruling and CJEU settle down that according to the Directive on Sale of Consumer Goods and Associated Guarantees, the seller is forbidden to require any compensation for the use of the defective goods.[107]

It is essential to point out that in *Quelle*, the seller relied on the domestic law to settle down their terms and conditions to the sale and establish compensation for the company in case of replacement. Nevertheless, the CJEU analyzed the scope of the freedom of contract and even that the terms and conditions of the sale fulfill national law, it did not comply with EU law, thereby, the contract would be governed under EU law instead and the consumer must not pay any compensation for the change of the faulty goods.[108] In other words, the freedom of contract finds limitation under national law but also in EU law and that might be a big challenge for entrepreneurs that lack knowledge of the law in other jurisdictions involves in cross border transaction.

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[101] Directive 2011/83/EU of 25 October 2011 on consumer rights, repealing Directive 85/577/EEC and Directive 97/7/EC of the Parliament and of the Council (2011) OJ L 304
[102] Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (2019) OJ L 136
[103] Ibid Article 12(2).
[104] Ibid Article 17.
[105] Ibid Article 17.2.
[106] Directive on contracts for the sale of goods, Articles 5-8
[107] Quelle (n 65) paras 22-44.
[108] Ibid

2.3.3. Post-contract stage

2.3.3.1. Remedies for non-performance or non-conformity

The principle of liability is vital at the EU level taking into account the relevance of the protection of the consumers. Hence, in various directives there a common obligation in seller, trader, and the strong party to assume the responsibilities for a non-performance or non-conformity. Thus, a package travel retailer and/or organizers have the obligation of the performance of the contract, otherwise the travelers are entitled to get the respective compensation. The *Simone* case settled down that consumers have the right of compensation for non-material damage that result from the non-performance or improper performance of the services constituting a package holiday.[109] Nevertheless, there are some exceptions of this rule. For instance when the lack of conformity is the fault of the travel, third parties or circumstances outside the competence of the organizer.[110]

In addition, the Consumer Sales Directive set out four remedies when the seller failed to accomplish its obligation, such as replacement, repair, replacement, price reduction or termination of the contract. The liability of the seller covers the delivery of the goods and at least two years after the delivery. This rule has some exception such as when the goods are second hand the liability period can be reduced to one year. There is also some obligation for the consumer in order to get the remedies, such as the consumer shall notify within a period of at least 2 months of the date on which the consumer detected a lack of conformity.[111]

Furthermore, Each Member State lays down different remedies in case of non-performance or non-conformity. There is a distinct approach to Common Law than in Civil law. For instance, for non-performance in a contract, the enforcement is the remedy according to French law and German law while for Common law accept the enforcement would be an exceptional remedy.[112] It would be accepted just in cases where the Court can be monitoring the performance of the contract.[113] Instead, Common Law tend to establish as a remedy that the affected party can withdraw from the transaction and claim damages, the reasoning behind this legal remedy is it would allow that the affected party is not forced to be in an unsatisfactory commercial relationship.[114] Thereby, in practice, in the national courts under the common law system the request for execution is not accepted in cases of non-conformity or breach of the contract while French courts ordering the performance is the most common remedy in this scenario.[115] Accordingly, even the EU directives establish the remedies national systems still remain power to adopt the remedy that has been carrying out for similar cases. As a result, undertakings must be aware prior to any transaction that

[109] Case C-168/00 Simone Leitner and TUI Deutschland GmbH & Co. KG (2002) I-02631.
[110] Directive on package travel, Article 14.
[111] Directive on contracts for the sale of goods, Articles 10-13.
[112] Beale, Cases, Material and Text (n 33) 918.
[113] Kötz (n 83) 205-206.
[114] Ibid 205.
[115] Ibid 206.

non-performance and non-conformity have different effects in each jurisdiction and the distinction in the remedies that the National Court would order depending on the case.

2.3.3.2. Enforcement- Jurisdiction & Applicable law

In a cross border transaction is an enormous problem to identify which jurisdiction and which the applicable law shall be applying in case of disputes between the parties.[116] This problem has been increased with the use of tech tools. It quite common that the parties are in different domicile and even sometimes the products or services are in different places of the world and it will be delivered and/or performed to other locations that involve many jurisdictions in one transaction.[117]

There is not a straight answer to this problem. The EU respects the autonomy of the parties to choose which legal system wants to be governed the contract and which is the governing law of each agreement. It is an important clause to be discussed and written down in the contract to avoid doubts in case of disputes.[118]

The parties usually choose the law that ensures legal certainty and the most familiar jurisdiction to their business. Nevertheless, the negotiation of the parties regarding jurisdiction will end up as the party with the most economic power in the transaction is who decides the rules of the business.[119]

Rome I,[120] Rome II,[121] Brussels I[122] are the legal frameworks that approach jurisdiction and applicable law in contracts that involve more than one jurisdiction. The following paragraphs explain the differences among these regulations and briefly sums up the general rules that it contains. Rome I was ratified by all the Member States except Denmark and it came to force 2008. It dealt with the conflict rules of choice of law at the European level. It is the cornerstone of the system of conflict rules that establish remedies to determine which law is applicable to the transaction. Rome I respect the freedom of parties to choose the governing law of their contracts, nevertheless set up the minimum condition to exercise the freedom to choose the law of the contract inter alia, the choice shall be clear under the term of the contract; the choice can be applicable to the whole or just a section of the contract and this clause can be changed through an amended at any time but it cannot prejudice third parties.[123]

The simple scenario is when the contract sets up the law that will be applicable but there are some cases that the contract has contradictions in the clause or it does not allow understand the will of

[116] Beale, Cases, material and text (33) 25
[117] Ibid, 50
[118] Ibid, 28-31
[119] Ibid
[120] Regulation (EC) No 593/2008 of the Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008) OJ L 177
[121] Regulation (EC) No 864/2007 of the Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (2007) OJ L 199
[122] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Brussels Regulation (EU) (2012) OJ L 351/1
[123] Ibid; Rome I, Article 3.

the parties or simply the contract did not approach the topic of the disputes at all. Rome lays down general rules to be applied in those cases, inter alia, (i) The residence of the seller or the service provider in the case of a sale of goods or performs services. (ii) A contract relating to land or to a tenancy shall be governed by the law of the country where the property is situated; (ii) A franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; (iv) A distribution contract shall be governed by the law of the country where the distributor has his habitual residence. (v) A contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place. [124]

Rome II regulated the choice of law in non-contractual obligations inter alia (i) agreement signed after the damaged arisen (ii) the damaged occurred as an outcome of a prior business between the parties tort delict or unjust enrichment. [125]

Brussels I which entered into force on 10 January 2015, regulated which jurisdiction would be applicable in the case of the dispute has different Member States linked. The general rule is that the country where the party sues gets jurisdiction. The general rules are that the individual only can be sued in the Member State of their domicile which means in the ordinary or habitual residence but these rules have many exceptions that allow that the plaintiff sue in a different place. [126]

The private international law such as Brussels, Rome I and II does not completely solve the problem. For instance, there is special protection for consumers that set up that despite the clauses of the contract, consumer will be allowed to use their own jurisdiction.

The *Pammer* case is recognized for dealing with the jurisdiction over consumer contracts. The circumstances that open this case were that Mr. Pammer (Austrian Citizen) bought a travel package through an intermediary's website from services performed by a company established in Germany. However, Mr. Pammer refused to embark in the cruise when he noticed that the description of the holiday package that he bought did not coincide with the service of the ship that he would get in his holidays. On these reasons, the plaintiff brought the action against the Company before Austrian Court and the defendant alleged the lack of competence of the National Court, hence, the Supreme Court of Austria refer for preliminary the question regarding what the criteria shall comply to determine whether the undertaking has the intention to offers their services in another Member State. Thus, the Austrian Court can establish competence in the case.[127]

The CJEU laid down that any contract which involves consumer online, the contracts shall be understood as the trader is doing business with consumers domiciled in one or more Member States, there is no an exhaustive list to follow for determined whether the trader´s activity is directed to the Member State of the consumer´s domicile but the national court might require

[124] Ibid. Article 4.
[125] Rome II (n 119)
[126] Brussels Regulation (n 120)
[127] Pammer (n 66), paras 14-24.

analyzing some facts to determine the will of the undertaking to offer services to other Member States such as if the online website is handle by different currency, languages and the phone number includes international code call. Might is possible to conclude that the trader wants to attract customers for a different Member State that their own domicile.[128]

The common practice is that the parties exercise the autonomy of choosing the law under the contract would be governed and the jurisdiction. If the parties fail to select the clauses, in case of dispute it shall be applying by default Rome I, II, and/or Brussels which are relevant legal tools to resolve the conflict of law. However, mostly all the cases the party who has economic power is who choose those. Thereby, the Union recognized that the Rome I, II and Brussels are not consumer-friendly, in view of the fact that consumer usually accept the terms and conditions of the undertaking and do not negotiate the jurisdiction in case of dispute either under what law would be governed the contract.[129] That can arise problem for consumers that accepted the clauses imposed by the undertaking and then do not have the legal opportunity to settle a dispute because would be highly costly bear the legal and administrative fees of a case in a different jurisdiction than your domicile.

3. Internal Market and the application of Article 114 TFEU

3.1. Brief evolution of the internal market and Article 114 TFEU as a legal tool.

In 1958, the Treaty of Rome´s laid down the common market as the main objective which encompassed that tariffs and quotas on trade between the Member States are removed and instead, there is common external policy respect of non-members, ensuring the free movements of products. In addition, promoting freedom of persons (citizens and workers), services, and capital.[130]

The failure of the common market was evident around 1980. So, as an answer to this fact there was in 1985 an initiative to attempt to relaunch the common market through as it has known the White Paper that contained a proposal to adopt approximately 300 measures to eliminate barriers to trade.[131] The aim was that the public, stakeholders, the Parliament and the Council were aware of the discussion in order to arrive at a political consensus of the matter. It was one of the most significant commitments to a single market.[132] The paper has three headings to remove physical, technical, and fiscal barriers.[133] In addiction some explanation regarding the benefits for the community for the elimination of these barriers, such as the Community will expand the market, it

[128] Ibid, paras 76-95.
[129] Action Plan, para 31; Ch 4.5.3 Responses from Consumer organisations.
[130] Paul Craig and Gráinne de Búrca, EU Law Text, Cases, and material (Sixth Edition, Oxford, 2015) 608 and Catherin Barnard, ´The Substantive Law of the EU- The Four Freedoms´ (5th edition, Oxford, 2016) 8-10.
[131] Barnard, The Four Freedoms, (n 130) Ch. 3.2 The single market.
[132] Búrca (n 130) 609.
[133] Commission to the Council ´completing the internal market: white paper from the commission to the Council (Milan, 28-29 June 1985) ´ (Communication) COM (1985) 310.

will turn in a new industrial dimension that allows economy of scale.[134] It also highlighted those barriers increase the cost that will be paid for the consumer, increase unit cost and the outcome is that high prices end up to discourage the business.[135] And emphasizing that the harmonization is the cornerstone of the Community the creation of common rules on a community-wide basis.[136]

The Council approved the Commission´s White paper on the completion of the internal market in June 1985 and the first significant change of the Treaty was The Single European Act (SEA) which entered into force on 1 July 1987. It was abandoned unachievable ambitions for a ´complete´ harmonization and promoting the new approach of the internal market which was more realistic.[137] Thereby, the SEA introduced new legal basis Article 100 EEC (later Article 94 EC now 115 TEU), Article 100 EEC (later Article 95 EC now Article 114 TFEU) and Article 14 EC (nowadays Article 26 TFEU) these are the legal basis for the approximation of laws in the name of the internal market which allows the Union enact measures with the objective of the well-functioning of the internal market.

The EU recognized that the common market had a broad scope that made it unreachable. As a result, the attention was address to the internal market which its scope is narrow and attainable becoming as the main objective of the EU.[138] Notwithstanding, the internal market is an ongoing task.[139]Some of the relevant communications are 'Better governance for the Single Market',[140] ' Towards a Single Market Act' Communication regarding measures to increase the EU economy and create jobs. [141] The Single Market Act II approached further develop the single market and exploit its untapped potential as an engine for growth.[142] 'Upgrading the Single Market: more opportunities for people and business'.[143] Recently Digital Single Market Strategy was approaching the digital component in the internal market also set a program to building a European digital economy. [144] Consequently, through the years, there is a communal effort to approach different issues that hinder the well-functioning of the internal market.

3.2. Constitutional foundation to ensure the internal market

The treaties establish a general classification of the competence of the Union. Exclusive competence refers when only the Union may legislate and shared competence when the Member States and the Union may legislate.[145] Some provision has a broad scope because involves concepts as peace,

[134] Ibid, N° 13.
[135] Ibid, N° 60.
[136] Ibid, N° 61.
[137] Barnard, Peer, EU Law (n 137) 310.
[138] Laurence Gormley, Regulating the Internal market, (Edwar Elgal Publihing, 2006) Ch The internal market history and evolution,13-27
[139] Commission, ´20 years of the European single market´ publication office of the European Union 2012 <https://op.europa.eu/en/publication-detail/-/publication/c505dbb4-64f1-40a6-8062-ebdea6240bd4> accessed 20/03/2020
[140] Communication COM(2012) 0259.
[141] Commission ´Communication Towards a Single Market Act´ (Communication) COM(2010)0608.
[142]Commission ´Communication Single market act II together for new growth´ (Communication) COM(2012)0573.
[143] Commission ´Communication upgrading the Single Market: more opportunities for people and business {SWD(2015) 202 final} {SWD(2015) 203 final}´(Communication) COM(2015)0550.
[144] Commission ´Communication Digital Single Market Strategy for Europe' (Communication) COM/2015/0192 final.
[145] Article 2- 4 TFEU.

human dignity or internal market, other provisions are narrowly approaching specific issues as Article 113 TFEU, allowing harmonization of turnover taxes, excise duties, and indirect taxation. The most important is that any legal act adopted by the EU must have a legal base, any measure by EU that fall apart of the competence must be annulled by the Court of justice.[146]

The Internal Market as the objective of the Union remains in current time through different provision Articles 4(2)(a), 26, 27, 114 and 115 TFEU. Article 4(2)(a) TFEU included the internal market as a shared competence where the Union and the Member States can adopt any legal act to pursue this objective.

Article 26.1 TFEU stated that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market. The paragraph is also recognizing that the establishing of the functioning of the internal market is an ongoing task. In addition, Article 26.2 TFEU disposes of that the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties.

Article 27 TFEU works more as a Commission´s commitment to take into account the differences economies according to the development of the Member States prior to any proposal to reach the objective set in Article 26 TFEU.

Article 114 TFEU regarding the approximation of laws. It can be used as the legal basis when the measures have as an object the establishment and functioning of the internal market. The legal procedure requires that Commission proposal and adoption by the Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee.

Article 114 TFEU requires that the measure to be adopted must have as the main objective the establishment and the functioning of the internal market. Nevertheless, there are three fields where Article 114 TFEU cannot be used, fiscal matters, free movement of persons are to those relating to the rights and interests of employed persons. These matters were considered too sensitive by the Member States.[147]

Article 115 TFEU provides the legislative power to harmonize any matter that impedes the good flow of the internal market. Despite Articles 114 TFEU and 115 TFEU seem similar, there are constitutional differences among them. Article 114 TFEU stated an ordinary legislative procedure while Article 115 TFEU shall use the special legislative procedure which involves unanimity requirement. That is the main reason that in practice Article 115 TFEU is used just for specific cases often when Article 114 TFEU cannot be used (taxation, free movement of persons, employee

[146] Giandomenico Majone, ´The European Commission: The Limits of Centralization and the Perils of Parliamentarization´ (2002) Wiley Online Library <https://onlinelibrary.wiley.com/doi/epdf/10.1111/0952-1895.00193> Accessed 23/03/2020.
[147] Barnard, Peer, EU Law (n 137) 330.

rights).[148] It is stated in Article 114 TFEU that the EU is allowed to adopt ´measures´ this means that it involves the discretion to choose the legal instrument most suitable. Thus, it is not limited to directives.[149] The fact that under Article 114 TFEU the Union can enact directives and regulation while under Article 115 TFEU the Union is just competent to enact directives is another reason that Article 114 TFEU is used more often than Article 115 TFEU.[150]

Harmonization is the legal tool to help the market to function properly.[151] It is the vital importance to reach the single market, but this legislative power cannot be unlimited. Therefore, there is some provision to set out the scope of the harmonization. Article 5.1 TEU stated that the limits of Union competences are governed by the principles of conferral, subsidiarity and proportionality.

In Article 5.2 TEU the legislator goes deeper and provided the meaning of the principle of conferral which refers that the Union shall act only within the limit of the competence established in the treaties to attain the objectives, emphasizing again that competences which are not conferred remain with the Member States. [152] The principle of conferral stated that the Union competencies are not wider than the treaties itself permit. Lastly, there is Article 3.3 TEU which narrowing down the competences of the Union regarding the internal market.

In conclusion, The Union can act within the limits of the treaties and, that represents the legitimate basis to exercise the power. It cannot act outside of the competence stated in the treaties.

3.3. The scope of Article 114 TFEU.

3.3.1. Residual provision

Article 114 TFEU is a residual legal basis for circumstances where it is necessary to adopt legislation regarding the internal market for which there is no other legal basis available in the treaties.[153] Thence, this provision is used in circumstances where is no other power confer in any specific provision to be used. Hence, there is a challenging task to distinguish in the measure to enact whether there are specific legal bases that could be used. Often a measure might have implications in the internal market but if there is any specific provision it shall be used.

[148] Mańko, Rafa, ´EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence´ (2015) Series: EPRS In-Depth Analysis, Parliamentary Research Service, 24 <SSRN: https://ssrn.com/abstract=2553945> Accessed 23/03/2020. 10.

[149] Barnard, Peer, EU Law (n 137) 331.

[150] Stephen Weatherill, Contract Law of the Internal Market (Intersentia, 2016) 57; Burga (n 130) 616.

[151] Gutman, Constitutional foundation (n 49) 314.

[152] Article 5 TEU.

[153] Christian Twigg-Flesner, ´The Power to adopt harmonising legislation on the Basis of Article 95 and 308 EC' 15 Nottingham L.J. 59 (2006) <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/notnghmlj15&id=123&men_tab=srchresults#> Accessed 23/03/2020.

The *Commission v Council VAT* case.[154] The applicant is asking the Court for annulment of regulation regarding administrative cooperation in the field of VAT.[155] The Commission argues that the correct basis of the regulation is Article 114 TFEU, even the exception stated in Article regarding fiscal matters the Commission´s interpretation is that this exception should be narrow. Thereupon, the exception does not apply to mutual assistance by authorities in a tax matter, taking into account that the measure is linking to cooperation, verification and information whose purpose is to facilitate the elimination of frontiers. In other words this measure does not harmonize the tax rule itself.[156] Nevertheless, the CJEU held that if the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision,[157] in the specific case, the appropriate legal basis was Articles 113 TFEU as an outcome, the action was dismissing. The CJEU highlights in this judgment the importance to respect the residual feature of Article 114 TFEU.

The *Titanium Dioxide* case[158] deal to find out the correct legal basis of the Directive 89/428/EEC whose purpose was harmonizing the programs for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry. The discussion concerned that the directive aims are the improvement of the condition of competition and an environment protection.[159] This case shows the harder task to distinguish what is the main purpose of the measure or center of gravity. In this case, the Court held that the appropriate legal basis of the directive is Article 114 TFEU, considering that the environment is a burden for the undertakings, so competition could be appreciably distorted in the absence of harmonization. As a result, the measure falls within the scope of Article 114 TFEU and it is particularly appropriate to the attainment of the internal market.[160] Nevertheless, this judgment got criticized because the Court selected Article 114 TFEU over the more specific provision Article 192 TFEU.

Waste directive case[161] discussed the appropriate legal basis of a directive regarding waste disposal which was adopted on the basis of Article 175 TFEU. In this case, the applicant argued that the measure has a wrong legal basis and the appropriate legal basis should be Article 114 TFEU. Surprisingly this time the CJEU considered that Article 175 TFEU was the appropriate legal basis in consideration with the aim and content of the directive. And highlighted that the mere fact that the establishment or functioning of the internal market is affected is not sufficient to use Article 114 TFEU. Moreover, it is not justified use Article 114 TFEU when the measure to be adopted has only an incidental effect of harmonizing market conditions.[162] Thus, Article 114 TFEU can be used as a

[154] Case 533/03 Commission v Council (2006) I-01025
[155] Ibid, paras 1-9
[156] Ibid, paras 23-25
[157] Ibid, para 45.
[158] Case C-300/89 Commission v Council (Titanium Dioxide) (1991) I-02867.
[159] Ibid, para 11.
[160] Ibid, para23.
[161] Case C-155/91 Commission of the European Communities v Council of the European Communities. Directive on waste - Legal basis. (Waste Directive) (1993) I-00939.
[162] Ibid para 19; Case C-70/88 Parliament v Council (1991) ECR I-4529, para 17.

legal basis where there is no other provision applicable to the case. Moreover, the measure shall improve the internal market, this improvement cannot be random or subsidiary.

3.3.2. Approximation of national law is an essential feature of Art 114 TFEU

The approximation is the tool to reach the objectives in the treaty. But, the approximation itself it is not an objective of the Union.[163] The CJEU has emphasized that the divergences in law by itself it is not a justification to use Article 114 TFEU.[164] Accordingly, it is the differences between national laws that obstruct the fundamental freedoms and as a consequence have a direct effect on the functioning of the internal market that would be the justification to use Article 114 TFEU [165]

According to the case-law the approximation of laws includes law, regulations and administrative provisions of the Member States.[166] In addition, the approximation of laws harmonize the divergent national rules addressed to uniform EU rules but exclude the creation of new legal forms or rights due to this will fall within the scope of Article 352 TFEU.[167]

Spain v Council[168] is concerning the proper legal basis of a regulation that created a supplementary protection certificate for medicinal products. The applicant argued the wrong selection of Article 114 TFEU as a legal basis and argued that the correct legal basis would be Article 115 TFEU or 352 TFEU. The CJEU asserted that the Union is competent to act in property right when those circumstances hinder the free movement of goods. Furthermore, regarding the analysis of the legal basis, the CJEU held that the regulation was validly adopted on Article 114 TFEU, taking into account that the contested regulation´s objective prevents the heterogeneous development of national laws affecting the internal market. Moreover, it is the exercise of the Union´s legislative power in the approximation law. Thence, any disparities between the domestic law that are liable to create or maintain the distorted condition of the competition shall be harmonized.[169]

Besides, Spain v Council confirmed[170] the opinion 1/94 which stated that the Union is competent on intellectual property matter. And refers that is possible to harmonize IP national laws pursuant to Articles 114 TFEU and may use Article 352 TFEU as the basis for creating new rights superimposed on national rights. [171] On these grounds the Court dismisses the action.

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[163] Gutman, Constitutional foundation (n 49) 314.
[164] Tobacco Advertising I (n 16) para 84, 95; Case C-491/01 British American Tobacco and Imperial Tobacco (2002) ECR I-11453, para 60.
[165] Case C-210/03, Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health (2004) I-11893; Case C-434/02 Arnold André GmbH & Co. KG v Landrat des Kreises Herford (Arnold Andre) (2004) ECR I 11825, para 30.
[166] Case C-66/04, United Kingdom of Great Britain and Northern Ireland v Parliament and Council of the European Union (Smoke flavourings), para 56.
[167] Ibid
[168] C-350/92 Spain v Council [1995] ECR I-1985.
[169] Ibid, paras 1,3, 23, 32-35.
[170] Ibid. para 23
[171] Opinion 1/94 Opinion of the Court on competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty (1994) ECR I-5267 EC, OJ L 11, para 59

It is clear from the preceding overview that in order to use Article 114 TFEU it is required that the measure adopted is dealing with approximation of laws. The analysis regarding the approximation of laws includes. Firstly, there must be heterogeneous domestic law. Secondly, this diversity in the domestic shall create obstacles and/or appreciable distortion of competition affecting the internal market. And, lastly, the measure adopted under Article 114 TFEU shall harmonize national law eliminating the appreciable distortion and /or the obstacles that are affecting the establishment or functioning of the internal market but there is a severely constrain connected that the measure adopted cannot create new legal forms. Otherwise would fall out the scope of Article 114 TFEU.

3.3.3. Divergences on national law shall affect directly the internal market/ the present or future obstacles shall be identified and the main aim shall be removing the obstacles to ensure the internal market

To use of Article 114 TFEU shall follow the mandatory requirement that the measure should have as a center of the gravity shall be an internal market.[172] Article 114 TFEU does not provide a general power to regulate. Instead, the measure should genuinely seek the internal market or improve its functioning which encompasses that the measure shall design rules to eliminate the obstacles or deal with the appreciable distortion of competition.[173] Using Article 114 TFEU without the main aim of the internal market would be an abuse of power.

Tobacco advertising I case concerned the dispute arisen by Germany that seeks the annulment of Directive 98/43/EC the approximation of the law relating to the advertising and sponsorship of tobacco products. The applicant argued that Article 114 TFEU is not the proper legal basis for the directive.[174] According the scope of Article 114 TFEU which is harmonize national legislation in order to promote the internal market.[175] And, the center of gravity of the contested measure is public health protection and not the functioning of the internal market. [176]

The Court considered the pleas and upheld that the legal basis of the contested directive was inappropriate and triggered the annuls the contested measure.[177] The reasoning behind the outcome was that Article 114 TFEU shall ensure the internal market. It is characterized by the abolition of all obstacles in the exercise of the freedoms. Furthermore, any measure to be taken shall have the view of establishing the internal market which comprises an area without internal frontiers. Nevertheless, Article 114 TFEU is not a general power to regulate the internal market. It would be incompatible with Article 5 TEU which stated that the power to legislate is conferred under the limits laid down in the treaties.[178] In conclusion, prohibit certain forms of sponsorship are not

[172] Gareth Davies, ´Democracy and Legitimacy in the Shadow of Purposive Competence First´ European Law Journal (2013) <https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12079> Accessed 23/03/2020.
[173]Barnard, Peer, EU Law (n 137) 330.
[174] Tobacco Advertising I (n 16) Para 12.
[175] Ibid, para 23.
[176] Ibid, para 34.
[177] Ibid, operative part.
[178] Ibid.

such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the directive.

The outcome of the case was not a surprise because already it had been suggested Article 352 TFEU which requires unanimity in the Council, would be the correct legal basis of this kind of measure that was also the view of the Council legal services.[179] The *Tobacco Advertising* case has gotten highly recognized because for the first time a general EU legislative measure was struck down for a lack of competence. A few years later a new directive was adopted. This time It was much more closely tailored to the internal market concerns which mean that EU can regulate those aspects of tobacco that lead to real distortions of competition but it could not just ban the product in the name of the internal market. [180]

Tobacco Advertising case sent an important warming that Article 114 TFEU was not unlimited.[181] Moreover, the approximation of laws could not be used to regulate all aspect of economic life.[182] Even the broad scope of Article it has boundaries that the legislative power must respect

In Case *C-436/03*, the Parliament sought the annulment of a Regulation that established a *European Cooperative Society*. It was adopted on the basis of Article 308 EC (nowadays 352 TFEU). The Parliament alleging that Article 352 TFEU was wrongly chosen as the legal basis for the contested regulation. And its opinion Article 95 EC (nowadays Article 114 TFEU) was an appropriate legal basis. The CJEU, in this case, laid down that Article 114 TFEU empowers the Union to adopt measures to improve the conditions for the establishment and functioning of the internal market and they must genuinely have that object, contributing to the elimination of obstacles to the economic freedoms.[183] The national law remains unchanged by the regulation (the aim of the measure was to create a new form of cooperative in addition to national forms) the regulation did not lead to an approximation of national law and Article 114 TFEU could not be used.[184] As a consequence, CJEU disagrees with the Parliament and dismiss the action.

To sum up, the CJEU has been clear that a measure adopted on the basis of Article 114 TFEU shall affect the internal market. Thus the main objective of the measure should be improving the internal market. Moreover, the measure to be adopted under Article 114 TFEU shall identify the obstacles for the internal market and seeks to remove the identifiable obstacles that hinder the exercise of fundamental freedom. In *Tobacco advertising* is clear that the obstacle to trade must be identified and the measure shall be designed to prevent the obstacles. [185] Nevertheless, in *BAT* case the Court analyzed that the obstacles might appear in the near future and the aims of the measure shall be to

[179] Tobacco Advertising I (n 16), Opinion of Advocate General Fennelly.
[180] Barnard, Peer, EU Law (n 137) 333.
[181] Ibid, 330.
[182] Barnard, Peer, EU Law (n 137) 566-567
[183] Case C-436/03 Parliament v Council of the European Union (2006) I-03733 (European Cooperative Society SCE), para 38; C-45/86 Commission v Council (1987) ECR 1493, para 13; Spain v Council (n 68) para 26.
[184] Weatherill, Internal Market (n 149).
[185] Tobacco Advertising I (n 16) para 97.

prevent it.[186] To conclude Article 114 TFEU is used to enact measure that contributes to the removal of appreciable distortions of the competition arising from national rules.[187]

3.3.4 The measure adopted on the basis Article 114 TFEU shall eliminate the obstacle in the internal market and/or the distortion of the competition complying with subsidiarity and proportionality principles

It is a fact that Article 114 TFEU confers a broad power concerning the internal market but it is also true that this power has limits to use it. There are some relevant cases that provide a guide regarding the use of Article 114 TFEU as a legal basis. Moreover, respect to the principles as subsidiarity and proportionality. *Poland* Case[188] the applicant sought the annulment of a directive concerning the approximation of the law in the manufacture, presentation, and sale of tobacco[189] on grounds of the infringement of Article 114 TFEU, the principle of proportionality and the principle of subsidiarity.[190]

This case was the perfect opportunity to clarify the scope of Article 114 TFEU. The CJEU one more time held that Article 114 TFEU is addressed to give legislative power to the Union to enact measures which have as an aim the establishment and functioning of the internal market. That is the meaning of the rule that the legislative power vested the Union to analyze the specific circumstances and decide which is a suitable method of approximation to achieve the aim.[191] Nevertheless, it is clear for the Court that to use the legislative power it is not enough to find different national rules. It is mandatory that the national measures hinder the freedoms and have a direct effect on the functioning of the internal market, but also is clear the possibility to use the contested Article to prevent the emergence of future obstacles to trade.[192]

The most important input of the CJEU clearly emphasized that even the use of Article 114 TFEU confer an EU legislature a discretion. It is required to comply with the principles mentioned in the TFEU or identified in the case-law, such as proportionality and subsidiarity.[193]

Article 114 TFEU is a broad provision. It has limits in the proportionality and subsidiarity principles. In this specific case the CJEU upheld that the contested directive was validly adopted on Article 114 TFEU. The use of the contested Article was appropriate considering that the measure enacted pursuit the well-functioning of the internal market and removed any obstacle at the time or that might emerge in the future.[194]

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[186] British American Tobacco (n 164), para 61.
[187] Titanium Dioxide (n 158), para 15.
[188] Case 358/14 Poland vs Parliament (2016) Digital reports (Court Reports - General).
[189] Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (2014) OJ L 127.
[190] Parliament v Council, (n 162) para 19.
[191] Ibid, para 37, 68.
[192] Ibid, paras 31- 33
[193] Ibid, paras 36-37
[194] Ibid

The proportionality and subsidiarity continues to be relevant principles to apply in any measure adopted on the basis of Article 114 TFEU. Regarding the subsidiarity, the CJEU had said that the subsidiarity shall be respect when the Union has exercised a competence which is not exclusive and inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market but only a certain competence for the purpose of improving the condition for its establishment and functioning.[195] Moreover, after comply with the subsidiarity principle the measure to enact must also be ensuring that is proportional which mean no more extensive than necessary to achieve the objective. [196]

Subsidiarity has proved a particularly sensitive issue. The subsidiarity is more political than a legal principle. In the past, the Court has been reluctant to review the criteria in Article 5.3 TEU for example when the merits of complaints alleging breach of subsidiarity. In particular, it has refused the examine whether the action can be sufficiently achieved by the Member State or whether by reason of the scale or effect of proposal action, it could be better achieved by the Union.[197] However, it has been changed and the CJEU began by considering whether the objective of the proposed action could be better achieved at Union level and the intensity of the action undertaken by the Union did not go beyond what was necessary to achieve the objective pursued.

3.4. Positive and negative harmonization

There are two techniques used by the Union to obtain the economic integration. There can be a negative or positive harmonization. The Union used a negative approach when prohibiting national rules that hinder cross-border trade because they discriminate against goods, service and the others freedoms from other Member States, or because they render market access more difficult, that promote the mutual recognition due that any Member State requires to accept for instance products and services made under other legal systems of other Member States. [198]

Positive harmonization refers to the Union can enact common rules on particular aspects, which allows integration of national law at European level.[199] There is always a need for harmonization that would help the market function properly, by setting standards EU enables goods, services, products, and capital to move freely.[200]

3.5. Minimum or maximum harmonization

[195] British American Tobacco (n 164) para 179.
[196] Ibid, Para 122; Case 137/85 Maizena v Bundesanstalt (1987) ECR 4587, para 15; Case C-339/92 ADM Ölmühlen v Bundesanstalt (1993) ECR I-6473, para 15; Case C-210/00 Käserei Champignon Hofmeister v Hauptzollamt (2002) ECR I-6453, para 59.
[197] Nicolas Bernard, The future of European economic law in the light of the principle of subsidiarity´ (1996) Common Market Law Review 33: 633-666; Barnard, The Four Freedoms, (n 130) 573-574
[198] Búrca (n 130) 608
[199] Ibid
[200] Barnard, The Four Freedoms, (n 130) 558.

Harmonization involves replacing the multiple and divergent national rules on a particular subject with a single EU rule this rule pretends to advance free trade and market integration. The types of harmonization employed by the EU are minimum harmonization or maximum harmonization.[201] Minimum harmonization refers to when the EU enact a measure with the minimum standards that allow the Member State to introduce stricter rules for products, service, etc. Therefore, the same matter could be applicable to a minimum rule enacted by the Union and depend on the jurisdiction a strict rule enacted by the Member State. Minimum harmonization is recognized as respect the diversity of national law, even the Union set a basic standard rule and the Member States are free to set more demanding rules.[202]

Minimum harmonization is one of the most popular forms of approximation used today, considering that the Union can intervene to sets minimum standards but each Member State is free to impose higher standards. As a consequence, this method keeps the balance between has a level playing field for competition (the minimum standard) with space to accommodate national diversity (above the minimal). [203]

Some examples of minimum harmonization are Tobacco Labelling Directive;[204] Tobacco Control Directive;[205] Doorstep Selling Directive[206]. These directives provide through minimum harmonization such as the floor which national legislation cannot fall but above this floor, the Member States can choose stringent measures.[207]

Maximum harmonization takes place when the Union regulates a matter and do not leaving room for any possible intervention of the Member State. Some academics also name it exhaustive harmonization or full harmonization but the meaning is the same refers when the Union enacts a whole harmonization in a field and the Member States cannot unilaterally impose stricter rules. The advantage of the full harmonization is that the producers can rely on EU measure and they do not have to worry about additional requirements depending on the jurisdiction that promotes the same level playing field for all the competitors. Nonetheless, there is a disadvantage given a close look to approve a full harmonization is required unanimous voting in Council which means that any measure unpopular can be blocked indefinitely, and once the measure is adopted is quite difficult to amend. It makes this kind of harmonization conservative and inflexible and unfriendly with the innovation or any unforeseen circumstances.[208] There is a constant debate surrounding the proper model of harmonization which never is an easy decision and requires deep analysis of the suitable approach depending on the topic and the best way to reach the goals of each measure.

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[201] Leible & Schröder in: EUV/AEUV, ed. Rudolf Streinz (2nd ed., Beck 2012), p. 1455, para. 19; Mańko (n 148).
[202] Barnard, Peer, EU Law (n 137) 336
[203] Barnard, The Four Freedoms, (n 130) 586-590
[204] Directive 89/622/EEC concerning the labelling of tobacco products (Tobacco labelling Directive) OJ L 359.
[205] Directive 2001/37/EC concerning the manufacture, presentation and sale of tobacco products (Tobacco Control Directive) (2001) OJ L 194
[206] Directive 85/577 on contracts negotiated away from business premises, replaced by the consumer right Directive 2011/83
[207] Opinion 2/91 Opinion delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty (1993) ECR I -1061 para 16; case 2-97 Societa Italiana Petroliini SpA v Borsana (1998) ECR I-8597
[208] Barnard, The Four Freedoms, (n 130) 582-585

4. Article 114 TFEU plausible legal basis to be used on EU contract law

4.1. Legal basis to extend the Union´s competence on contract law.

The question regarding to what extent can reach EU law depends on a political will and economic decision by the Member States. Thereupon, The Union can only be considered competent if it is economically justified and accepted in the political scenario.[209] Therein, political will for the Member States is the key for the Union to succeed with any further action in contract law undertaken.[210] Nevertheless, the possibility of an future instrument on contract law will open the door for challenges before CJEU for a lack of competence and the suitable legal basis.[211]

Assuming that contract law would get political and economic approval, the initial legal discussion would be the purported lack of legal Union competence in the field and the plausible legal basis.[212] However, there are many cases that reflect a broad interpretation of the European Union´s competence in the name of the internal market. Thus, it has been emphasized that Article 114 TFEU as the most obvious candidate to be the suitable legal basis for the harmonization on contract law. Notwithstanding, there are other provisions that could also be suitable as a legal basis of the future instruments on contract law, such as Articles 81, 352 or 115 TFEU.

4.1.1. Article 81 TFEU

Article 81 TFEU seeks the development cooperation in civil matters which has cross-border implications. Such cooperation may include the adoption of measures for the approximation of the laws, particularly when necessary for the proper functioning of the internal market.[213] In addition, Article listed the aims that the measure shall pursue in order to use this Article as a legal basis and it is unclear if contract law is linked with any of these goals. [214]

Moreover, This provision grants the Union legislative power for the implementation of an area of security, freedom, and justice.[215] It will follow the ordinary legislative procedure stated in Article 294 TFEU that involves that the Commission submit a proposal in order to be adopted requires a qualified majority vote.[216]

[209] Wulf, (n 68) 22-24.
[210] Gutman, Constitutional foundation (n 49), ch 7.
[211] Wulf, (n 68) 22-24.
[212] Ibid.
[213] Council ´Tampere Council. Presidency Conclusions´. (Presidency Conclusion) (15 and 16 October 1999) conclusion 39.
[214] Twigg-Flesner, The Europeanisation (n 35), 182-183.
[215] Title V TFEU
[216] Article 81.2 TFEU

Admittedly, Article 81 TFEU is used for the approximation of substantive private law,[217] It is used as a legal basis of measures which the main objective is the judicial cooperation which it is not tied exclusively to the internal market but support indirect the purposes of the internal market.[218] Hence, Article 81 TFEU have been used as a legal basis for instruments relating to private international law such as Rome I, Rome II and Brussels I, which regulated topic connected to contract law such as jurisdiction and enforcement. However, these regulations have as the main objective the cooperation between judicial bodies more than the well-functioning of the internal market itself. Therein, to decide regarding the legal basis of a measure it should have analyzed carefully case by case, taking into account the objective of the instrument.[219] Also, there is margin discretion for the legislature for considering whether a measure is necessary for the proper functioning of the internal market itself or for judicial cooperation and indirectly improve the internal market. [220]

The choice of Article 81 TFEU also involves this future measure in contract law shall be limited to cross border contract, excluding any effect in domestic transactions,[221] which according to the Commission carries the risk of creating arbitrary and discriminatory effect increasing legal uncertainty.[222]

The choice of Article 81 TFEU as a legal basis of future measure in contract law would essentially require that firstly the future measure have as main objective the enhancing the judicial cooperation in a civil proceeding to civil more that improvement of the internal market. And secondly, the measure would have effects merely in contracts that involve more than one jurisdiction. As a consequence, seems unlikely to use Article 81 TFEU as a legal basis for an optional European contract law.

4.1.2. Article 352 TFEU

Article 352 TFEU provides a residual power to the Union stated that the Union would get competence in matters that are necessary in order to attain the objectives set out in the Treaties, such the well-functioning of the internal market.[223] Thereby, Article 352 has been considered as a legal basis to enact future measures to regulate any obstacles created by contract law that hinder the well-functioning of the internal market.[224]

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[217] Council 'The Hague Programme: strengthening freedom, security and justice in the European Union´ (Haggue Programe) (2005/C 53/01) OJ C 53 para 3.4.4. and Martijn Hesselink, ´European contract law: a matter of consumer protection citizen or justice? ´ (2007) Vol 15, European review of private law 323-348.

[218] Weatherill, Internal Market (n 149) 56-57.

[219] Commission 'Communication concerning the common position of the Council on the adoption of a Regulation of the Parliament and of the Council creating a European order for payment procedure´ (Communication) COM (2006) 374 final, 4, 7, 2006, point 3.1,5 Declaration of the Commission.

[220] Commission ´Explanatory Memorandum of the proposal for a regulation establishing a European Small Claims Procedure´, (Communication) COM (2005) 87 final 15.3.201, point 2.2.1.

[221] Jan-Jaap Kuipers ´the Legal basis for a European optional instrument´ (2011) European review of private law 5-2011 (545-564), Kluwer law International BV, Printed in the Great Britain 545, 549, 554.

[222] Commission ´Explanatory memorandum of the proposal for a Directive of the Parliament and of the Council on certain aspects of mediation in civil and commercial matters´, (Communication) COM (2004) 718 final 22.10.2004 pt 1.2.

[223] Article 3(3) TEU and 26 TFEU.

[224] Kuipers (n 221) 545-554.

The residual competence is an essential feature of 352 TFEU.[225] The CJEU held that the ´Article is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.´[226] Therein, the case-law emphasized that Article 352TFEU shall be used as a legal basis exclusively when other provisions do not give the power to adopt the necessary measures to reach the objectives stated in the treaties.[227]

Another essential feature to choose Article 352 as a legal basis of a measure in contract law, it is the fact that this provision shall be used exclusively when the measure to enact involves the creation of new supranational legal forms.[228] Thereupon, the main difference between Article 114 TFEU and 352 TFEU is that Article 114 TFEU deals with the harmonization of national rules which are existing already while Article 352 TFEU is concerned with the creation of new supranational legal forms.[229] Besides, Article 352.3 TFEU stated expressly the forbidden to use this provision for the approximation of law.

Despite the broad scope of Article 352 TFEU the legislature set a limitation of this legislative power in the procedure. Thence, any measure that is using Article 352 TFEU as a legal basis in order to be approved requires a unanimous decision of the Council. [230] Thus, it is unattractive to choose this provision as a legal basis which in practical terms means to get the consensus of the 28 Member States to enact any legal measure, which is unlikely to be achieved.

Admittedly, Article 352 TFUE potentially can be an appropriate legal basis for a future measure on contract law, as long as, the measure pursues the creation of new legal forms and does not fall in the approximation of national law falling into the scope of Article 114 TFEU. In addition, another advantage to using Article 352 is that it would apply both domestic and cross border contracts. This is different from the requirement laid down in Article 81 TFEU.[231] As a consequence , the legislature shall make a deep analysis in the selection of the legal basis of the future measure on contract law taking into consideration the content and objectives pursued by the new instrument.

4.1.3. Article 115 TFEU

[225] C-45/86, (n 183) para 13; European Cooperative Society (n 183) para 36
[226] Joined Cases C-402/05 P and C-415/05 Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities (2008) ECRI-6351, para 211 and Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1996) I-01759, para 29.
[227] European Cooperative Society (n 183) para 36; Spain v Council (n 168), para 26
[228] European Cooperative Society (n 183) para 37.
[229] Ibid, para 44, 45
[230] Wulf, (n 68) 22-24.
[231] See. Ch 4.1.1 Article 81 TFEU of this document.

There is a close relationship among Article 114 TFEU and Article 115 TFEU. Both grant the Union with legislative power to harmonize in order to ensure the internal market.[232] Further, the importance of these Articles is that through the approximation of law the Union has been carrying out the European integration process. Therein, harmonization is not an objective by itself. It shall be seen as the most important tool to extend the proper functioning of the Internal market, consequently, ensuring the area without internal frontiers in which the free movement of goods, persons, services and capital.[233] Another similitude is that both provisions are residual provisions which means that they must be used when is no other provision of the treaty can be used.[234] Thereby, if there is a specific provision able to be considered the legal basis of the measure that provision takes priority over Article 114 TFEU and 115 TFEU.

There are some relevant distinctions among Articles 114 TFEU and 115 TFEU. Firstly, the procedure in Article 115 TFEU requires that the Council shall act unanimously according to the special legislative procedure, whereas Article 114 TFEU goes through an ordinary legislative procedure which entails that the Commission proposal for the subsequent adoption requires the Council acts by the qualified majority.[235] Hence, from a procedural perspective Article 114 TFEU grant more possibilities to a measure to be enacted.

Secondly, the fact that Article 115 TFEU begins with the sentence ´without prejudice to Article 114 TFEU´ has been considering as Article 115 TFEU is applicable in the cases that Article 114 TFEU would not have enough competence to act. Therein, Article 115 TFEU has been used on taxation, free movement of persons, employee rights matters, on grounds that Article 114, 2 TFEU excluding these topics of its scope.[236]

Thirdly, Article 115 TFEU exclusively is using to enact directives, leaving outside the scope the possibility to enact other measures, as a regulation.[237] Thus, Article 115 TFEU has occupied a secondary role in comparison with Article 114 TFEU.

Therefore, Article 115 has a narrow scope in comparison with Article 114 TFEU, as a result, might Article 115 TFEU is not the most suitable legal basis to extend the Union´s competences in contract law.

4.2. Criteria to use Article 114 TFEU as a legal basis in a future measure to harmonize EU contract law

[232] Weatherill, Internal Market (n 149) 56.
[233] Gutman, Constitutional foundation (n 49) 56; 313-323.
[234] Case C-271/94 Parliament v Council (1996) ECR I 1689 para 33, see ch 3.4.1 Residual provision of this document.
[235] See ch. 3.2 Constitutional foundation to ensure the internal market of this thesis
[236] Mańko (n 148)
[237] Weatherill, Internal Market (n 149) 57 and Búrca (n 130) 616

4.2.1. A future measure to harmonize contract law requires a real approximation of laws in order to use Article 114 TFEU as a legal basis.

The first criteria to review in order to determine the use of Article 114 TFEU as a legal basis, it is that the measure to adopt deal with the approximation of national law.[238] Article 114 TFEU excludes the adoption of an optional instrument if the content of the measure is considered to be a new legal form that would fall outside the ambit of the approximation.[239]

The European Cooperative Society (SCE)[240] regarding the appropriate legal basis of the contested regulation which lays down a statute to remove barriers for SCE, inter alia, regulated the possibility of transferring its registered office from one Member State to another, without the creation of a new legal person.[241] The regulation was adopted on the basis of Article 352 TFEU.[242] Therefore, Parliament sought the annulment to consider the correct legal basis would be Article 114 TFEU.[243]

The CJEU dismissed the action and their reasoning of the Court includes the remainder that the election of the legal basis will depend on the content and main objective of the measure. Thereupon, Article 114 TFEU shall be used for the approximation of national law and the genuinely objective shall be improving the conditions for the establishment and functioning of the internal market that shall be reflected in a contribution of elimination of obstacles in the freedoms. Furthermore, it is possible to protect future obstacles. Nevertheless, SCE statute is creating something new which does not change domestic laws. SCE´s purposes is the creation of a new form of cooperative society, in addition to the national form.[244] In other words, Article 114 TFEU cannot be used for creating supranational legal forms because this power was conferred to Article 352 TFEU and the scope of Article 114 TFEU is exclusively limited for harmonization of domestic law.

In light of the foregoing discussion, contract law has been discussed whether Article 114 TFEU was the correct legal basis of the CESL. From the Commission perspective the CESL´s legal basis is correct, by virtue that the approximation of the law and it cannot be perceived as the creation of a new legal form which is independent of national contract law.[245]

Besides, the CESL provides an alternative contract law which does not imply the modification of the current national contract law. [246] This discussion has already created controversies between the

[238] See ch 3.3.3 Aproximation of national of this study.
[239] European Cooperative Society (n 183) paras 39-45.
[240] European Cooperative Society (n 183).
[241] Ibid, 2-9.
[242] ex Article 308 EC.
[243] ex Article 95 EC.
[244] European Cooperative Society (n 183) paras 35-39, 44, 45; Tobacco advertising I (n 16) paras 83, 84, 86 and 95; British American Tobacco (n 164) paras 60-61; Spain v Council (n 168) para 35; Case C-377/98 the Netherlands v Parliament (Biotechnology) (2001) I-07079, para 15.
[245]Luigi Berlinguer and Klaus-Heiner Lehne, ´Common European Sales Law (CESL)´ Legislative Train Schedule-Connected Digital Single Market (2019). <https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law> Accessed 20/03/2020; Wulf, (n 68) 22-24.
[246] Ibid.

scholars that analyzed which was the suitable legal basis of the CESL and, whether the measure is creating something new (Article 352 TFEU) or whether the measure is an approximation of law (Article 114 TFEU). [247]

Some scholars held that the appropriate legal basis of the CESL and the future instrument on contract law shall be Article 114 TFEU. Argued that CESL satisfied the conditions required in Article 114 TFEU, moreover, emphasizing that CESL falls out of the interpretation of European Cooperative Society case, taking into account that the proposal is a harmonization of the existing national contract law and even the fact that is not binding will not make the difference regarding that the aim of the measure which is that through the approximation on contract law will remove any obstacle of the exercise of the freedoms.[248] Besides, the topic if an harmonization measures on contract law could be based on Article 114 TFEU, because it would not create new supranational legal forms instead it would harmonize the existing national law.[249]

On the other side, some scholars after the *European Cooperative Society* case has a serious concern that Article 114 TFEU can serve as the legal basis on contract law.[250] The Bundestag expressed that might be the proper legal basis of a future instrument on contract law is Article 352 TFEU, on the ground that harmonization does not include replace national measure either uniform legal regimes.[251] Also, scholars argued that there are multiples advantages to use Article 352 TFEU, emphasized that it could be the legal basis to eliminate any obstacle for the internal market, reaching the objectives in the treaties through the creation of new supranational legal forms. Moreover, the requirement of the unanimity in the Council during the legal procedure will give legal certainty to the future instrument.[252] They suggested that in practice to reach the uniform contract law would encompass an adjustment of the domestic law with the creation of new forms. [253]

It is potentially relevant for the future instrument on contract law that Articles 114 TFEU and 352 TFEU were confined to legislative action to ensure the internal market. It is clear that Article 352 TFUE is the correct legal basis when the measure to adopt is creating new regimes while Article 114 TFEU is promoting harmonization of the existing national regimens. Thus, much of the discussion regarding the use of Article 114 TFEU as a legal basis has been focus on the requirement of approximation of laws which cannot fall within the scope of the creation new legal form which would part of the scope of Article 352 TFEU. Therefore, it is likely that Article 114 TFEU would be a suitable legal basis as long as the content and the objective of the measure does not create a new supranational legal form. And, the measure for adopted in its content and scope seeks for the approximation of law.

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[247] Wulf, (n 68) 22-24; Gutman, Constitutional foundation (n 49) ch 8.3.3.3.
[248] Gutman, Constitutional foundation (n 49), ch 8.3.3.3.
[249] Jacobien Rutgers, ´An Optional Instrument and Social dumping revisited´ (2006) European review contract law 199-208; Twigg-Flesner, The Europeanisation (n 35) 185.
[250] Wulf, (n 68) 22-24.
[251] Opinion of German Bundestag on CESL (30.11.2011) Committee recommendation and report of the Committee on Legal Affairs (6th committee) (2011) Printed Paper 17/8000 - Printed Paper 17/7713 no. A.5.
[252] Kuipers (n 221) 545-554.
[253] Ibid.

4.2.2. The possible measure on contract law requires that the main objective is the well-functioning of the internal market to use Article 114 TFEU as a legal basis

A future instrument on contract law that pretends to use Article 114 TFEU cannot be justified in the promotion of cross-border trade neither the divergences of national law in the field. Thence, it is mandatory that this future measure shall contribute to eliminating existing or future obstacles for the well-functioning of the internal market and/or appreciable distortion on the competition.

Tobacco advertising I[254] is a clear example regarding that Article 114 TFEU can be used as a legal basis when have as a genuinely objective to improve the conditions for the establishment and functioning of the internal market. This legislative power is not a general power. Moreover, the diversity of law or abstract risks in the exercise of the freedoms are not enough to use Article 114 TFEU as a legal basis. [255]

Tobacco Advertising I was the first time that the Court annulled a Union measure for the misuse of Article 114 TFEU. As it is mentioned in the previous chapters, it is not enough of the disparities between the law to justify the use of Article 114 TFEU.[256] It requires that the diversity of national law hinders the well-functioning of the internal market or there is an appreciable distortion of the competition.

In addition, The CJEU upheld that the measure adopted on basis Article 114 TFEU shall identify the obstacles that hinder the internal market and or/and the appreciable distortion of competition. The Court emphasized that it is not enough just merely identify the obstacle and or the distortion the Court seeks to review whether the distortion of competition which the measure *purports to eliminate is appreciable*.[257] Besides, The Court upheld that *eliminating the smallest distortions of competition would be incompatible with the conferral principle*. [258] Thus, this assessment ensuring that the obstacle and/or the distortion of the competition is significant enough to enact the measure. Otherwise, the power of the Union conferred in Article 114 TFEU would unlimited.[259] As a consequence, any measure on the basis of Article 114 TFEU shall fulfill the condition that the obstacle and or distortion of competition shall be identify and significant enough to enact the measure.

Furthermore, it is possible to use Article 114 TFEU as a legal basis of a measure which aim is to prevent the emergence of future obstacles to trade, as long as, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[260] As a result the

[254] European Cooperative Society (n 183) paras 35-39, 44, 45.
[255] Tobacco Advertising I (n 16) para 84.
[256] Ibid para 95; British American Tobacco (n 164), para 60.
[257] Tobacco Advertising I (n 16) para 106; Titanium Dioxide (n 158) para 23.
[258] Tobacco Advertising I (n 16) paras 107, 83.
[259] Ibid, para 107.
[260] Ibid, para 86; Spain v Council (n 168) para 35.

scope of Article 114 is not restricted to currents obstacles, it is possible to foresee futures obstacles that hinder the well-functioning of the internal market.

Years after *Tobbaco Advertising I* the topic once again came into the spotlight with the case *Tobbaco Advertising II*.[261] The case concerned the legality of a Directive 2003/33/EC on the approximation of the laws relating to the advertising and sponsorship of tobacco Products.[262] This directive replace the directive annulled in the case *Tobbaco Advertising I*. One more time Germany sought the annulment the contested directive argued that the measure could not be adopted on the basis Article 114 TFEU because the directive did not contributes to eliminating obstacles to the free movement of goods or to removing appreciable distortions of competition.[263]

The CJEU recall that there. Firstly, there were diverse national laws on the advertising of tobacco products. Secondly, it analyzed that these diversity laws provoked restrictions on the free movement of the products. Lastly determined that the adopted measure contributes to eliminating the identified obstacles and or distortions of the competition.[264] Therefore, the Court upheld that the contested directive fulfill the condition to use Article 114 TFEU as a legal basis.

In the *Biotechnology case*[265] Netherlands sought the annulment of Directive 98/44/EC concerning the legal protection of biotechnological inventions. The applicant argued that the contested directive was incorrectly adopted on the basis Article 114 TFEU,[266] taking into account that the contested measure identified obstacles that *do not exist or only concern secondary issues which do not justify harmonization*.[267] Nevertheless. The CJEU upheld that the directive *was correctly enacted considering that the purpose of Article 114 TFEU is to reduce the obstacles, whatever their origin, to the operation of the internal market which differences between the situations in the Member States represent.*[268] Moreover, this case is relevant because the Court extends the scope of the approximation of laws to divergences interpretations which are contrary among the Member States, and also, to the terms of international legal instruments to which the Member States are parties ensuring a uniform interpretation of such terms. [269]

Furthermore, the CJEU stated that if the aim is to prevent the emergence of future obstacles to trade resulting from the diversity development of national laws, it is mandatory that such obstacles *are likely and the measure in question is designed to prevent them*. [270] Thence, there is a control of the correct use of Article 114 TFEU ensuring that the measure adopted effectively eliminates the distortion of the competition or obstacle of the internal market according to its objectives, thereby,

[261] Case C-380/03 Federal Republic of Germany v Parliament and Council of the European Union (Tobbaco Advertising II) (2006) I-11573
[262] Ibid para 1.
[263] Ibid, para 17.
[264] Ibid, 45, 52, 69 and Case C-380/03 Federal Republic of Germany v Parliament and Council of the European Union (Tobbaco Advertising II) (2006) I-11573, opinion of Advocate General Léger delivered on 13 June (2006) 90 -95.
[265] Biotechnology (n 244)
[266] Ibid Para 13
[267] Ibid Para 14
[268] Ibid 20
[269] Ibid 20
[270] Ibid 15; Spain v Council (n 68), para 35; Tobacco Advertising I (n 16) para 86.

the measure to be adopted cannot eliminate the obstacle for the internal market and or the distortion of the competition in an incidental or subsidiary way.

According to the case law for the approximation of laws on contract law which pretends uses as a legal basis Article 114 TFEU, it is required to satisfy the following conditions. Firstly, the future measure of contract law must have a genuinely objective to improve the conditions for the establishment and functioning of the internal market. Secondly, the measure to be adopted shall identify clearly the obstacles that hinder the internal market and or/and the appreciable distortion of competition. Thirdly, this obstacle and/or distortion must be significant that impact the internal market and justify the harmonization. Fourthly, the scope of Article 114 TFEU includes the possibility to harmonize future obstacles of the internal market. Fifthly the future measure on contract law must be designed to prevent the obstacles and/or the distortion of the competition that were identified. Sixthly, the scope of Article 114 TFEU includes the possibility to harmonize when there are diverse interpretations of the national or international law. Thus, Article 114 TFEU can be used as a legal basis of future contract law if the future measure satisfied those conditions.

4.2.3. A future measure on EU contract law shall compliance with the principles of subsidiarity and proportionality

The exercise of the Union power encompassed that Union measure shall respect the principles of conferral, subsidiarity, and proportionality,[271] those are the entangled relationship among themselves. Article 5 TEU regulates the principle of conferral which stated the existence of Union´s competence; subsidiarity regulates when the competence shall be exercised by the Union or by the Member States, and proportionality regulated the terms or intensity of the action.[272]

Swedish Match[273] concerned the validity of Article 8 of Directive 2001/37/EC which stated that the Member States are to prohibit the placing on the market of tobacco for oral use.[274] This directive was adopted using as a legal basis Article 114 TFEU. Swedish Match producer of snus, (small piece of tobacco to be placed between the gum and the lip) could not sell the product in EU territory except Sweden (which has a derogation from the ban), thereby, Swedish Match argued the provision infringement the principle of proportionality and others.

The CJEU analyzed the contested provision under the scope of Article 114 TFEU. Firstly, to determine that there is a heterogeneous development of that tobacco market that constitute obstacles to the free movement of goods within EU territory.[275] Secondly, reaffirm the scope of Article 114 TFEU stated that the legislature can intervene by adopting appropriate measures, in compliance with Article 114 TFEU and with the principle of proportionality when there are obstacles

[271] Ch 3.3.4 of this thesis.
[272] Gutman, Constitutional foundation (n 49), 282-284.
[273] Swedish Match (n 165).
[274] Swedish Match (n 165) para 3.
[275] Ibid, para 38 -39.

to trade or it is likely that those will emerge in the future obstacles because the Member States is taking or is going to take divergent measures with respect to a product trigger different level of protection among the Member State, and as a result, the product cannot move freely affecting the internal market.[276] Thus, the Court applied the proportionality test to review that a measure fulfill with the proportionality principle, which in general term is one of the most important general principles and requires that EU measures shall be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them.[277]

Besides, this case analyzed if through harmonization of laws can ban the trade of a product and if this prohibition is not contrary to the proportionality principle, the CJEU answered that through the approximation of laws depending on the circumstances is possible requiring all Member State to ban the marketing of a product provisionally or definitive.[278] Therefore, The CJEU reviewed that the diversity national law that hinders the functioning of the internal market. Moreover, extends the scope of Article 114 TFEU even to ban the trade a product to ensure the well-functioning of the internal market, as long as comply with the proportionality principle.

In *Biotechnology Case,*[279] the applicant argued that the challenged directive breaches the principle of subsidiarity[280] and the Court stated that in areas which do not fall within its exclusive competence, the Union has the competence to take action only if the objectives cannot be sufficiently achieved by the Member States and by reason of the scale or effects of the proposed action, be better achieved by the Union.[281] Hence, determined that the contested directive is ensuring the smooth operation of the internal market in the area of the protection of biotechnological inventions, which could not be achieved by action taken by the Member States alone. Thereupon, the scale and effects of the proposed action must be taken into consideration and conclude that the objective can better achieve by the Union.[282] Notwithstanding, the Court confirmed that by virtue of the application of subsidiarity the Union is to legislate to the extent necessary and EU measures should leave as much scope for national intervention as possible.[283] Thence, the CJEU stated that the contested directive compliance with the principle of subsidiarity.

Regarding the application of subsidiarity and proportionality principles on contract law, it is relevant to highlights that the proposed CESL complies with the balance of subsidiarity and proportionality principles in the measures taken.[284] In addition that there are the explanatory memorandum of the proposal, impact assessment and consultation known as the 2010 Green Paper that explained deeply the barriers created by contract law that affects the internal market and leads the conclusion

[276] Ibid, para 33.
[277] Case C-58/08 Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform. (Vodafone) (2010) I-04999, para 51.
[278] Ibid 34 and Case C-359/92 Germany v Council [1994] ECR I-3681, paras 4, 33.
[279] Biotechnology (n 244).
[280] Ibid 30.
[281] Ibid, para 31, 72.
[282] Ibid, para 32.
[283] Ibid, 73.
[284]Vodafone (n 277); Gutman, Constitutional foundation (n 49), ch. 8.3.3.3

that the Union intervention is required. Making the analysis according to the case law, it is clear that the divergences of national contract law is hindering the internal market and the Member States are not being able to address any solution, so considering the scale and effects of the future measure is the Union that can achieve better the objectives pursued. Accordingly, the harmonization on contract law is possible as long as the future measure ensure the right balance between proportionality and subsidiarity which will depend on the content of the measure.

4.3. Legislative discretion

The legislative discretion represents other features of the use of legislative power conferred to the Union, some case law touched this issue. Such as Vodafone[285] concerning the validity of the Mobile Roaming regulation, the claimants argued that the contested measure adopted on the basis of Article 114 TFEU has an inadequate legal basis, besides it is disproportionate and breach the principle of subsidiarity.[286]

The CJEU reviewed the adopted measure on the ground of the criteria established in the case law for the correct use of Article 114 TFEU, such that the genuine aim shall be to improve the conditions for the establishment and functioning of the internal market; which is not enough the diversity law either abstract risk that hinders with the internal market to justify the approximation of laws. Indeed the use of Article 114 TFEU requires that the multiples national law obstruct the fundamental freedoms having a direct effect on the functioning of the internal market.[287] Moreover, the CJEU upheld that Article 114 TFEU confer on the Union legislature a discretion spotlight that *´depending on the general context and the specific circumstances of the matter to be harmonized, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features*.´[288] The CJEU concluded that the contested directive fulfills the condition to use as a legal basis Article 114 TFEU.

Undoubtedly, The CJEU has accepted that in the exercise of the powers conferred on it the legislature must be allowed a broad discretion of the Union to legislate and to choose the best approach and technique to reach with the objectives stated in the treaties´. Therefore, the criteria to be applied is not whether a measure adopted in such an area was the only or the best possible measure since its legality can be effected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.[289] Despite the broad discretion the Union must examine if the objectives of measure to be adopted justify the legal basis election.

[285] Vodafone (n 277).
[286] Ibid, para 29.
[287] Ibid, para 32.
[288] Ibid, para 35.
[289] Ibid, para 52.

Similar conclusion was provided in *Smoke Flavourings and ENISA* the CJEU upheld the broad scope of Article 114 TFEU and stated that by virtue of the legislature discretion the Union can decide the best techniques of the approximation appropriate to achieve the goal which will be depending on the general context and specific circumstances of the field to be harmonized.[290] Moreover, determine in use of the discretion some approximation would require a complex evaluation. Such as physical, chemical or biological analyses to be made and scientific developments in the field concerned to be taken into account of ensuring the result of the measure.[291] Thence, the Union has the possibility to make complex evaluations in order to make the best decision.

The case law shows a broad scope of Article 114 TFEU the adequacy to be adapted for distinct matters that affect the internal market. Besides, the competence of the Union to decide the best technique for the approximation. Notwithstanding, in *Tobacco Advertising I*[292], the Court made a close examination regarding the identification of the obstacle that hinders the internal market and the center of gravity of the directive. Accordingly, the directive did not satisfy the criteria to used Article 114 TFEU as a legal basis and it was declared null. Thus, Tobacco Advertising I established the boundaries in Article 114 TFEU and the consequences to do not fulfill the criteria established in the provision. Nevertheless, since *Tobacco Advertising I* the case law continues to confirm the broad scope of Article 114 TFEU and confirms the legislative discretion on the Union to decide.

These case law applied to the discussion on contract law lead to think that in use of the legislative discretion is possible to harmonize contract law in the basis of Article 114 TFEU that requires that the legislature analyzes the diversity national contract law to identify the barriers that are affecting the internal market and decides the best instrument to eliminate these obstacles. Moreover, choosing depending on the circumstances the method of approximation most appropriate for achieving the desired result taking into consideration the boundaries of Article 114 TFEU and its application reflected in *Tobacco Advertising I case*.

5. Conclusions

Initially, regarding the differences among the Member States' contract laws that impede the well-functioning of the internal market; this study has shown that contract law has mainly been regulated by the Member States. Thus, the diversity of national law on contract law has become a barrier to trade for undertakings who must assume extra costs, such as, legal advice, administrative expenses, and others to succeed in cross border transactions.

Furthermore, these obstacles have been increasing due to the lack of uniformity and legal certainty of EU acquis on contract law which due to the sector-specific approach has been developed in fragmented legislation to deal with specific problems. As a result, while some specific contracts are

[290] Smoke flavourings (n 166) paras 1, 45-46, 52.
[291] Ibid 45-46, 52.
[292] Tobacco Advertising I (n 16).

regulated through directives, such as package travel, contracts, or negotiated away from business premises, other contracts have an absence of rules in the matter.

Therefore, the current multiple domestic legal frameworks on contract law and the fragmentation in EU contract law triggered many obstacles in all the stages of the contract process, pre-contractual, contractual, and post-contractual. Thence, the well-functioning of the internal market has been affected directly, discouraging undertakings in the exercise of the free movements of goods and services.

In order to spotlight the dimension of the barriers, this thesis mentioned the concept of contract in which there is a non-binding EU definition. Thus, the definition is established by each Member State, each of them with different scope. For example, in civil law ´gift´ falls within the definition of contract while in common law it falls out of the scope of contract. The same scenario occurs with the act of bargain and unilateral act and the promise to give a reward.

Concerning the validity, each Member State has its own substantive and procedural requirements to make a transaction and the consequence to do non-fulfillment of these requirements can be that the transaction would be void. These requirements are completely different in each Member State. For instance, some contract requires public registration, for example the transferring of land. Others require notarization such as transfer shares, leases, and gifts.

There are other barriers, such the remedies for nonperformance, the remedies for nonconformity, and the enforcement, jurisdiction, and applicable law. Thereby, the undertakings to trade abroad must count with the legal advice and the economic power to pay extra costs than domestic undertakings. As a consequence, the diversity of contact law makes the cross border transactions costly which directly affects the internal market.

After established that domestic contract law hinders the internal market this thesis studied the constitutional foundation to ensure the internal market. The relevant provisions are Article 4(2)(a) which stated that the internal market is shared competence. Article 26 provides that the Union has the competence to enact measures to ensure the functioning of the internal market which can be adopted through the approximation of laws using the legal basis stated in Article 114 TFEU, excluding matters regarding taxation, free movement of persons, employee rights which fall in the scope of Article 115 TFEU. Furthermore, these legislative power shall be exercised with respect for the principles of conferral, subsidiarity and proportionality Article 5 and 3 TEU.

Subsequently, the research focused on the scope of Article 114 TFEU to be used as a legal basis in an EU measure. Firstly, it is relevant to recall that Article 114 TFEU is a residual provision that shall be used when there is no other provision to apply which means in practical terms that a specific provision that is capable of constituting the legal basis shall have a preference that Article 114 TFEU.

Secondly, the approximation of laws requires that there is a variety of national law which is creating obstacles and/or appreciable distortion of competition that are directly affecting the internal market, which means that it is not enough just with the diversity of law, it is also mandatory that the heterogeneous laws represented an obstacle for the internal market. Moreover, harmonization of law does not include the creation of supranational legal form.

Thirdly, the measure to be adopted must have as a main objective the well-functioning of the internal market. It cannot improve incidentally the functioning of the internal market. In addition, the measure to enact must identify clearly the current obstacles or the future obstacles that interfere with the internal market and be addressed to remove identified obstacles.

Lastly, the subsidiarity and proportionality principles are boundaries to the scope of Article 114 TFEU. Therein, the subsidiarity principle requires that the measure to enact has reasons to justify the intervention of the Union in the matter, such as the objectives of the measure cannot be sufficiently achieved by the Member States, by reason of the scale or effects. Furthermore, the proportionality principle requires that the measure cannot go beyond what was necessary to achieve the objective pursued.

Despite that this thesis has been focusing in Article 114 TFEU as the appropriate legal basis of future measure on contract law there are other provisions that might be suitable as a legal basis. Article 81 TFEU is the legal basis of measures to pursues enhancing the judicial cooperation in a civil proceeding to civil, it might provide a legal basis but the future instrument on contract law would be limited to cross border transaction excluding domestic transaction which might create a lack of certainty and uniformity. Article 352 confers the Union power to act in order to attain the objectives set out in the Treaties which might be is an appropriate legal basis of future measures on contract law as long as the measure seek the creation of new supranational legal forms excluding the harmonization of laws. Article 115 TFEU stated the approximation of laws. This provision has a narrow scope. Thereupon, it is possible to enact directives and excluding the possibility of enacting regulations.

Therefore, is clear that the mentioned provisions are unlikely to be used as a legal basis due to its narrow scope. Thus, the succeeding examination of this thesis was to establish the criteria to fulfill in order to use Article 114 TFEU as a legal basis for a future measure on contract law. Firstly, Article 114 TFEU is a residual provision. This requirement can be satisfied for EU contract law, considering that the treaties do not state any competence connected with contract law, as a result the fact that contract law is creating obstacles for the internal market that gives competence to the Union for acting.

Secondly, as it was explained, the divergence of national contract law has created barriers that affect directly the establishment and functioning of the internal market. Therein, a future measure on contract law can comply easily with the condition that the center of gravity is the well-functioning of the internal market. Thereupon, there is a low risk that a future harmonization measure on

contract law improves the internal market as a subsidiary achievement. Notwithstanding, a new instrument on contract law must be reviewed closely in its content and objectives to determine if the measure to enact seeks the creation of a supranational legal form (Article 352) or the harmonization of the national law (Article 114). Nevertheless, contract law has been developed for decades in all the Member States that lead us to think that it is likely the harmonization more than the creation.

Thirdly, the future measure should clearly identify the current obstacles or the emergence of future obstacles that the measure is preventing. In addition, the remedies designed to prevent the obstacles and/or the distortion of the competition that were identified. Moreover, these identified obstacles shall be significant for the internal market to justify the harmonization. It is not possible to remove the smallest obstacles that would be incompatible with the conferral principle. In the scenario of a future measure to harmonize contract law seems possible to fulfill these requirements taking into account there is a myriad of EU communication that identifies the main barriers that affects the internal market by contract law and the Union has recognized these obstacles as significant.

Lastly, the instrument on contract law shall ensure the respect of the subsidiarity and proportionality, considering the scale and effects of the future measure shall be evident that the Union can achieve better the objectives pursued and it cannot go beyond the strictly necessary to reach the aims.

Consequently, on those grounds Article 114 TFEU is the appropriate legal basis for a future measure of the harmonization of EU contract law. The election of a legal basis will depend on the content and the objectives of the future measure on contract law. Notwithstanding, it has been clear that national contract law has been creating obstacles for the well-functioning of the internal market. Therefore, Article 114 TFEU can potentially be the most optional provision to be the legal basis for a possible harmonization of contract law. As long as the future measure for the harmonization of contract law in its content and objectives fulfills the conditions to use the provision and ensuring the respect of the principles and the case-law that established the scope of article 114 TFEU.

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