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I Introductory Remarks

On the last occasion that I had the opportunity to speak in Paris I addressed the constitutional background to the debate about the place of ‘social justice’ in European contract lawmaking. I examined, first, the constitutional justification for the EC’s intervention into contract law; second, the legal criteria governing the content of the EC’s rules affecting contract law; and, third, the effect exerted by the EC on residual national competence. I aimed to show the dynamic and in places ambiguous nature of the relationship between the EU and its Member States, and to show how this impinges on private law in particular. 1

Today I want to be more concrete, and I want to be more normative. I want to defend the thesis that the EC can deliver ‘social justice’ and that it does deliver ‘social justice’. This occurs where pursuit of the missions assigned to it under the Treaty makes this unavoidable. A prominent example is provided by the harmonisation of private law pursuant to Article 95 EC, where the EC has to make its (re-regulatory) choices about the content and quality of the harmonised private law regime. I believe that the legislative acquis in this area discloses a rather sophisticated set of principles despite its incremental development.

But this is not a systematic programme of social justice. Nor, in my view, should the EC aspire to create a systematic programme of social justice. (Here I decisively retreat from the suggestions in this direction that I aired last time I spoke in Paris). Reasons include want of legal competence; absence of adequate budgetary resources; want of expertise; absence of a common European notion of social justice (or, more positively, the desirable diversity of conceptions of social justice in European societies); want of social legitimacy (i.e. absence of a European demos that would tolerate a European programme for promoting social justice).

Of much greater importance than promoting the EC as the site for achieving social justice is ensuring that the EC, in promoting efficient market- restructuring and acting to solve problems that lie beyond the problem-solving capacity of European states acting alone, does not obstruct the Member States from making choices about promotion of social justice. There is every reason to be nervous about models for European governance that re-allocate regulatory responsibility to EC level in circumstances where the EC lacks an adequate mandate to fill any gap caused by the exclusion of national legislative competence in the area in question. This requires me to refer to both primary EC law – most obviously the free movement rules – and secondary EC law – most obviously the programme of legislative harmonisation. I am not going to do this exhaustively. I am merely going to identify the principal relevant issues in the law. Those familiar with EC law will note that I have provided a very condensed version of a complex and in places ambiguous set of legal issues. But I

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1 The paper was subsequently published as ‘The constitutional competence of the EU to deliver social justice’ (2006) 2 European Review of Contract Law 136.
hope I have not strayed into misleading the reader through my concern to provide a manageable brief account.

The Services Directive and the Directive on Unfair Commercial Practices will provide recent case study illustrations. In particular I want to use them to draw out the point that the problem here begins with the weakness of Member States in the modern political and economic environment. The EC should be designed to help Member States to act together to achieve objectives they could not realise acting alone, while it should also be designed so as not to act as a restraint on Member States where they act to achieve objectives that do not conflict with the broader aims of the European Union. This is my normative assumption in examining the relevant provisions of EC law in this area in the light of concern for social justice. It means in particular that I have a scepticism about the use of a model of ‘maximum harmonisation’ in fields touching social justice.

II Primary EC law

II i Defining a trade barrier

What effect does EC trade law have on national private law in the absence of relevant EC legislation? None, if there is no barrier to inter-State trade. And this falls for assessment in the light of the Court’s re-orientation of Article 28 EC in its judgment in *Keck and Mithouard*. A national measure which constitutes a restriction on commercial freedom, but which applies equally in law and in fact to all operators and has no detrimental impact on the making of the EU internal market, lies beyond the reach of Article 28 EC. Such national rules are not trade barriers (and therefore the State does not need to justify them). National measures of market regulation that differ from those employed in other Member States and which are simply an expression of local taste divorced from any impact on market integration are untouched by the law of free movement (of goods).

The scope of Article 28 is not entirely settled at the level of detail. But as a general observation national rules of private law that lack the necessary connection with the project of market integration are untouched by Article 28 EC. Member States may promote social justice as they see fit. Put another way, free movement law is not

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3 Cf S Enchelmaier, ‘The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck’ (2003) 22 Yearbook of European Law 249. In Joined Cases C-158/04 & C-159/04 *Alfa Vita Vassilopoulos (formerly Trofo Super-Markets)* AG Poiarees Maduro advocated that the law be made more precise, and offered some suggestions, but the Court did not address the matter directly in its judgment of 14 September 2006.
directed at challenging diversity between national measures *per se*. There is space for national law concerning the promotion of social justice which is not imperilled by the EC Treaty rules governing free movement.

**II.ii Justification**

Even if a national measure is found to constitute a trade barrier in such circumstances, there is still room to justify it – *inter alia* in the light of its contribution to social considerations such as the protection of vulnerable consumers. From the perspective of preserving State choices about social justice, this is less secure than the route of showing that a national measure is not a trade barrier at all (under the *Keck* interpretation of Article 28), because it subjects the national regulatory choice to scrutiny under EC law rather than treating it as an exercise of local regulatory autonomy. But it reminds that even trade barriers are not automatically struck down under EC free movement law. They are instead put to the test of justification.

Justification embraces a wide range of matters in the public interest that may be advanced as more important in the circumstances than trade integration. Recently in *Ahokainen and Leppik* the Court remarked that ‘…Member States enjoy a margin of discretion in determining, having regard to the particular social circumstances and to the importance attached by those States to objectives which are legitimate under Community law …, the measures which are likely to achieve concrete results …’. The case involving public health and the control of strong alcohol but the principle is plainly capable of general application, including to justify trade-restrictive choices about promotion of social justice. So: the rules on free movement do not force down national rules to the standard preferred by the State that is the least rigorous regulator.

If national measures that restrict trade are ruled lawful, then the focus turns to the contribution of legislative harmonisation as a means to advance market integration. When we look at what the Court has done in interpreting Articles 28 – 30 (ex 30 –36) EC we are looking hard at the extent to which State regulatory autonomy is sliced away by the demands of EC law; and we are also looking hard at the interface between judicially-driven and legislature-driven approaches to advancing market integration in the EU. As *Keck* itself reveals the precise nature of this relationship has fluctuated over time.

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III Secondary EC law

III.i Scope of legislative competence

Article 5(1) EC declares that ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.’ This asserts the constitutionally fundamental principle of ‘attributed competence’, which holds that the EC can do no more than its Treaty permits. The EC has no general regulatory competence. Nor can it ‘self-authorise’ an increase in its own competence. And a reading of the Treaty will readily reveal that it enjoys no explicit competence to legislate to promote social justice.

However, as is well-known, the EC’s harmonization programme has made prominent interventions into private law. In so far as national laws vary, the argument has typically proceeded that the construction of a unified trading space within the EU was hindered. Therefore harmonisation of laws at EC level was required, first under Article 94 (ex 100) and more recently under Article 95 (ex 100a). The strict constitutional purpose of harmonisation was rule-making designed to make an integrated market, but its effect was to allocate to Community level (albeit, by virtue of the commonly used minimum formula, typically not exclusively) the competence to decide on the substance of the rules in question. Harmonised rules regulate the EU market – or more pertinent they ‘re-regulate’ it, in the sense that the Community is not acting as a de novo regulator but rather is responding to the pre-existing diverse regulatory choices among the Member States. As Mr Fennelly’s Opinion in Tobacco Advertising states, ‘the Community is not acting in a policy vacuum’. 9 So harmonising private law is not simply a technical process of market-making. It unavoidably means the shaping of a species of European private law – most conspicuously in the particular area of consumer contract law.

It is questionable how much of this legislative activity was sincerely pursued in the name of market-making. In truth the Member States, acting unanimously in Council, had sometimes ‘borrowed’ the competence to harmonise in the Treaty to pursue broader regulatory ambitions. 10 But this sense of constitutional unease, famously given sharper focus by the Tobacco Advertising judgment of 2000 11, in no way casts doubt on the practical significance of this body of law. Harmonisation, whatever its constitutional legitimacy, develops its own momentum, as commentators on the package of European (consumer) contract law have debated the weight and merits of principles and techniques within the acquis such as information disclosure, party autonomy and inquiry into substantive unfairness. They have sought to discover how much ‘system’ is at stake and to recommend ways to develop law and practice further. 12 Such ‘Europeanisation’ in turn induces (often unforeseen) adjustments in the

10 See generally on this pattern of evolution S. Weatherill, EU Consumer Law and Policy (Elgar European Law, 2005), Chapters 1, 3.
12 E.g. – and by no means adopting the same outlook – S. Weatherill, EU Consumer Law and Policy (Cheltenham, Elgar, 2005); N. Reich and H.-W. Micklitz, Europäisches Verbraucherrecht (Baden-
structure of national laws, as shrewd actors exploit EC law to disrupt settled national practices. These rhythms are typical of the pathways along which the search for an ‘EC policy’ is conducted in many areas. EC law and practice ‘spills over’ to provoke new academic sub-disciplines, as the ‘Europeanisation’ of many policy sectors that are in explicit terms subject to only a limited interventionist competence granted by the EC Treaty gathers pace.

III.ii Content

The harmonised legislative acquis therefore reveals an incremental, relatively unsystematic but tangible re-regulatory commitment to (forms of) social justice. And the Treaty recognises this to be constitutionally proper. Article 95(3) provides that ‘The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective’. Article 153(2) states that ‘Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities’, which must embrace inter alia the integration of consumer protection requirements into the process of market-making. The quality of a harmonised régime is constitutionally relevant: this is not simply an exercise in plotting a deregulated market for Europe. Article 6 performs a similar horizontal function for environmental protection. Moreover the point that harmonisation is not simply about opening up markets is further supported by the Court’s acceptance that harmonisation Directives are apt to produce rights held by those envisaged as enjoying regulatory protection – including consumers - in the event that a Member State fails to put in place the envisaged regime. And the Court’s aggressive interpretation of Directives in favour of protection of weaker parties is lately vividly illustrated by its October 2006 ruling in Mostaza Claro v Centro Móvil Milenium, in which, called on to interpret Directive 93/13 on unfair terms, it placed consumer protection above the importance of securing finality in arbitration. The lesson is that a programme of legislative harmonisation, broad in its scope, may be further invigorated by judicial interpretation.

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16 Case C-168/05 Mostaza Claro v Centro Móvil Milenium judgment of 26 October 2006.
Tobacco Advertising confirms these policy linkages. The Court accepted that Article 129(1) EC, which is now Article 152(1), provides that public health requirements are to form a constituent part of the Community’s other policies whereas, in addition, Article 100a(3) (now, after amendment, Article 95(3)) makes an express connection between harmonisation and ensuring a high level of human health protection. Protective concerns may properly play a central role in fixing the content of harmonising measures. In Swedish Match AG Geelhoed referred to the Community legislature’s ‘responsibility’ in matters of health and safety and, provided that the conditions for recourse to Article 95 are fulfilled, the Court accepted that public health protection may form a decisive factor in the selection of harmonised rule. So the EC measures ‘may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products’.

The jurisprudence does not therefore support the view that the Community is unable, by harmonisation, to adopt a re-regulatory standard that restricts particular forms of trade throughout the territory of the EU. Were it otherwise the validity of measures such as Directive 84/450 which forbids misleading advertising or even, at the extreme, Directive 92/59, now replaced by Directive 2001/95, prohibiting the marketing of dangerous goods would be imperiled. Similarly Directive 2005/29 on unfair commercial practices constitutionally properly includes a (harmonised) prohibition against unfair practices. The Court has not been lured down a path which envisages the internal market being built by the EC only on the basis of market freedoms unfettered by regulatory prohibition. Tobacco Advertising identifies harmonisation as a process which involves close attention being paid to the quality of the harmonised regime not simply to the mere fact of its common market-making application. It is possible to advance social justice through the harmonisation programme – provided the measure itself makes an adequate contribution to improving the conditions for the establishment and functioning of the internal market.

But what does the fact of EC legislative intervention in a particular field mean for national autonomy in that field? This is a constitutionally ambiguous area.

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17 Case C-376/98 above.
18 Paras. 78, 88 of the ruling. Case C-233/94 Germany v Parliament and Council [1997] ECR I-2405, the Deposit Guarantee case, provides a further example, although in that case the Court, while accepting the inter-relation of market-building and concerns to achieve consumer protection, rejected the submission that the latter had been unlawfully subordinated to the former in a Community regime that caused depreciation of standards of protection in some Member States.
21 Para 34 of the judgment.
22 Cf B. de Witte, ‘Non-market values in internal market legislation’, Ch. 3 in N. Nic Shuibhne, Regulating the Internal Market (Cheltenham: Edward Elgar, 2006).
III.iii Material scope, Derogations & Exclusions

Whether a Member State’s choices about the promotion of social justice are affected by EC secondary legislation depends first of all on determination whether the matter in question is within the reach of a relevant EC measure. The material scope of the measure will require interpretation. 23 The sensitivity of the matter is evidenced by the existence of derogations and exclusions in some EC measures. These provisos reveal a concern on the part of the Member States to place limits on the disability under which they suffer in the matter of promotion of (loosely) social justice where EC secondary legislation has been adopted.


. supposed exclusion of regulation of matters of ‘taste and decency’ which vary widely among the Member States – Recital 7. It is far from easy to know how to interpret this 24 but for present purposes I use it simply to demonstrate that Member States are perfectly prepared to include ambiguous provisions in Directives in order to reflect, if not fully to allay, fears about the destabilising effect of EC measures on national policy choices.

. Article 3(2) - the Directive ‘is without prejudice to contract law, and in particular to the rules on the validity, formation or effect of a contract’. Is it realistic or even intelligible to seek to achieve this separation from contract law? 25 The Directive's suppression of unfair practices surely must affect the way some rules of national contract law are applied, especially those pertaining to practices occurring before an enforceable contract comes into existence – where the EC Directives already have a significant impact. Here again we see the Member States’ taste for placing ambiguous limits on the extent to which Directives curtail national autonomy.

The ‘Services Directive’ – exclusion of health care services, Services of General Economic Interest, etc. (see in particular Articles 1,2,3 and 17). These exclusions from the scope of the Directive evidently reflect the deep political sensitivity associated with exposing such sectors to the modestly liberalising effect of the Directive and its (partial) exclusion of national regulatory autonomy in such sectors. Whether a matter falls within the Directive or the regime established by Article 49 may matter a lot, typically because the latter is more generous than the

former in permitting residual scope for national action that restricts cross-border trade in services. 26

**III.iv Pre-emptive effect**

What happens to national competence to regulate a sector once the EC has adopted legislation in that sector? The Treaty is not systematic in its treatment of this constitutionally important matter. And in some respects it is unhelpfully ambiguous. 27

There is an explicit ‘minimum’ formula in Article 153(5) (consumer protection) and Article 176 (environmental protection). EC legislative measures adopted pursuant to these provisions do not exclude State competence to act within the scope allowed by the Treaty. 28

By contrast Article 95 (ex 100a) does not address the matter, save only that it envisages a limited procedure under Article 95(4) et seq whereby States may be permitted to apply stricter standards than are envisaged by the Community rule.

Legislative practice reveals that individual measures of harmonisation adopted pursuant to Arts 94 and 95 (ex 100 and 100a) – including, prominently, the group of measures affecting protection of the economic interests of consumers - are typified by a clause in each Directive specifying the minimum character of the harmonisation. An example is provided by Directive 93/13 on unfair terms in consumer contracts. 29 Indeed the absence of any such clause from Directive 85/374, the ‘Product Liability Directive’, has served a factor in the Court’s interpretation of that measure’s pre-emptive effect. 30 The scope of the competence to harmonise pursuant to Article 95 has long been treated in a broad manner in the field of private law (most of all in relation to consumer contract law). Considerations of consumer protection have played a powerful role in shaping the content of the harmonised rules. But also central to understanding the prevailing political bargain is that in connection with harmonisation measures affecting the economic interests of consumers, the normal assumption has been that the EC rules do not displace scope left to national authorities

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26 Although any assumption that the service sectors which are excluded from the scope of the Directive can expect a quiet life would be misguided: see e.g. Case C-372/04 ex parte Watts judgment of 16 May 2006.
28 See e.g. on the notion of more stringent measures of environmental protection pursuant to Art 176, Case C-6/03 Deponiezeckverband Eiterkötpe [2005] ECR I-2753. Also de Cecco, ‘Room to Move? Minimum Harmonisation and Fundamental Rights’(2006) 43 CMLRev 9.
to fix rules of consumer protection that are stricter than the harmonised norm. That is to say that the orthodox model has been ‘minimum harmonisation’. 31

So the political bargain was that consumer protection at EC level would be achieved by reliance on the Treaty’s authorisation to harmonise laws but space would be left for national preferences to do more to protect consumers than could be agreed at EC level. In this way both the EC and the Member States would retain competence to protect consumers even after the EC had intervened by way of secondary legislation.

Both the Court and the Commission are, in different ways, endangering the viability of a model of minimum harmonisation as the paradigm for harmonisation of rules affecting the economic interests of consumers. And in so far as they are driving a preference for maximum harmonisation the result will be preclusion of State competence to do more in the name of social justice than is permitted by the EC’s harmonised rule.

The very notion of minimum rules adopted under Article 95 seems incompatible with the market-making emphasis embedded in the interpretation of that Treaty provision provided in Tobacco Advertising. 32 It appears from this ruling that rules above the minimum level may be applied only to domestic goods not imports. However – emphasising the ambiguity of this issue – the Court has in subsequent cases raised no objection when presented with fact patterns which seem to assume the viability and validity of minimum rule-making pursuant to Article 95. 33 I think and hope that Tobacco Advertising is not to be read in such brutal fashion 34 but there are plainly open questions about the constitutional consequences of the adoption of harmonised rules for national regulatory powers. 35


32 Case C-376/98 paras 101-104 of the judgment.


The Commission’s visible concern is more with policy than the constitutional dimension, though the two issues clearly inter-connect. The October 2004 document of the Commission dealing with European contract law refers to perceived failings of a minimum model of rule-making. 36 This conforms to general concerns currently expressed by the Commission about the fragmenting effect of a model of minimum rule-making. Other recent consumer policy documents, including the Commission’s Consumer Policy Programme for 2002-2006, reveal a growing preference for maximum harmonization, perceiving this switch to be in both the commercial and the consumer interest. 37 By eliminating the scope for market-fragmenting stricter national rules, a maximum model is more apt to drive forward the process of integrating markets in Europe under a common regulatory pattern. 38 The very recently released Green Paper on the Review of the Consumer Acquis 39 clearly assumes the desirability of eliminating the minimum clause in the eight Directives under review. Preserving the current position is not even offered as an option for the future.

The same approach dominated the debate about the Directive on unfair commercial practices. 40 And it won the day. Denmark and Sweden opposed earlier drafts, fearful of a maximum model of harmonisation. But after merely cosmetic changes the Directive was adopted as a maximum measure. It promotes social justice in the sense that it requires the suppression of unfair business-to-consumer practices in the internal market. But there is no scope for Member States to choose to establish stricter standards within the field occupied by the Directive. Defining and applying ‘unfairness’ under the Directive is of crucial importance for it is the Directive that has become the sole site of regulation of such matters in the EU.

IV The Services Directive

Whether one is favourably or unfavourably disposed to this model of maximum harmonisation 41, it is plain that the constitutional issue of division of competence has become fundamentally important to the location of policies promoting social justice in Europe. My general view is that the more sensitive and the more wide-ranging the issues involved, the less desirable is a model of maximum harmonisation. In the EU more is at stake than merely market-making.

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37 COM (02) 208, OJ 2002 C137/2.
38 Cf the Commission Communication on the implementation of Directive 97/7 on Distance Contracts, COM (2006) 514 21 September 2006, for an example of how a minimum measure cannot create a uniform regulatory environment – and a clear Commission assumption that this is undesirable.
39 Not yet formally published, as far as I am aware.
This is revealed with ferocity by the debate about the ‘Services Directive’.

The assumption driving the Services Directive is that Article 49 EC goes only so far in achieving an integrated market for services and that persisting but justified barriers to inter-State trade in services are (inter alia) responsible for denying consumers the benefits of a single services market. So harmonisation takes the strain. The adoption of common rules governing the regulation of the sector will set aside (in whole or in part, depending on the model chosen) the competence of Member States to choose diverse approaches, opening up an integrated trading space in services, while the content of those common rules will dictate the standards of (inter alia) consumer protection.

That is – roughly – the policy agenda underpinning the Services Directive. And impetus has been eagerly generated by economic analysis of the advantages to be gained through the adoption of market-making harmonised rules. 42 Further momentum is provided by embedding the initiative within the broader ‘Lisbon Strategy’ promoting economic reform. However, the detail of the proposed legal rules is complicated and contested.

How vigorous should the re-allocation of regulatory competence from State to Community level be? The alterations made in 2006 to the original 2004 Commission proposal are largely concerned with this vital issue. The so-called country-of-origin principle was initially favoured by the Commission as the model for the freedom to provide services when it presented its proposed Directive in January 2004. 43 This would have meant that the Directive would have established certain agreed standards of protection, but that there would have been no scope for host states – states where services were being provided – to demand compliance with stricter rules. 44 Such issues of social justice as arise within the scope of the planned legislative regime would have been the EC’s exclusive concern.

As made clear above, adoption of such a model would have constituted a radical departure from past legislative choices in the field of harmonisation of measures protecting consumers’ economic interests where minimum rules have long been the normal core political bargain. It would, however, have readily aligned with the Commission’s preference for the renovation of the consumer protection acquis in the direction of maximum harmonisation, mentioned above, and it has already found legislative favour in the Unfair Commercial Practices Directive, 2005/29. 45

42 The Commission’s impact assessment, published in connection with the 2004 draft, is available via Hhttp://ec.europa.eu/internal_market/services/services-dir/impact_en.htmH. Other economic studies are available via Hhttp://ec.europa.eu/internal_market/services/services-dir/studies_en.htmH. For a collection of relevant analyses on the impact at UK as well as EU level see Hhttp://www.dti.gov.uk/europeandtrade/europe/services-directive/economics_evidence/page22898.htmlH.
44 Chapter IV of the 2004 draft.
Had the original 2004 shape of the country-of-origin principle been retained in the 2006 Services Directive, the provisions establishing the common standards of consumer protection in what is now Chapter V would have been of vital significance to the pattern of market integration founded on re-regulatory common standards of protection. There would have been no scope for a host state to impose stricter rules. The harmonised rules would have provided the exclusive source of regulatory protection in matters falling within the material scope of the Directive.

A tide of popular and political dissatisfaction washed away the Commission’s initial plan. By 2006 the country-of-origin principle has been stripped out. Under the Commission’s proposal released in April 2006 46, converted into a common position agreed by the Council in July 2006 47, and agreed with minor procedural amendments by the Parliament in November 2006, host state rules shown to be justified may still be applied to restrict trade in services. And this model is now enshrined in the text of the Directive finally adopted in December 2006 – Directive 2006/123 of the Parliament and the Council on services in the internal market. 48 The 2006 agreed text of the Services Directive is a modified version which is by no means as radical in its impact on residual host state regulatory competence as the original 2004 version. Nonetheless this would not involve mere preservation of the existing position under the Treaty. The 2006 text is not barren of impact on competence distribution. It would limit the scope of justification of trade barriers available to a host state.

Article 16 in Chapter IV of the Directive, dealing with the freedom to provide services, stipulates that Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. Any limitations must respect stated principles – non-discrimination, necessity and proportionality. ‘Necessity’ covers justification ‘for reasons of public policy, public security, public health or the protection of the environment’ – a narrower formulation than that found elsewhere in the Directive (cf Article 15(3)(b) where necessity is justification ‘by an overriding reason relating to the public interest’ (defined in Article 4(8) by reference to the Court’s case law, and including ‘the protection of consumers’) and narrower than Article 49 EC itself. So, where consumer health and safety issues are at stake, host state intervention is envisaged by Article 16 (see also Article 18), but where the protection of the economic interests of consumers is the aim of the host state, it seems that the intervention would be precluded by the Directive – unless ‘public policy’ in Article 16 is stretched to embrace concern for the economic interests of consumers (which the Court has emphatically not been prepared to sanction in the interpretation of the Treaty provisions on free movement 49).

This, then, seems to mean that the application of some measures of national consumer protection would be excluded by the Directive, in so far as they constituted barriers to the cross-border provision of services – i.e. there would be no scope for the host state to seek to justify its measures as ‘necessary’ to protect the economic interests of consumers (whereas, crucially, there is such scope under the Treaty’s principle of non-absolute mutual recognition, vigorously elaborated by the Court). In these areas, then, the standards of consumer protection fixed by the Directive would become the unalterable rules of national consumer law. The adjustment of regulatory competence is by no means as extensive or radical as that originally proposed in 2004 – but it would still alter, and limit, the scope for host states to maintain measures of consumer protection.

Good or bad? 2004 or 2006 version of the Directive? Or neither? I don’t want to go deeply into the choices. From the perspective of the consumer there are costs in that it is no longer possible at national level to develop protective rules for particular service sectors that go beyond those set by the Directive: nor is there scope to act to protect particular groups of vulnerable consumers. But there are benefits - the intensified integration of service markets is itself in the interest of consumers because it generates competition and choice; and in any event the Directive does set its own rules of consumer protection: this is a regulated system of country-of-origin, see Chapter V entitled Quality of Services. Article 22 provides that ‘Member States shall ensure that providers make the following information available to the recipient… ’ This covers name, registration, authorisation, after-sales guarantees, price, and so on. This emphasis on information disclosure conforms to general policy preferences in the pattern of re-regulatory EC consumer protection law. Ultimately this inquiry is familiar in EC consumer policy – how to calculate the relative costs and benefits of loss of national-level consumer protection and the promotion of a more integrated market in the EU, underpinned by common standards of consumer protection. (Of course the debate about the Services Directive has involved much greater attention to costs rather than benefits). The chosen model, now found in the 2006 Directive, having abandoned the earlier model, would exert a real but small effect by confining in part host state regulatory competence to set stricter trade-restrictive rules in order thereby to advance service market integration.

V Concluding Remarks

What does the debate about the ‘Services Directive’ reveal more generally?

50 See S. Weatherill, EU Consumer Law and Policy (Elgar European Law, 2005), Chapter 4.
It reveals that ‘maximum harmonisation’ involves a sufficiently radical re-distribution of regulatory competence to call into question the very legitimacy of the EC’s lawmaking pretensions.

At a ‘micro’ level one can plausibly consider whether deficiencies in information provision to consumers represent a real market failure in (say) the Timeshare Sector or in matters of ‘Distant Selling’ – and one can plausibly consider whether the techniques chosen by the EC help to cure those market failures. But the services sector (even allowing for the many exclusions contained in the Directive) seems too broad in its scope to attract useful detailed informed analysis in this vein. There is surely a wide range of different problems/ market failures arising in different segments of the services sector. Is a general set of provisions governing information provision helpful? Or is it likely to constitute insensitive over-regulation? One may contrast Directive 2005/29 on Unfair Commercial Practices, where relatively careful account is taken of vulnerable consumers within an overall formula based on the ‘average consumer’. 52

The maximum model invites broader examination. Under a maximum model, unlike a minimum model, Member States cannot simply implement the EC rules alongside domestic rules and allow the system(s) to evolve: they must scrutinise the existing pattern of national law which falls within the material scope of the EC measure and ruthlessly exterminate any provisions that are stricter than mandated by the EC measure. To claim that this process is liable to lead to the ‘demolition of national legal systems’ may still count as exaggeration 53 - but it highlights the depth of the concern. It is deeply questionable whether the Commission’s general policy preference in favour of maximum harmonisation is well suited to a Union of 27 culturally, socially, legally and economically diverse Member States. At the very least there is a strong case to be made for regarding maximum harmonisation as applicable only in particular sectors and only where its use has been carefully justified in the prevailing sector-specific conditions.

At a ‘macro’ level the question is whether a transfer of authority of this breadth is tolerable.

These are high stakes. A maximum model radically shifts the pattern of European lawmaking away from a co-operative model towards a more hierarchical pattern. This occurs in ever wider and more sensitive areas. And in so far as EC rules pre-empt national rules the promoter of social justice would no longer be able to fall back on national law if dissatisfied with the treatment of a particular matter under EC law.

An orthodox (though far from fully satisfying) critique holds that it is for the Member States to achieve redistribution of wealth and promotion of social welfare (should they so wish) while it is for the EU to limit itself to achieving an efficiently functioning economy for Europe. And – the critique typically runs – the EU should not dip into matters of redistribution because it is lacking in the necessary popular legitimacy as an arena in which such choices should be made. But if ‘social justice’ can no longer adequately be achieved by the Member States in the context of an integrating transnational market in which key decisions about economic governance are taken at European level, and if retreat to the shelter of the nation state is flawed because it is no longer a reliable shelter in such economic conditions, then perhaps equipping the EU with a more prominent role as an actor in the field of ‘social justice’ is the least-bad alternative……… That is how I concluded the paper I delivered last time I spoke in Paris. 54 I think now I have a stronger view. And it is that this is not the direction to take.

The further one gets from technical market-making, and the more sweeping the material scope of the harmonisation, the more one should prefer minimum rules. Is managed minimum harmonisation possible? I hope so. But maximum harmonisation on a scale as ambitious as the ‘Services Directive’ is not.

So the EC should be concerned with matters of social justice where pursuit of the missions assigned to it under the Treaty makes this unavoidable (e.g. where harmonisation of private law pursuant to Article 95 is on the legislative agenda). As I hope I have explained I believe that the legislative acquis in this area provides a rather sophisticated set of rules. But it is not a systematic programme of social justice, nor can it be.

Of much greater importance is that the EC, in promoting efficient market-restructuring and acting to solve problems that lie beyond the problem-solving capacity of European states acting alone, does not obstruct the Member States from making choices about promotion of social justice. Article 28 EC has been refined since the Keck ruling to achieve that. A deeper scepticism of the virtue of maximum harmonisation is a necessary accompaniment.

To take away the EC would not allow the rediscovery of a haven of social justice within the State. The pressures and tensions caused by transnational economic adaptation would not vanish, and indeed, absent the EC, they would likely present still tougher challenges for the States of Europe than they do currently. The problem here is not the EC itself but rather the weakness of Member States in the modern political and economic environment. (This insight was dismaying absent from the debate about the Services Directive, and in fact it is missing in a lot of what passes for political and popular debate about the EU.) The EC should be designed to help Member States to act together to achieve objectives they could not realise acting alone. But the EC strains its own legitimacy if it takes over the task of promotion of

54 Note 1 above.
social justice, especially where it purports to do that to the exclusion of Member State competence to act in the field. The field of social justice should normally remain under the control of the Member States and that means that ‘maximum harmonisation’ should be an exception rather than the rule.