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HOMO ECONOMICUS, BEHAVIOURAL SCIENCES,  
AND ECONOMIC REGULATION:  
ON THE CONCEPT OF MAN IN INTERNAL MARKET  
REGULATION AND ITS NORMATIVE BASIS

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## **Abstract**

In the following paper we investigate how EU law conceptualizes the individual to whom internal market regulation is addressed. To this end, we take as an analytical point of departure a stylized information paradigm, whereby for reasons of internal market benefits, market players have to bear the burden of perceiving and processing information that is relevant in respect of an intended transaction, as well as disadvantages should they be ill-equipped to cope with this assignment. We will show that although it implemented the normative concept of a well-informed, observant and circumspect consumer, the ECJ never adopted such a stylized information paradigm. Moreover, we illustrate through various examples how the EU legislature assists market players in perceiving and processing information, and even seeks to steer their decision-making process. We reconsider whether or to what extent this should be understood as an advancement of an information paradigm or rather as a “behavioural turn.” We argue that only a differentiated approach that balances the internal market rationale with potentially conflicting rights meets the exigencies of EU law.

## **Keywords**

EU Law, Internal Market, Behavioural Sciences, Regulation, Information Paradigm



# Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis

Jens-Uwe Franck & Kai Purnhagen

## Introduction

Despite of a considerable broadening of its sphere of activity over the last few decades, the project of creating a well-functioning internal market still remains a central ambition of the European Union.<sup>1</sup> To achieve this objective, the Union regulates in various respects market activities, i.e. it seeks to control, order or influence the economic behaviour of the internal market players<sup>2</sup>: Its institutions pass legal acts. Internal market related law with a regulatory impact is applied by the European Commission (as well as by agencies of the Union) and is construed by the European Court of Justice,<sup>3</sup> both of which act in close cooperation with Member State institutions and private players.

Initially referred to in the Lisbon agenda<sup>4</sup> and thereafter emphasized by the white paper on new governance,<sup>5</sup> quality of regulation became a focal point of political and scholarly interest during the last few years.<sup>6</sup> A recent struggle of the European Commission for “better” and “smarter” regulation reflects this development.<sup>7</sup> To improve EU governance as a whole and particularly the quality of regulation, economic analysis has been assigned a key role. Economic implications and consequences of contemplated regulatory acts shall be assessed before any regulatory initiative by the EU.<sup>8</sup> “Better regulation” is expected to achieve an enhancement of allocative and dynamic efficiency, and therefore aims at positive welfare effects.<sup>9</sup>

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<sup>1</sup> Article 3(3)1 TFEU.

<sup>2</sup> Cf. the definition of “regulation” adopted by *Julia Black*, *Critical Reflections on Regulation*, 27 *Australian Journal of Legal Philosophy* (2002), 1.

<sup>3</sup> Now officially named “Court of Justice of the European Union,” see Section 5, Articles 251 et seq. TFEU. Hereinafter we will refer to it as “the Court” or the “ECJ.”

<sup>4</sup> *European Council*, European Council 23 and 24 March 2000, Lisbon, Presidency Conclusions; *Claudio Radaelli*, *Whither better regulation for the Lisbon agenda?*, 14 *Journal of European Public Policy* (2007), 190-207.

<sup>5</sup> *European Governance – A white paper*, COM(2001) 428 final; see for an assessment *David Trubek* and *Louise Trubek*, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 *Columbia Journal of European Law* (2007), 539-564.

<sup>6</sup> See *Claudio Radaelli*, *Measuring Regulatory Quality? No Thanks (But Why Not?)*, 3 *European Journal of Risk Regulation* (2012), 108-112.

<sup>7</sup> Cf. *Alberto Alemanno*, *The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?*, 15 *European Law Journal* (2009), 382-400; *Lorenzo Allio*, *On the Smartness of Smart Regulation – A Brief Comment on the Future Reform Agenda*, 2 *European Journal of Risk Regulation* (2011), 19-20; *Helen McColm*, *Smart Regulation: The European Commission's Updated Strategy*, 2 *European Journal of Risk Regulation* (2011), 9-11; *Claudio Radaelli*, *Whither better regulation for the Lisbon agenda?*, 14 *Journal of European Public Policy* (2007), 190-207; *Jonathan B. Wiener*, *Better Regulation in Europe*, 9 *Current Legal Problems* (2006), 447-518.

<sup>8</sup> Cf. *Mandelkern Group on Better Regulation*, Final Report, 13 November 2001, p. 34: “Regulation must be viewed as a legal instrument with economic effects carried out through public institutions.”

<sup>9</sup> Cf. *Mandelkern Group on Better Regulation*, Final Report, 13 November 2001, p. 37: “The review of existing regulation should be done [...] regarding the effect of existing regulation on innovation, economic growth and employment.”

The normative relevance of the latter point is particularly evident with respect to internal market regulation. As it was already laid down in the *travaux préparatoires* to the Treaty of Rome,<sup>10</sup> the EU law project of an internal market is conceptually based on classical free trade theory.<sup>11</sup> First formulated by *Adam Smith* as a theory of absolute advantage, it was *David Ricardo* who subsequently advanced the idea to a theory of comparative advantage<sup>12</sup>: Even if one assumes that a country was more efficient in the production of all goods than another country, both countries would gain by trading with each other, as long as they were characterized by different relative efficiencies. That is because the former country may gain when it specializes in the production of the good where it has a comparative advantage, supposing it may trade that good for other goods whose production it gives up. Thus, by removing obstacles for cross-border trade a greater number of transactions will be made possible, cooperation and specialization based on a division of labour will be facilitated, and competitive pressure will increase. Ideally, this will result in an efficient allocation of production, labour and capital, cheaper and better products for all market players in the internal market, and ultimately in an enhancement of social welfare.<sup>13</sup>

Consequently, the European legislature is called on to ensure that regulatory initiatives that are based on the competence of the Union to establish an internal market, and particularly on its competence pursuant to Article 114 TFEU, are ultimately apt to indeed reach the efficiency gains that are promised by the project of establishing an internal market.<sup>14</sup> Although efficiency gains do not constitute the only ambition of the internal market, the “efficiency” rationale does in fact form the central means of the day-to-day work of regulators in the EU.<sup>15</sup> Moreover, in construing internal market law, it is up to the ECJ to enforce its economic rationale.<sup>16</sup>

Therefore, due to both general considerations on “good regulation” and the economic rationale of internal market law, it should be considered unassailable that a state-of-the-art approach to internal market regulation requires consideration of economic theory. However, on this basis internal market law must not only be conceived as having a de-regulatory function having regard to the theory of comparative advantage. Rather, it has to be acknowledged that economic theory has identified

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<sup>10</sup> *Comité Intergouvernemental Créé Par La Conférence De Messine*, Rapport Des Chefs De Délégation Aux Ministres Des Affaires Etrangères, Doc. MAE 120 f/56 (1956), generally referred to as the “Spaak-Report,” p. 13: “The object of a European common market should be to create a vast zone of common economic policy, constituting a powerful unit of production and permitting a continuous expansion, an increased stability, an accelerated raising of the standard of living [...] To attain these objectives, a fusion of the separate markets is an absolute necessity. Through the increased division of labor, such a fusion will enable the wasting of resources to be eliminated [...]. In an expanding economy, this division of labor is expressed [...] by a relatively more rapid development, in the common interest, of the most economic production programs. Competitive advantage will, moreover, be determined less and less by natural conditions”; translation taken from *Joseph J.A. Ellis*, Source Material for Article 85(1) of the EEC Treaty, 32 *Fordham Law Review* (1963), 247, 249.

<sup>11</sup> See on the historical roots of classical free trade theory *Douglas A. Irwin*, *Against the Tide: An Intellectual History of Free Trade*, 1996.

<sup>12</sup> *David Ricardo*, *On the Principles of Political Economy and Taxation*, Chapter 7, 1817.

<sup>13</sup> See *Willem Molle*, *The Economics of European Integration*, 5<sup>th</sup> ed. 2006, pp. 35-36 and 67.

<sup>14</sup> This is reflected, e.g., in recital (4) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, OJ 2007 L319/1: “It is vital, therefore, to establish at Community level a modern and coherent legal framework for payment services [...] which is neutral so as to ensure a level playing field for all payment systems, in order to maintain consumer choice, which should mean a considerable step forward in terms of consumer cost, safety and efficiency, as compared with the present national systems.”

<sup>15</sup> The 2007 survey among EU-25 samples of directors of better regulation came to this conclusion, see *Claudio Radaelli* and *F. de Francesco*, *Regulatory Quality in Europe: Concepts, Measures, and Policy Processes*, 2007.

<sup>16</sup> See for an elaborate analysis of the EU’s market-related agenda *Ari Afilalo*, *Dennis Patterson* and *Kai Purnhagen*, *Statecraft, the Market State and the Development of European Legal Culture*, in *Geneviève Helleringer* and *Kai Purnhagen* (eds.), *Towards a European Legal Culture*, forthcoming 2013, who assign to this market-related rationale the feature of a distinct European legal culture.



categories of so-called market failures that at least in principle may justify (re-)regulation. These categories include in particular monopoly power, externalities, and public goods. To give an obvious example, in contrast to the days of *Adam Smith* and *David Ricardo*,<sup>17</sup> the need for antitrust laws is uncontested today and thus Articles 101 and 102 TFEU as well as the EC Merger Regulation form an essential part of internal market regulation.

With respect to our topic, it is important to see that while it has for a long time already been standard knowledge of microeconomic price theory that for markets to function, market players must obtain adequate information on prices and quality of marketed products, it is only since the 1970s that economists have started to focus on information deficits as a potential reason for market failure, and on possible remedies to counter such risks. *George Akerlof* famously described in his seminal paper on “lemon markets” the mechanism whereby informational deficits on the part of consumers due to prohibitively high search costs generate a risk of adverse selection among available products, resulting in a failure of the market to provide high quality goods.<sup>18</sup> It is basically this theory that provides the economic justification to regulate markets if market mechanisms such as signalling through advertisement, labelling and other instruments, reputational mechanisms or information intermediation,<sup>19</sup> do not suffice to provide for an adequate level of product-related information, or where market players are rationally ignorant of available information due to prohibitively high costs or cognitively inapt to perceive and process available information. There is a broad range of potential regulatory remedies available to regulators, reaching from measures to prevent deceptive practices, through mandatory information duties to content-related regulation such as, for example, a definition of mandatory quality standards.<sup>20</sup>

Yet as such (re-)regulatory measures whose justification lies in potential informational deficits may themselves establish a restriction on free trade and which, therefore, are subject to legal scrutiny, the question has to be raised as to what kind of individual behaviour should be assumed in this regard. Neo-classical microeconomic theory assumes a rational human being to whom stable preferences, self-serving, and transitive behaviour are attributed,<sup>21</sup> a model man that is conventionally labelled *homo economicus*.<sup>22</sup> Yet insights of different sciences whose interests are dedicated to human behaviour like cognitive psychology and behavioural economics have revealed various phenomena of cognitive deficits and bounded rationality that are in particular of relevance with regard to perceiving and processing information and decision behaviour.<sup>23</sup> This has triggered an intra-economic debate on

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<sup>17</sup> See *Adam Smith*, *The Wealth of Nations*, 1778, p. 160: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice.”

<sup>18</sup> *George Akerlof*, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, *Quarterly Journal of Economics* 84 (1970), 488-500; previously, *Edward H. Chamberlin*, *The Product as an Economic Variable*, 68 *Quarterly Journal of Economics* (1953), 1, 24-27, had already described the risk of adverse selection due to consumers’ ignorance of product quality.

<sup>19</sup> See for an overview on market mechanisms that may counter informational deficits *Jens-Uwe Franck*, *Europäisches Absatzrecht*, 2006, pp. 190-203.

<sup>20</sup> See for an overview *Jens-Uwe Franck*, *Europäisches Absatzrecht*, 2006, pp. 203-216.

<sup>21</sup> The first formulation of the rationale behind the concept of a *homo economicus* is attributed to *John Stuart Mill*, *Essays on Some Unsettled Questions of Political Economy*, 2nd ed. 1874, essay 5, paras. 38 and 48.

<sup>22</sup> *Klaus Mathis*, *Efficiency Instead of Justice?*, 2009, pp. 7-30.

<sup>23</sup> Early works include *Howard Kunreuther* and *Paul Slovic*, *Economics, Psychology, and Protective Behavior*, 68 *American Economic Review*, *Papers and Proceedings* (1978), 64-69; *Daniel Kahneman* and *Amos Tversky*, *Prospect Theory: An Analysis of Decision under Risk*, 47 *Econometrica* (1979), 263-291; *Robin M. Hogarth*, *Judgment and Choice*, *The Psychology of Decision*, 1980/2<sup>nd</sup> ed. 1987; *Daniel Kahneman*, *Paul Slovic* and *Amos Tversky* (eds.), *Judgment under uncertainty: Heuristics and biases*, 1982. An illustrative survey of various insights presents *Melvin A. Eisenberg*, *The Limits of Cognition and the Limits of Contract*, 47 *Stanford Law Review* (1995), 211, 216-218. A popular science

whether it may be feasible or even imperative to integrate such findings into general microeconomic theory. Among economists scepticism seems to be widespread in this regard as they tend to stress an inherent tendency of markets to reward rational behaviour while they punish irrationality. Thus, it is assumed that those market players who do behave rationally will have a decisive influence on prices, quantity, and quality of products and other market parameters.<sup>24</sup> Among lawyers and scientists from related disciplines, the debate about whether and to what extent findings of behavioural sciences may influence regulation is also in full swing. Positions as to a need for their implementation into regulatory strategies range from outright rejection<sup>25</sup> to limited<sup>26</sup> or at least careful<sup>27</sup> and full support.<sup>28</sup>

Viewed from the position of a regulator who seeks to employ economic expertise, such intra-economic controversies and their spill-over to other disciplines must not be ignored. Yet since regulation happens within a legal framework, the issue of an individual behaviour model has a normative dimension, too. Thus, it may not be regarded as a merely technical aspect of behavioural sciences. It is based on this insight and against the background of the important role attributed particularly to information economics with respect to internal market regulation that we investigate how positive EU law conceptualizes the individual to whom internal market regulation is addressed.

### **The Establishment of the Concept of a Well-Informed, Observant and Circumspect Internal Market Player and Its Normative Justification**

The idea that information rules might operate less restrictively (but potentially adequately effectively) compared to mandatory content-related regulation, and particularly if compared with product bans, is an assumption that has been considered in the context of European securities markets regulation already in the 1960s.<sup>29</sup> This rationale that was later conceptualized as the “information model” of internal market law<sup>30</sup> gained general importance in the aftermath of the ECJ’s seminal judgment “Cassis de Dijon.” In this case, Germany had prohibited the distribution of a French brand of liquor since the marketing of fruit liqueurs was subject to the condition of a minimum alcohol content of 25 percent. The ECJ, interpreting the notion of measures having equivalent effect to quantitative import restrictions as it is now laid down in Article 34 TFEU, put forward the argument that the restrictive

(Contd.) \_\_\_\_\_

presentation has been produced by *Richard H. Thaler* and *Cass R. Sunstein*, *Nudge, Improving Decisions About Health, Wealth, and Happiness*, 2008.

<sup>24</sup> *Hal R. Varian*, *Intermediate Microeconomics*, 7<sup>th</sup> ed. 2006, ch. 30.5, pp. 560-561. This point has also been stressed by law-and-economics scholars such as *Alan Schwartz*, *How Much Irrationality Does the Market Permit?*, 37 *Journal of Legal Studies* (2008), 131-159, and *Richard Posner*, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stanford Law Review* (1998), 1551-1575.

<sup>25</sup> *Michael S. Pardo* and *Dennis Patterson*, *Philosophical Foundations of Law and Neuroscience*, University of Illinois Law Review (2010), 1211-1250.

<sup>26</sup> *Barbara Bottalico*, *Risk Communication: Cognitive Neuroscience, Decision Making and the Law*, 2 *European Journal of Risk Regulation* (2011), 427-432; *Sabine Frerichs*, *False Promises? A Sociological Critique of the Behavioural Turn in Law and Economics*, 34 *Journal of Consumer Policy* (2011), 289-314.

<sup>27</sup> *Evan Selinger* and *Kyle Powys Whyte*, *Nudging Cannot Solve Complex Policy Problems*, 3 *European Journal of Risk Regulation* (2012), 26-31.

<sup>28</sup> *Alberto Alemanno*, *Nudging Smokers The Behavioural Turn of Tobacco Risk Regulation*, 3 *European Journal of Risk Regulation* (2012), 32-42; *Adam Burgess*, “Nudging” Healthy Lifestyles: The UK Experiments with the Behavioural Alternative to Regulation and the Market, 3 *European Journal of Risk Regulation* (2012) 3-16; *On Amir* and *Orly Lobel*, *Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research*, 3 *European Journal of Risk Regulation* (2012), 17-25; *Cass R. Sunstein*, *Humanizing Cost-Benefit Analysis*, 2 *European Journal of Risk Regulation* (2011), 3-7.

<sup>29</sup> Cf. the so-called “Segré-Report,” European Economic Community, *The Development of a European Capital Market*, Report of a Group of experts appointed by the EEC Commission (1966), pp. 225-238; see *Thomas Ackermann*, *Das Informationsmodell im Recht der Dienstleistungen*, *Zeitschrift für Europäisches Privatrecht* (2009), 230, 237.

<sup>30</sup> *Ernst Steindorff*, *EG-Vertrag und Privatrecht*, 1996, p. 195.

effect of trade that goes along with such a mandatory requirement may not be justified if the protective purpose pursued could be adequately served by providing information to consumers:

“As the Commission rightly observed, the fixing of limits in relation to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public.

However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.”<sup>31</sup>

Two notions are enshrined in this passage that became essential features of the conceptual debate on the regulatory framework for the internal market. This is, first, a dichotomy of “information-related” vs. “content-related” rules<sup>32</sup> in conjunction with the statement that when a problem has been identified as requiring a regulating measure (i.e., it is assumed that market mechanisms alone are insufficient to ensure the necessary degree of consumer protection, fairness of competition etc.), preference should be given to an information-related rule wherever that seems sufficient to cure the problem.<sup>33</sup>

Yet it is essentially the yardstick that is applied to evaluate which regulating means are considered sufficient and necessary to reach a legitimate protective objective that ultimately decides on how effective this standard really is in respect of its liberalizing, market-opening ratio. In this regard, the second noteworthy point in the passage quoted from the judgment in “Cassis de Dijon” comes into play, as the ECJ without much ado presumed with regard to the case at hand that the consumers’ interests in purchasing products that would correspond to their preferences would be adequately served by indicating the alcohol content on a tag.

Thus, on the one hand the Court assumed on the part of the producer a duty to provide product related information and therefore implicitly acknowledged a justification for (re-)regulation to ensure that adequate information is provided on the market. In the context of “Cassis de Dijon,” this certainly does not seem to be a contentious step as a producer may generally be regarded as being in the position to generate such product related information in the most efficient way. On the other hand and more remarkably, the ECJ shifted the burden of perceiving and processing information to some extent to the consumers. That is because it would save them the time and the trouble to read the small print on a tag if the use of a certain label like “fruit liqueur” already indicated a certain (minimum) alcohol content. The ECJ’s judgment implicitly involved a trade-off: in order to benefit from lower barriers for internal market trade that may entail enhanced competition, lower prices and a broader choice of products, one should risk the consequence that a certain number of consumers will suffer a

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<sup>31</sup> ECJ, 20 February 1979, Case 120/78, REWE v Bundesmonopolverwaltung für Branntwein, [1979] ECR 649, para. 13.

<sup>32</sup> In fact, the rule of German law in question could be characterized as “information-related” as it was apparently only prohibited to market the product under the label “Cassis” or “fruit liqueur.” Viewed in this light, the judgment might be interpreted as dismissing one information-related regime as unnecessarily intrusive given the existence of a less intrusive but equally effective information based rule. However, in its later case-law the Court considered a domestic prohibition of certain publicity markings that were born by a product as an obstacle to intra-Community trade by nature as opposed to mere selling arrangements. The Court based this finding on the fact that such rules “may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs,” ECJ, 6 July 1995, Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln v Mars, [1995] ECR I-1936, para. 13. Against the background of this reasoning, it seems consequent to characterize a rule according to which a certain label may only be used for products that fulfill specified content-requirements as “content-related” and not as merely “information-related.”

<sup>33</sup> See *John A. Usher*, Disclosure Rules (Information) as a Primary Tool in the Doctrine on Measures Having an Equivalent Effect, in: *Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill* (eds.), Party Autonomy and the Role of Information in the Internal Market, 2001, 151, 152-153.

disadvantage, namely those who are not able or willing to carry the increased burden of information perceiving and processing, and who would for example purchase a bottle of “Cassis de Dijon” only to realize later that due to the insufficient alcohol content another product would have better served their preferences. The Court expects a learning process on the part of these consumers, in the course of which they may suffer a material disadvantage.

In its subsequent case-law, the ECJ more explicitly elaborated on its concept of the consumer as an internal market player. In particular, the ECJ had various occasions to judge on the question whether certain labels, material or techniques used for commercial communication could be regarded as deceptive and therefore, legitimately prohibited by domestic law. In this context, the Court held that the deceptive potential of commercial communication must be assessed taking the viewpoint of the “average consumer who is reasonably well-informed and reasonably observant and circumspect.”<sup>34</sup>

While the ECJ originally developed this concept as an expression of the principle of proportionality with regard to the interpretation of the free movement of goods (Article 34 TFEU) and therefore as a standard of Union law confining domestic law that establishes obstacles to free trade, subsequently the Court also applied the same yardstick to construe which practices may be considered “deceptive” under secondary law that aimed at harmonizing domestic protective standards in order to ensure free trade in the internal market.<sup>35</sup> This spill-over of the consumer concept from the interpretation of a fundamental freedom to legislative internal market activities of the Union, that is, from the de-regulatory to the re-regulatory aspect of internal market law, is consequent first, since the secondary internal market legislation follows in principle the same rationale and secondly, because it has to be regarded as settled law that not just the national legislatures but also the institutions of the Union are bound by the fundamental freedoms.<sup>36</sup>

It is against the background of this case-law that authors such as *Steindorff*,<sup>37</sup> *Weatherill*,<sup>38</sup> and *Wilhelmsson*<sup>39</sup> posited in the context of the internal market the concept of a confident consumer as an antithesis to the concept of a weak and vulnerable consumer, and *Steindorff* developed what has later been labelled the “information paradigm” of internal market law.<sup>40</sup> According to this notion, as the internal market is characterized by differentiated and fragmented conditions, it might only operate effectively to the benefit of all market players and to the society as a whole if the consumers who were on the one hand enriched with a wider choice of products had, on the other hand, to bear the burden of perceiving and processing information which was relevant to decide which product actually could meet their preferences. That is, in the internal market context, consumer protection and unfair competition law had to be interpreted instrumentally and hence, reconciled with the normative

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<sup>34</sup> The ECJ has consistently used this wording since its judgment of 16 July 1998, Case C-210/96, *Gut Springenheide and Tusky v Oberkreisdirektion Steinfurt*, [1998] ECR I-4657, para. 37. Prior to this decision the Court had already referred to the “[r]easonably circumspect consumer” as yardstick, ECJ, 6 July 1995, Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars*, [1995] ECR, I-1923, para. 13: “Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product’s quantity and the size of that increase.”

<sup>35</sup> ECJ, 2 February 1994, Case C-315/92, *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder*, [1994] ECR I-317, para. 16; ECJ, 28 January 1999, Case C-77/97, *Österreichische Unilever v Smithkline Beecham Markenartikel*, [1999] ECR I-431, para. 27; ECJ, 24 October 2002, Case C-99/01, *Linhart and Biffl*, [2002] ECR I-9375, para. 26.

<sup>36</sup> ECJ, 9 August 1994, Case C-51/93, *Meyhui v Schott Zwiesel Glaswerke*, [1994] ECR I-3879, para. 11.

<sup>37</sup> *Ernst Steindorff*, *EG-Vertrag und Privatrecht*, 1996, pp. 195-196.

<sup>38</sup> See *Stephen Weatherill*, The evolution of European consumer law: from well informed consumer to confident consumer, in *Hans-W. Micklitz* (ed.), *Rechtseinheit oder Rechtsvielfalt in Europa?*, 1996, 423-440.

<sup>39</sup> *Thomas Wilhelmsson*, *Social Contract Law and European Integration*, 1995, pp. 145-146.

<sup>40</sup> The notion of an “information model” in the internal market context has subsequently been taken up by several authors, see *inter alia* the articles in *Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill* (eds.), *Party Autonomy and the Role of Information in the Internal Market*, 2001.

objectives to foster free trade and the integration of the national markets. Thus, protection against deceptive practices, for instance, must not take the ignorant consumer as a yardstick since such an approach would ultimately require the prescription of uniform products.<sup>41</sup> By and large it shall be considered sufficient to ensure for reasons of consumer protection free access to information which might be relevant for a rational transaction decision.

To argue along the lines of an information paradigm in a pure form would imply a model of a “smart and decent” internal market player who did not suffer from capacity constraints or mental defects or biases in perceiving and processing data, and who realized market transactions based on available information, rationally balancing pros and cons and being aware of their own preferences.<sup>42</sup> It is precisely such an ideal of an internal market player that shares essential features with the concept of a *homo economicus*, and which presupposes a rational and self-interested actor who has the ability to make judgments towards their subjectively defined ends.

Though the early protagonists of an information paradigm for internal market regulation could not yet appreciate the insights of cognitive psychology, behavioural economics or other disciplines on characteristics of human behaviour, as they were taken up only during the last decade or so by legal writers, they were certainly not naïve as to the realities of consumers’, investors’ or other market players’ individual capacity to process information and to reach rational decisions on that basis. *Steindorff*, for instance, made it clear that his concept had to be understood as a normative one when he wrote that the internal market “demanded” a circumspect consumer. It is for the sake of internal market integration that market players should bear the burden of perceiving and processing information, and also the drawbacks that may follow should they carry out a market transaction suffering a cognitive deficit.<sup>43</sup>

The ECJ’s concept of a “reasonably well-informed and reasonably observant and circumspect” consumer has to be regarded as a normative one, too. This insight is supported by the fact that the ECJ on various occasions denied the deceptive potential of commercial communication without considering its actual perception by the addressees in question.<sup>44</sup> This has led to the persistent conclusion among some scholars according to which consumer protection in the EU was categorical in the sense that “[w]hoever falls under the definition is entitled to protection, and to the same degree.”<sup>45</sup> A closer look at EU consumer law in action discloses quite the contrary<sup>46</sup>: It is essential to see that the ECJ in its interpretation of prohibitions of deceptive practices did not adopt an information paradigm in a pure sense, shifting the burden of perceiving and processing information generally and entirely onto the individual market player. This is in particular reflected by the use of the attribute “reasonably” in the aforementioned phrase, which leaves the door open to a differentiated yardstick.

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<sup>41</sup> AG Capotorti, 16 January 1979, Case 120/78, *Rewe v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 666, 673: “But the idea of this widespread, if not general, incapacity on the part of the consumer seems to me to doom to failure any effort to protect him, unless it be to impose upon him a single national product the composition of which is constant and is rigorously controlled.”

<sup>42</sup> Cf. *Thomas Wilhelmsson*, *Social Contract Law* (1994), 145-146: “[...] one can claim that the consumer model prevailing in the Community is a well-informed and well-to-be-informed consumer – the active internal market consumer – who can and should decide on his own affairs and at his own risk.”

<sup>43</sup> *Ernst Steindorff*, *EG-Vertrag und Privatrecht*, 1996, pp. 195-196.

<sup>44</sup> ECJ, 13 December 1990, Case C-238/89, *Pall*, [1990] ECR I-4827, paras. 18-21; ECJ, 2 February 1994, Case C-315/92, *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder*, [1994] ECR I-317, paras. 19-23; ECJ, 4 April 2000, Case C-465/98, *Darbo*, [2000] ECR I-3397, paras. 21-34; ECJ, 24 October 2002, Case C-99/01, *Linhart and Biffl*, [2002] ECR I-9375, paras. 31-35.

<sup>45</sup> *Martijn Hesselink*, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?*, 15 *European Review of Private Law* (2007), 323, 327.

<sup>46</sup> See *Wulf-Henning Roth*, *Freier Dienstleistungsverkehr und Verbraucherschutz, Verbraucher und Recht* (2007), 161, 163-164; in general on European consumer law *Stephen Weatherill*, *Consumer Protection under EU law “is not absolute”*: *yes, but be careful!*, 8 *European Review of Contract Law* (2012), 221-233.

Thus, it has been recognized by the ECJ that the level of attention (normatively) expected from a consumer may “vary according to the category of goods or services in question.”<sup>47</sup> Moreover, the Court submitted that its concept of a “reasonably well-informed and reasonably observant and circumspect” consumer would not apply in contexts where a “mistake as to the product’s characteristics [may] pose any risk to public health.”<sup>48</sup> That is, in defining whether a piece of commercial communication has to be considered deceptive, the Court takes into account normative considerations such as “public health” which may conflict with an internal market rationale.

## **The Information Paradigm and the Individual Cognitive and Behaviour Concept behind (Secondary) Internal Market Law**

### ***The Internal Market Rationale Pro-Choice: Harmonization of Information-Related Regulation May Supersede Harmonization of Product Standards***

The message delivered by the ECJ in “Cassis de Dijon” according to which a wide choice of products should be available to the benefit of all internal market players, and hence, protective purposes like consumer protection, fairness of competition etc. should as far as possible be addressed by information-related rules rather than by content-related rules, affected also the focus of secondary internal market regulation. It encouraged the internal market legislature to seek to foster free product trade based on a harmonization of information-related rules, largely waiving ambitions to harmonize product specifications.<sup>49</sup> Therefore, it does not come as a surprise that a large bulk of secondary internal market law may be characterized as information-related: mandatory information requirements for producers and dealers, regulation of various instruments of commercial communication (advertisement, labelling, brochures), withdrawal rights, as well as rules on information intermediaries such as insurance agents and brokers. To this end, for example recital (21) of Directive 2003/71/EC (Prospectus Directive)<sup>50</sup> stipulates that “[i]nformation is a key factor in investor protection.” Recital (18) of the Prospectus Directive becomes even more concrete: “The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors.”

It is in accord with the internal market rationale that information-related regulation may to a large degree supersede content-related regulation as a mechanism to protect the interests of consumers, investors and other market players. That is, the internal market legislature has taken up the ECJ’s reasoning in “Cassis de Dijon” whereby the Court indicated its acceptance to some extent of a lower level of consumer protection in order to harvest the benefits of an enlarged market with lower barriers to free trade, enhanced competition and a wider choice of available products. This “trade-off” rationale is partly reflected in the reasoning for secondary internal market legislation, though expressed in a euphemistic way, such as in recital (52) Life Insurance Directive<sup>51</sup> which stipulates that “[i]n an internal market for assurance the consumer will have a wider and more varied choice of contracts. If he/she is to profit fully from this diversity and from increased competition, he/she must be provided

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<sup>47</sup> Cf. ECJ, 22 June 1999, Case C-342/97, *Lloyd Schuhfabrik Meyer v Klijsen Handel*, [1999] ECR I-3819, para. 26.

<sup>48</sup> ECJ, 13 January 2000, Case C-220/98, *Estée Lauder*, [2000] ECR I-117, para. 28; see also ECJ, 24 October 2002, Case C-99/01, *Linhart and Biffl*, [2002] ECR I-9375, para. 31.

<sup>49</sup> See *Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill, Party Autonomy and the Role of Information in the Internal Market – An Overview*, in: *Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill* (eds.), *Party Autonomy and the Role of Information in the Internal Market* (2001), 3, 7.

<sup>50</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public and admitted to trading, OJ 2003 L 345/64.

<sup>51</sup> Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ 2002 L 345/1.

with whatever information is necessary to enable him/her to choose the contract best suited to his/her needs.”

Hence, seen against the background of the dichotomy of “information-related” vs. “content-related” rules, it is correct to state that secondary internal market law is dominated by an “information paradigm,” as indeed a large part of market-related rules aims at ensuring that a sufficient degree of (correct) product information is provided on the market, assuming that market mechanisms alone are insufficient to ensure an efficient generation of transaction relevant information. Certainly, a considerable number of content-related internal market rules exists nevertheless, which are either designed as direct top-down regulation, such as the prohibition of certain chemical substances in Article 56 Regulation (EC) No 1907/2006 (hereinafter REACH),<sup>52</sup> or incentives-regulation such as in the “new approach” Directives.<sup>53</sup> However, conceptually this regulatory approach represents an exception that is mainly reduced to the role of a protective mechanism where crucial individual rights such as the individual health of a market player is at stake but not if the regulated market behaviour may affect merely financial interests. That is the reason why, for example, Article 3 Tobacco Products Directive<sup>54</sup> stipulates maximum tar, nicotine and carbon monoxide yields.

The general internal market rationale “permit but inform” in favour of enhanced competition and a wide product choice, as it is also reflected in secondary legislation, entails the basic normative assumption that market players are smart enough to cope with a large diversity of products given that the regulator ensures through various information-related instruments that sufficient information is available on the market that enables them to make transactions that meet their preferences. Yet it is important to see with regard to the individual cognitive and behaviour concept behind such an information-focused regulatory strategy that a general orientation in favour of pro-choice neither presumes a decision whereby the burden of perceiving and processing information is entirely left on the individual market player, nor that the legislature had to abstain from any attempt to steer transaction decisions in certain directions.

We will show that a stylized information paradigm according to which the internal market player has to carry the full burden of information processing has actually never been realized in internal market law. Rather, the selection and weighting of information by the legislature and his choice on how it has to be made accessible to the market players has always taken a certain part of the burden of information processing from the individual market player. As the following paragraphs reveal, the internal market legislature is first of all indeed sensitive to the needs of market players who are particularly vulnerable, secondly, it seeks in many respects to facilitate information processing on the part of the market players, and thirdly, it strives to influence market players’ decision-reaching, partly even strategically following a certain political agenda.

### ***Acknowledging Individual Weaknesses: Protecting Particularly Vulnerable Market Players***

Granting specific protection to market players who are particularly vulnerable has been accepted by the ECJ as a legitimate restriction on trade. In “Buet” the ECJ accepted a French ban on canvassing for the purpose of selling educational material on the grounds that

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<sup>52</sup> Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency, OJ 2006, L 136/3.

<sup>53</sup> The standard example is Directive 2001/104/EC of the European Parliament and of the Council of 7 December 2001 concerning medical devices, OJ 2002, L 6/50. See on the EU’s new approach regulation *Christopher Hodges*, European Regulation of Consumer Product Safety, 2005, pp. 22-25, where *Hodges* provides a list of new approach legislation.

<sup>54</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, OJ 2001 L 194/26.

“[t]he potential purchaser often belongs to a category of people who, for one reason or another, are behind with their education and are seeking to catch up. That makes them particularly vulnerable when faced with salesmen of educational material who attempt to persuade them that if they use that material they will have better employment prospects.”<sup>55</sup>

The Court considered a prohibition on direct marketing a proportionate protective mechanism since “an ill-considered purchase could cause the purchaser harm other than mere financial loss that could be longer lasting.”<sup>56</sup> Though it remains an exception to the general consumer concept in internal market context<sup>57</sup>, there are various examples in secondary internal market regulation, too, which illustrate that consideration has been given to the needs of particularly vulnerable market players. This demonstrates that in such contexts neither the ECJ nor the internal market legislature expects a learning process on the part of these individuals that may entail disadvantages for them.

### Particularly vulnerable consumers

As a cornerstone of secondary internal market law, the Unfair Commercial Practices Directive<sup>58</sup> establishes uniform rules on commercial communication and marketing activities at the Union level, thereby, creating a level playing field for businesses, and facilitating them in exercising their internal market freedoms. The regulatory approach that has been implemented through the Directive may be characterized by three elements: market transparency and freedom of choice and decision-making for consumers.<sup>59</sup> Pursuant to Article 5(2)(b) of the Directive, a commercial practice shall be unfair if “it materially distorts [...] the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed [...]” As explained in recital (18), this has to be understood as a reference to the concept of the “reasonably well-informed and reasonably observant and circumspect” consumer as it was shaped in the ECJ’s jurisprudence.<sup>60</sup>

Yet Article 5(3) of the Directive requires a special protection of consumers “who are particularly vulnerable to a commercial practice or the underlying product because of their mental or physical infirmity, age or credulity” as the unfairness of the commercial practice in question “shall be assessed from the perspective of the average member of that group.” However, this stricter yardstick applies only if a commercial practice is “likely to materially distort the economic behaviour only of a clearly identifiable group of consumers.” Therefore, it is restricted to instances where the practice is particularly addressed at such a group, for example if its presentation is especially appealing to children.<sup>61</sup> Moreover, the exceptional character of this provision is further emphasized through the restrictive indication whereby “[t]his is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.”

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<sup>55</sup> ECJ, 16 May 1989, Case 382/87, *Buet and another v Ministère public*, [1989] ECR 1235, para. 13.

<sup>56</sup> *Ibid.* para. 14.

<sup>57</sup> See *Geraint Howells and Thomas Wilhelmsson*, 28 *European Law Review* (2003), 370, 381: “The protection of the weak and vulnerable consumers has probably never been very high on the agenda of Community law.”

<sup>58</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), OJ L 149/22, 2005.

<sup>59</sup> Cf. *Hans-W. Micklitz*, in *Hans-W. Micklitz, Norbert Reich and Peter Rott* (eds.), *Understanding EU Consumer Law*, 2009, p. 71.

<sup>60</sup> Recital (18): “In line with the principle of proportionality, and to permit the effective application of the protections contained in it, this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect [...] as interpreted by the Court of Justice [...]”

<sup>61</sup> There is no need to say that it is far from obvious where one should draw the line in those cases, cf. *Hans-W. Micklitz*, in *Hans-W. Micklitz, Norbert Reich and Peter Rott* (eds.), *Understanding EU Consumer Law*, 2009, p. 88.



In the same vein, recital (34) of the Directive on Consumer Rights<sup>62</sup> requires traders to “take into account the specific needs of consumers who are particularly vulnerable” when providing information. Recital (34) then further defines these groups as “consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity.”

### Minors

In order to protect minors,<sup>63</sup> Article 9(1)(e) Audiovisual Media Services Directive<sup>64</sup> prohibits commercial communication for alcoholic beverages that is aimed specifically at minors. Moreover, Article 9(1)(g) of the Directive stipulates that “commercial communications shall not cause physical or moral detriment to minors,” and therefore “they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.”

### Sick persons

People who are suffering from a disease are considered particularly susceptible to alluring advertisement messages, and might tend to make spontaneous decisions that actually contradict their own preferences. To work against such risks, various rules restrict commercial communication that attributes to food the property of preventing, treating or curing a human disease,<sup>65</sup> and even prohibit commercial communication for medicinal products and medical treatment available only on prescription.<sup>66</sup>

## ***Recognizing Individual Cognitive Constraints: Regulative Activities to Facilitate Information Processing***

Internal market regulation makes ample use of regulatory techniques that have as their object and effect to facilitate market players in perceiving and processing information. It is the basic concept of these rules to reduce effort and costs that have to be borne by a market player who seeks to make a rational, information-based transaction decision. This finding indicates that the internal market legislature does indeed take into account individual cognitive constraints and deficits in this respect, and does not just rely on market mechanisms to overcome these problems.

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<sup>62</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64, 2011.

<sup>63</sup> See on the need of the protection of minors in their role as consumers *Lodewijk Pessers*, Refining the legal approach towards the underage consumer: A process still in its infancy, 3 *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2012), 2-11.

<sup>64</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2010 L 95/1.

<sup>65</sup> See e.g. Article 6(2) Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, OJ 2002 L 183/51; Article 8 Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses (recast), OJ 2009 L 124/21.

<sup>66</sup> Article 9(1)(f) Audiovisual Media Services Directive.

### Rules on the way information has to be presented

There is a multitude of rules requiring that information is provided in a transparent way. To take an example from labelling law, Article 6(1) Cosmetic Products Directive<sup>67</sup> provides that information on the container and on the packaging is given “in indelible, easily legible and visible lettering.” An investment company has to include in its prospectus an explanation of the fund’s risk profile which is “clear and easily understandable.”<sup>68</sup> Pursuant to Article 10(1) Directive on electronic commerce<sup>69</sup> mandatory information has to be provided “clearly, comprehensibly and unambiguously.”

The language of provided information is an essential factor of how much effort a market player has to put into perceiving information. Various language-related rules ensure that provided information is accessible to the addressee. For example, it is required according to Article 4(3) Timeshare Directive<sup>70</sup> that owed information “is drawn up in the language [...] of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the Community.”

Standardization makes it easier for market players to compare prices and other product-related information. Exemplary in this respect is the requirement that traders have to indicate not only the selling price but also the price per unit of measurement.<sup>71</sup> To pick up another example, the mandatory nutrition declaration has to include information on the energy value that shall be expressed per 100 g or per 100 ml.<sup>72</sup>

Weighting of information signals which pieces of information are presumably the most relevant, and thus may facilitate a rational application of the limited resources of market players to perceive and process information in preparation of a transaction decision. A requirement of a specific sequential arrangement of data, for instance, entails a formal weighting of the provided information. Article 6(1)(g) Cosmetic Products Directive, for example, requires that the packaging includes “a list of ingredients in descending order of weight.” A substantive form of weighting comes along with an outspoken classification of information, for instance if certain information has to be characterized as an “Important Notice,” e.g. in accordance with Article 13(4) Infant Formulae Directive,<sup>73</sup> or even as a “warning,” e.g. pursuant to Article 6(3)(c) Food Supplements Directive<sup>74</sup> or Article 19(5) Markets in Financial Instruments Directive.<sup>75</sup>

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<sup>67</sup> Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, OJ 1976 L 262/169.

<sup>68</sup> Article 69(1) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), OJ 2009 L 302/32.

<sup>69</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1.

<sup>70</sup> Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ 2009 L 33/10.

<sup>71</sup> Article 3 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27.

<sup>72</sup> Article 32(2) Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ 2011 L 304/18.

<sup>73</sup> Commission Directive 2006/141/EC of 22 December 2006 on infant formulae and follow-on formulae and amending Directive 1999/21/EC, OJ 2006 L 401/1.

<sup>74</sup> Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws on the Member States relating to food supplements, OJ 2002 L 183/51.

<sup>75</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ 2004, L 145/1.

### Regulation of information intermediaries

Internal market law includes detailed rules on insurance mediation<sup>76</sup> and investment firms<sup>77</sup> by means of which the legislature attributes to insurance and investment agents and brokers the function to serve as information intermediaries.<sup>78</sup> The need for regulation in these fields rests upon the assumption that first, the individual customer or investor is unable to cope with the amounts of information that has to be provided to the markets by insurance companies, issuers of securities, investment companies etc. and secondly, that market mechanisms including mechanisms of information intermediation are not sufficient to make up for these deficits. Both assumptions are well-founded.<sup>79</sup>

It should be pointed out that the establishment of single European insurance and investment markets had a strong liberalizing and deregulating impact. As a consequence, the range of available financial instruments – that due to their character as complex experience or credence goods, respectively,<sup>80</sup> entail high information asymmetries and search costs anyway – has significantly widened. Internal market regulation to strengthen the role of information intermediaries has to be understood against this background,<sup>81</sup> and fits into an internal market rationale which on the one hand accepts a trade-off between higher financial risks on the part of consumers and investors caused by increasing information problems and positive welfare effects through an enlarged market, but on the other hand seeks by way of various regulative mechanisms to counter these risks of information deficits, though as far as possible without restricting the choice of products generated by the internal market in the first place.

### ***Steering the Process of Decision-Making: Explicit and Implicit Paternalism***

Where a regulator does not only assist market players in ensuring the informational basis to find an informed transaction decision, but where it also seeks to influence the content of that decision in their best interest, such a regulatory impact may be considered “paternalistic.” The finding of phenomena of bounded rationality through the behavioural sciences seems to have opened up a leeway for regulators to engage in what has been dubbed “libertarian paternalism.”<sup>82</sup> Thus, steering the individual process of decision making in a certain direction might be regarded as legitimate on the grounds that individual market players have to be assisted in reaching a decision that meets their preferences or that they have to be prevented from acting irrationally against their own best interest, respectively.

This line of argument may be employed on the one hand to give reason to content-related regulation, e.g. to justify a prohibition of potentially dangerous products. On the other hand, it may also

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<sup>76</sup> Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ 2003 L 9/3.

<sup>77</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ 2004, L 145/1.

<sup>78</sup> *Jens-Uwe Franck*, *Europäisches Absatzrecht*, 2006, pp. 305-319.

<sup>79</sup> See e.g. the law-and-economics analysis by *Stefan Grundmann* and *Wolfgang Kerber*, *Information Intermediaries and Party Autonomy – The Example of Securities and Insurance Markets*, in *Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill* (eds.), *Party Autonomy and the Role of Information in the Internal Market*, 2001, pp. 264-310.

<sup>80</sup> The term “experience good” has been established by *Philip Nelson*, *Information and Consumer Behavior*, 78 *Journal of Political Economy* (1970), 311-329, to characterize products whose quality can hardly be observed in advance but only upon consumption. *Michael R. Darby* and *Edi Karni*, *Free Competition and the Optimal Amount of Fraud*, 16 *Journal of Law and Economics* (1973), 67, 68-69, introduced the concept of “credence goods” for goods whose quality consumers may not judge even after they consumed them.

<sup>81</sup> Cf. recital (2) *Markets in Financial Instruments Directive*: “In recent years more investors have become active in the financial markets and are offered an even more complex wide-ranging set of services and instruments.”

<sup>82</sup> Cf. *Cass R. Sunstein* and *Richard H. Thaler*, *Libertarian Paternalism Is Not an Oxymoron*, 70 *University of Chicago Law Review* (2003), 1159-1202.

substantiate regulatory techniques that, while they influence the decision-making process of market players in a certain direction, e.g. through the selection or the way of presentation of information that has to be provided to them, technically preserve an individually free product choice and which therefore have to be considered to be less intrusive than a content-related regulation. As may be demonstrated by the following examples taken from internal market regulation, the manipulative and thus paternalistic facet of such regulatory interventions may be more or less pronounced.

#### Warnings against tobacco products

Article 5 Tobacco Products Directive requires that both a general and an additional warning against the damaging effects of smoking are printed on each unit packet of tobacco products and that these warnings have to cover not less than 30 and 40 per cent, respectively, of the external area of the surface of the packet. The language of these warnings is at least in part highly suggestive (“Smoking can cause a slow and painful death”<sup>83</sup>). Member states may require additional warnings in the form of colour photographs and other illustrations. These may be chosen from a library of 42 pictorial health warnings designed by the Commission. Several of these images appear to be quite shocking to an observer.<sup>84</sup>

The way the information on the health risks of smoking has to be presented to potential purchasers illustrates that the objective of this regulative measure goes beyond enabling consumers to make an informed transaction decision. Rather, it is the obvious agenda to prevent them from purchasing a – perfectly legal – product. Tobacco regulation aims at affecting social habits, even if regulation comes in the guise of information.<sup>85</sup> Pursuant to its legitimizing assumption, people who smoke do so contrary to their own preferences. This implies that if only they had sufficient inner strength they would certainly keep their hands off tobacco products. Thus, tobacco regulation conceptualizes the consumer as a person who even if informed about the health risks of a product is not able to act according to their own best interest.

#### Notice in favour of breast feeding

Article 13 Directive 2006/141/EC<sup>86</sup> permits the marketing of infant formulae only if its label contains *inter alia* “a statement to the effect that the product is suitable for particular nutritional use by infants from birth when they are not breast fed,” and if the labelling bears under the headline “Important Notice” a statement concerning the superiority of breast feeding. On the one hand such a notice informs addressees about the suitability of feeding infants with the respective product but that breast-feeding is in general considered to be a preferable way of feeding them. On the other hand, such a requirement aims not only at enabling consumers to make an informed decision. The statement contains a judgment, and the obvious purpose is to bring mothers of infants to consider the purchase of the product only as a second class option.

Though the promotion of breast feeding might be fairly uncontroversial,<sup>87</sup> the example demonstrates that a requirement to provide a certain piece of information necessarily entails a paternalistic facet that

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<sup>83</sup> Annex I no. 9 Tobacco Products Directive.

<sup>84</sup> See [http://ec.europa.eu/health/tobacco/law/pictorial/index\\_en.htm](http://ec.europa.eu/health/tobacco/law/pictorial/index_en.htm).

<sup>85</sup> See *Alberto Alemanno*, Nudging Smokers The Behavioural Turn of Tobacco Risk Regulation, 3 *European Journal of Risk Regulation* (2012), 32-42.

<sup>86</sup> Commission Directive 2006/141/EC of 22 December 2006 on infant formulae and follow-on formulae and amending Directive 1999/21/EC, OJ 2006 L 401/1.

<sup>87</sup> But see on potential negative effects of breastfeeding promotion *Ellie Lee*, Health, morality, and infant feeding: British mothers' experience of formula milk use in the early weeks, *Sociology of Health & Illness* 29 (2007), 1075-1090.

becomes particularly apparent where the information in question has to be particularly emphasized and where it not only concerns product related data, but also normative statements.

#### Formal weighting of required information

To require a weighting of information according to a formal and therefore, apparently neutral criterion such as, for example, the aforementioned listing of “ingredients in descending order of weight” pursuant to Article 6(1)(g) Cosmetic Products Directive, is not entirely free of a paternalistic element: As higher-ranked pieces of information are more likely to be perceived by consumers, the rule may provoke a situation where ingredients with a higher weighting may be more influential on the decision to purchase the product in question.

Though this effect might be fairly weak, it shows that there is no such thing as a purely neutral, absolutely non-paternalistic way to select and present information. Every regulatory choice as to which information has to be provided and how it has to be provided is necessarily accompanied by an element of paternalism, if only as a matter of fact, as the regulatory decision may not be based on a determined agenda to steer decision-making of information addressees in a certain direction.

#### Defining a required method of access to information

As may be illustrated using the example of information distribution in respect of chemical substances, the prescribed path by which a piece of information has to be disseminated carries some potential to steer behaviour more or less effectively in a certain direction. Any chemical substance within the scope of REACH and beyond the amount of 1t requires labelling in accordance with Articles 5, 6, 10(a)(iv), Section 4 of Annex VI REACH, Regulation 1272/2008 (CLP-Regulation) in order to be fit for marketing. Articles 77(2)(e) and 119 REACH stipulate the availability of these labels on the internet. The labelling requirements shall enable the addressee to evaluate directly the dangers involved in the use of the substance. Additionally, according to the principle of substitution, it shall enable the addressee to assess which substance could be used that results in less harm but has the same effect. In other words: It shall enable the users at the moment they intend to use the substance to assess how to handle it safely.

However, if the very same substance is (only) part of an article, is not intended to be released, and the European Chemical Agency did not request special labelling according to Article 7(5) REACH, pursuant to Article 33 REACH the information on how to handle the risks involved with the substance must be made available only on the special request of the consumer. The same information aimed at the safe use of a substance is therefore directly available in the case that the addressee is directly exposed to the substance, whereas when the same substance is contained in an article, the information is regularly only available on the request of the consumer.

Obviously, users of a substance may much more easily observe a warning that is issued on the container of a substance than if they have actively to ask for it. It follows that the EU lawmaker refrains from imposing the burden to access information on users that are directly exposed to a substance. They hence need to deal with the processing of information only. In contrast, consumers of articles which contain certain chemicals even carry the burden of accessing information about the dangerousness of the substances in question.

#### ***A Brief Summary***

Secondary internal market regulation has implemented and perpetuated the concept laid down in the ECJ’s decision in “Cassis de Dijon” according to which information-related regulation should be given preference over content-related regulation if the former has to be considered sufficient in the light of the protective purpose of the regulation. Assessing this point, one has to accept a trade-off

between higher financial risks on the part of consumers and investors caused by increasing information problems and positive welfare effects through an enlarged market. Thus, the internal market legislature has adopted the concept of a “well-informed, observant and circumspect” consumer. However, the implementation of such a concept does not mean that an individual market player has to bear entirely the burden of information processing. Rather, internal market law considers individual cognitive limits and seeks to counter the risks of information deficits through various regulative mechanisms, though as far as possible without restricting the widened choice of products generated by the internal market in the first place.

While it remains in general the freedom of the individual market players to decide which transaction may correspond to their preferences, we may also find rules such as the required warnings against smoking tobacco that cannot anymore be understood as aiming merely at enabling consumers to reach an informed transaction decision, but that follow an explicit political agenda and seek to steer transaction decisions in this direction, though technically without restricting free product choice.

However, such instances where the consumer is conceptualized as a person who is not able to act according to their own best interest remains exceptional, and hence, it would be misleading to postulate a “behavioural turn” in internal market policy. Yet it is important to recognize that every regulatory choice on which information has to be provided on the market and in which form it has to be provided involves an element of paternalism as it influences the informational basis that may establish the grounds for the decision-making process of market players. Thus, any rule that is meant only to facilitate perceiving and processing information contains a “behavioural facet,” if only implicitly or as a matter of fact rather than intention, and weak in its nature.

### **Normative Requirements with respect to the Individual Cognitive and Behaviour Concept to Adopt for Internal Market Regulation**

In this section we will discuss how the normative concept of a market player as an addressee of internal market regulation is shaped by requirements of EU primary law. The fundamental freedoms as the paramount legal instruments to implement the internal market (Article 26(2) TFEU) establish a normative basis in this regard. Consequently, the idea of an internal market player as a “well-informed, observant and circumspect,” i.e. roughly speaking as a “smart and decent fellow” who shares essential features with the concept of a *homo economicus* serves as a basic model. Yet this line of reasoning may not explain the protective impetus and the “behavioural facet” we also may observe with regard to the normative idea of the internal market player as it becomes apparent considering internal-market legislation and the adjudication of the ECJ. We will argue that the rationale behind this normative dimension may be attributed to an increasing consideration of individual, non-market related rights enshrined particularly in the fundamental rights as part of EU primary law.

#### ***On The Normative Basis of a Regulatory Image of the Internal Market Player as a “Smart and Decent Fellow”***

The concept of the internal market as embodied in the Treaties first and foremost aims at enhancing the social welfare of participating countries based on classical free trade theory. As obstacles to cross-border trade are removed, the choice of potential counter-parties will be expanded and the number of transactions will rise. This will entail a more efficient allocation of factors of production (capital and labour) and ensure that products may circulate freely to where they are remunerated best. This virtuous circle relies on “private initiative in free markets,”<sup>88</sup> and assumes that any additional cross-border transaction shall enhance the utility of participating parties. It thereby presupposes that individual market players are capable of perceiving and processing transaction relevant information, and of

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<sup>88</sup> *Stefan Grundmann*, The Structure of European Contract Law, 4 *European Review of Private Law* (2001), 505, 510.

making on such solid informational bases rational transaction decisions that actually meet their preferences.

Thus, the role that has been assigned to the market players by the internal market rationale does indeed conceive the individual actor as “well-informed, observant and circumspect” as it has been stated by the ECJ. The accentuated role that has been attributed to the individual market player through the normative programme outlined in the internal market provisions of the Treaties is further reflected in the Court’s jurisprudence whereby these provisions “confer upon them rights which become part of their legal heritage.”<sup>89</sup> Certainly, the outlined concept of internal market players does not exclude regulatory activities that may be characterized as market rational, i.e. for example rules that seek to ensure a sufficient informational basis for a transaction decision. The assigned role only presupposes that the individual may be empowered with the help of such assisting rules to reach transaction decisions that meet their preferences and enhance their individual utility.

Such a concept on the one hand grants market players the freedom to make autonomous decisions, but on the other hand also demands such autonomous decision-making and in this regard even expects a learning process from them.<sup>90</sup> This assumes that market participants who suffer material disadvantages as they neglect available information or who regret certain transactions because they had not carefully evaluated enough their preferences at the outset, shall benefit from such an experience and shall in future act more responsibly and clever on the market. The idea of such successful learning processes forms a classical justification of preference autonomy and personal responsibility as normative principles.<sup>91</sup> Consequently, fundamental freedoms such as the essential market integrative tools have been interpreted as instruments that extend party autonomy across borders.<sup>92</sup> Hence, the internal market concept as enshrined in the Treaties is basically hostile towards paternalistic content-oriented, market-rectifying<sup>93</sup> regulatory activities that seek to actively steer transaction decisions in a certain direction. It conflicts with an image of internal market players as individuals whose transaction decisions should be actively controlled by regulation as they suffer from cognitive deficits and from the effects of bounded rationality and therefore are considered incapable of responsible market activities in accordance with their own interest.

### ***Normative Requirements to Consider Individual Weaknesses, Cognitive Deficits, and Effects of Bounded Rationality***

The concept of the internal market player as a “smart and decent fellow” as sketched above rests only on one – though the most essential – dimension of the normative framework of internal market regulation. Yet it neglects that EU primary law does not only attribute an economic function and market-related rights to the individuals that are subject to regulatory acts of the Union. Rather these individuals are woven into a more complex normative network of rights and duties particularly as they have had fundamental rights and the status of European citizens conferred upon them. We will argue that it is the fundamental-rights dimension that accounts for the fact that internal market regulation is at least partly characterized by a consideration of individual weaknesses, cognitive deficits, and exceptionally even shows an openly paternalistic facet as illustrated by the regulation on the labelling

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<sup>89</sup> ECJ, 5 February 1963, Case 26/92, *van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR I, 12.

<sup>90</sup> *Jens-Uwe Franck*, *Europäisches Absatzrecht*, 2006, p. 330.

<sup>91</sup> See *Horst Eidenmüller*, *Effizienz als Rechtsprinzip*, 1995/3<sup>rd</sup> ed. 2005, pp. 329-333.

<sup>92</sup> See *Peter-Christian Müller-Graff*, *Basic Freedoms – Extending Party Autonomy across Borders*, in *Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill* (eds.), *Party Autonomy and the Role of Information in the Internal Market*, 2001, 133-150.

<sup>93</sup> This terminology is borrowed from *Thomas Wilhelmsson*, *Social Contract Law and European integration*, 1994, p. 126: “Therefore it is easy to see that the concept pair content-neutrality/content-orientation is quite closely related to another concept pair [...] the concepts are market-rational and market-rectifying regulation.”

of tobacco products. This raises the question whether the normative framework even demands a more pronounced “behavioural turn” whereby regulatory activity has to focus even more on the effects of bounded rationality, seeking to cure “behavioural deficits,” and steering the behaviour of market players in their own best interest.

#### On the impact of fundamental rights on the regulatory concept of internal market players

The market-player concept of internal market regulation largely relies on the market integrating function as it is embodied in the fundamental freedoms. It is indeed convincing to take their rationale as a starting point to evaluate the market-player concept.

However, during the last few years the ECJ has attributed a significant role to fundamental rights also in the context of the application of fundamental freedoms. As the Court highlighted in “Carpenter,” fundamental rights safeguard activities and interests such as a functioning family life that in fact have to be considered “conditions” under which fundamental freedoms may be exercised.<sup>94</sup> Hence, as “Carpenter” illustrates, the exercise of fundamental freedoms should be considered as being embedded in a normative framework set up by fundamental rights.

Further implications of these findings were illustrated by the ECJ’s judgments in “Schmidberger,” and subsequently confirmed *inter alia* in “Viking” and “Laval” where the Court held that fundamental rights may justify a restriction of fundamental freedoms.<sup>95</sup> Accordingly, if measures that implement the integration of the internal market restrict fundamental rights, the weight of the restriction of these fundamental rights has to be balanced against the weight of the general interest in a functioning internal market and the individual rights conferred by fundamental freedoms as recognized in “van Gend en Loos.”<sup>96</sup> Viewed from the perspective of the internal market legislature, fundamental rights turn into duties to protect the individuals as they are affected by activities in exercise of fundamental freedoms, and which require the European legislature to strike a balance when acting as a regulator. This development reflects previous suggestions to attribute a horizontal effect to fundamental rights under EU law.<sup>97</sup>

Hence, individual weaknesses, cognitive constraints and the effects of bounded rationality must not be ignored *per se* in the context of internal market regulation, but instead need to be taken into account according to the requirements set by fundamental rights, and have to be balanced against the rights resulting from fundamental freedoms. It is this aspect that explains why internal market regulation does not follow the illustrated stylized information paradigm, but also aims at protecting particularly vulnerable market players, seeks to facilitate information processing, and partly even seeks to steer the process of decision-making in a certain direction. And as the European institutions are obliged to protect the mental and physical integrity of persons,<sup>98</sup> it is consistent that the ECJ, while it has adopted the concept of a well-informed, observant and circumspect” consumer in its adjudication regarding deceptive marketing practices, does apply a more protective standard when a marketing activity entails

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<sup>94</sup> ECJ, 11 July 2002, Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279, para. 39.

<sup>95</sup> ECJ, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, [2003] ECR I-5659, para. 74; ECJ, 11 December 2007, Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779, para. 45; ECJ, 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, [2007] ECR I-11767, para. 93.

<sup>96</sup> ECJ, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5659, para. 81.

<sup>97</sup> *Joseph Weiler*, *To Be a Citizen: Eros and Civilization*, in *Joseph Weiler* (ed.), *The Constitution of Europe – “Do the New Clothes Have An Emperor?” and Other Essays on European Integration*, 1999, 324, 332.

<sup>98</sup> See Article 3(1) EU Charter of Fundamental Rights.



the risk that a misapprehension on the part of an addressee poses not just financial but health risks to that individual.<sup>99</sup> This is essentially why Union consumer law has always followed a double-headed approach, aiming primarily at the establishment of an internal market but at the same time striving for protective goals.<sup>100</sup>

This raises the question as to normative guidelines set out by EU law on how the balancing between the fundamental freedoms' impetus to grant greater freedom for economic activities and the protective goal pursued through fundamental rights should be accomplished. In "Schmidberger" the ECJ granted the lawmaker a "wide margin of discretion" in this regard.<sup>101</sup> Thus, it seems reasonable to suppose that the legislature also enjoys a margin of discretion when it has to decide to what extent it relies on the normative concept of the internal market player as a "smart and decent fellow" with regard to regulatory measures that secure the exercising of fundamental freedoms and the functioning of the internal market, and to what extent such regulatory activities have to be guided by a protective impetus required by fundamental rights.

However, in other cases the ECJ stipulated more specific instructions as to this regulatory balancing task. In "Affish" the Court stated that whenever a contested decision is intended to guarantee the protection of public health "it must take precedence over economic considerations."<sup>102</sup> Such a finding is supported by Article 168(1) TFEU, whereby a "high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities," and by Article 114(3) TFEU, according to which the Commission has to take a high level of health into account when proposing measures under Article 114(1) TFEU. While the wording of the provisions in question suggests a distinction between public and individual health issues, this seems to be – at least in our context – of no significance. As the protection of individual health and the protection of public health are partly associated with different competence regimes,<sup>103</sup> both may be conceptually distinguished. However, the ECJ has implicitly assumed that policy choices for public health protection are intertwined with human health protection and may therefore be referred to interchangeably.<sup>104</sup> The Treaty also reflects this view as "human health" in Article 168(1) TFEU is stipulated as part of Title XIV "public health."

Neither Article 168(1) TFEU nor Article 114(3) TFEU provide for a competence norm, hence no duty can be imposed on the EU institutions to implement pro-health regulation. One may nonetheless deduce the following aspect from the rationale of "Affish" reading it together with Article 168(1) TFEU and Article 114(3) TFEU: When EU institutions conduct a balancing test and thereby consider concerns of public health in an internal market context, this aspect shall prevail over a concept that is solely based on an impetus to expand the freedom for economic activities in the interest of internal market integration. Thus, under such circumstances the normative image of an internal market player as a "smart and decent fellow" has to be modified accordingly, i.e. individual weaknesses, cognitive

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<sup>99</sup> See supra note 48.

<sup>100</sup> *Thomas Wilhelmsson*, The Abuse of the „Confident Consumer“ as a Justification for EC Consumer Law, 27 *Journal of Consumer Policy* (2004), 317, 319.

<sup>101</sup> ECJ, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5659, para. 82.

<sup>102</sup> ECJ, 17 July 1997, Case C-183/95, *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees*, [1997] ECR I-4362, para 43; approved ECJ, 19 April 2012, Case C-221/10 P, *Artedogan GmbH v European Commission*, [2012] ECR I-0000 (n.r.), para 99.

<sup>103</sup> When common safety concerns are at stake, public health is according to Article 4(2)(k) TFEU part of the EU's shared competence regime, while human health is according to Article 6(a) TFEU only within the EU's competence to carry out actions to support, coordinate or supplement the actions of the Member States.

<sup>104</sup> ECJ, 5 October 2000, C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco I)*, [2000] ECR I-8419, para. 88.

defects etc. that give reason to fear that market activities might entail risks of health damage must not be ignored based on an internal market rationale or an information paradigm in a pure form.

### The implementation of citizenship rights and its impact on the concept of an internal market player

In 1992 the Member States introduced provisions on a “Citizenship of the Union” through the Maastricht Treaty. These provisions confer upon any person holding the nationality of a Member State *inter alia* the individual right to move and reside freely within the Union’s territory,<sup>105</sup> and the political right to take part in elections to the European Parliament and to municipal elections in their Member State of residence.<sup>106</sup> Beyond those rights which are expressly mentioned in the citizenship provisions<sup>107</sup> the concept of an EU citizenship has to be understood as a label for the bundle of rights that are conferred upon the nationals of EU Member States in the Treaties.<sup>108</sup> As such the concept signals that EU law conceives individuals not only instrumentally, i.e. restricted to their “function” as producers or consumers of goods and services or as providers of capital or even as a mere factor of production (“labour”). Rather, the aggrandisement of the diverse individual rights through their bundling under the status of an EU citizenship recognizes individual human beings beyond their role as economic actors also as participants in the political sphere and as individuals with social needs.

While acknowledging this rationale of the implementation of the status of a “Citizenship of the Union,” it still remains unclear to what extent EU citizenship as a legal concept does effectively grant broader rights to individuals beyond those which are expressly mentioned in Articles 20 to 24 TFEU or which are already embodied in the primary or secondary law of the Union.<sup>109</sup> The ECJ has referred to Union citizenship in cases where it sought to substantiate an application of the principle of non-discrimination on grounds of nationality (Article 18 TFEU) to grant persons a right of access to social benefits without referring to their role as economic actors, e.g. in the cases of students<sup>110</sup> or job-seekers.<sup>111</sup>

However, while the concept of an EU citizenship points to the fact that EU law not only recognizes the individual isolated in its economic function, it is hard to see how EU citizenship – at least as it stands now in its character as a legal concept – could raise conflicts with a certain construction of internal market regulation or in particular of the fundamental freedoms beyond those conflicts that are already provoked by the application of fundamental rights (that are, certainly, also bundled under the “label” of EU citizenship). Though the rationale of EU citizenship may almost certainly be associated with a normative assignment to ensure that “the economic law provisions are interpreted with due respect for the dignity of the persons,”<sup>112</sup> the mechanism at work resembles the impact of fundamental rights we have seen in “Carpenter,” but it misses the conflicting dimension we have seen with regard to fundamental rights e.g. in “Schmidberger,” “Viking” or “Laval”. As illustrated by these cases, the

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<sup>105</sup> See Article 20(2)(a) and Article 21 TFEU.

<sup>106</sup> See Article 20(2)(b) and Article 22 TFEU.

<sup>107</sup> Article 20(2) TFEU and Articles 21 to 24 TFEU.

<sup>108</sup> Article 20(2) 1st sentence TFEU.

<sup>109</sup> See *Dimitry Kochenov and Richard Plender*, EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text, 37 *European Law Review* (2012), 369-396; *Dennis-Jonathan Mann and Kai Purnhagen*, The Nature of Union Citizenship between Autonomy and Dependency on (Member) State Citizenship - A Comparative Analysis of the Rottmann Ruling, or: How to Avoid a European Dred Scott Decision?, 29 *Wisconsin International Law Journal* (2011), 483-532.

<sup>110</sup> See ECJ, 20 September 2001, Case C-184/99, *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, paras. 29-37.

<sup>111</sup> ECJ, 23 March 2004, Case C-138/02, *Brian Francis Collins v Secretary of State for Work and Pensions*, [2004] ECR I-2703, paras. 61-63.

<sup>112</sup> Cf. *Stephen Weatherill*, *EU Law*, 9<sup>th</sup> ed. 2010, p. 463.

recognition of fundamental rights may provoke direct conflicts with the impetus of internal market law to expand economic freedom for market actors across borders, and which therefore entails the need for a balancing of opposing rights and interests. In contrast, social or political rights that are established through the principle of non-discrimination construed and strengthened in the light of EU citizenship seem to add a different but not conflicting dimension to a pure economic and market-oriented perspective.

Thus, “Citizenship of the Union” as a legal status represents an allocation of not only economic but also of political and social rights to Member States’ citizens and thereby illustrates that EU law conceives persons not only restricted to their economic “function.” However, the concept of the EU citizen must still be seen through the rationale of EU law. The social and political facet of the concept of EU citizenship therefore does not resemble a new, transformed or other form of nation-state citizens, but rather “corresponds to the set of rights granted to individuals as participants and beneficiaries of economic integration.”<sup>113</sup> In this sense, it implements additional but not conflicting normative aspects of internal market integration since these additional requirements stem from the benefits of economic integration achieved *inter alia* by economic regulation. Hence, economic integration and the regulation aiming at this end form the basis of EU citizenship rather than the other way round.<sup>114</sup>

Therefore, with regard to our topic we may conclude that from EU citizenship in its legal effect beyond the relevance of the bundled rights and duties, one may not deduce normative guidance on the shape of economic regulation, particularly as to the question to what extent EU law demands or allows for a normative concept based on a consciously exaggerated assumption of the individual’s capability to perceive and process information and of rational decision-making, or rather to what extent it requires the consideration of individual weaknesses, cognitive restraints, or the effects of bounded rationality.

#### Article 114 TFEU as the pivotal competence norm for internal market regulation

The European Union has only the powers the Member States specifically conferred on it in the Treaties (Article 5(2) TEU). Thus, the Union has no general power of market regulation. As it is laid down in Article 114(1) TFEU by reference to Article 26 TFEU, and as it has been emphasized by the Court, the European legislature must ensure that any regulatory measure enacted on the basis of Article 114 TFEU as the pivotal competence norm for internal market legislation “must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.”<sup>115</sup>

Beyond that, Article 114(1) TFEU does not contain any substantive guideline on the harmonizing measures for which it provides the legal basis. However, Article 114(1) TFEU must not be read in isolation, but in connection with certain qualifications. According to Article 114(3) TFEU the European Commission when it envisages a proposal on a harmonization of national regulation based on Article 114(1) TFEU relating to health, safety, environmental protection, and consumer protection has to take “as a base a high level of protection.” In addition, the European Parliament and the Council shall also “seek to achieve these objectives.”

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<sup>113</sup> Miguel Maduro, Europe’s Social Self: “The Sickness unto self”, in Jo Shaw (ed.), *Social Law and policy in an evolving European Union*, 2000, 325, 340.

<sup>114</sup> See from the perspective of consumer policy Jim Davis, *Entrenchment of New Governance in Consumer Policy Formulation: A Platform for European Consumer Citizenship Practice?*, 32 *Journal of Consumer Policy* (2009), 245, 249.

<sup>115</sup> ECJ, 5 October 2000, Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, [2000] ECR I-8419, para. 84.

While it has been remarked that this wording does not compel the EU institutions to enact measures in accordance with a high level of protection,<sup>116</sup> Article 114(3) TFEU certainly does not only contain a general appeal for political consideration of those protective goals. Rather it has to be understood as a binding normative guideline that at least prevents the EU legislature from ignoring the mentioned non-economic objectives or from harmonizing protective standards at the lowest conceivable level. In this respect, Article 114(3) TFEU reflects normative requirements that are laid down elsewhere in EU primary law, for instance in horizontal clauses such as Article 11 TFEU concerning environmental protection and Article 12 TFEU concerning consumer protection. Thus, Article 114(3) TFEU takes away from the European legislature the option to generally neglect any individual weaknesses, cognitive constraints etc. of market players, such as, for example, by adopting a stylized information paradigm as indicated above that imposes the burden of perceiving and processing information and reaching a rational transaction decision completely upon each individual market player.

This raises the question if contrariwise Article 114(3) TFEU forces the internal market legislature to fully take into account individual defects and weaknesses that are revealed by behavioural sciences (“taking account in particular of any new development based on scientific facts”) and excludes the option of adopting a normative concept of internal market players that at least to some extent neglects those insights. Does Article 114(3) TFEU in fact require a “behavioural turn” in internal market regulation, understood as a significant expansion of regulatory interventions based on an impetus to influence market players’ conduct in a paternalistic way?

We may answer this in the negative as such an understanding and implementation of Article 114 TFEU would in fact result in the harmonizing of regulation at the highest conceivable level of protection. Such an approach would – to take up again the argument of Advocate General *Capotorti* in “*Cassis de Dijon*”<sup>117</sup> – ultimately amount to a prescription of uniform products. However, if internal market regulation were to put an end to the diversity of products available on the internal market, it would in fact eliminate an essential purpose of its concept, namely to open markets to enrich all internal market players with a greater variety of products, thereby better serving the diverse interests of market players. Article 114 TFEU neither legitimizes, nor does it demand regulatory measures with such counterproductive effects on internal market integration as it is the internal market rationale that forms the basis for any regulatory measure in the first place.<sup>118</sup>

Hence, what Article 114 TFEU calls for is a balancing between a promotion of the functioning of the internal market as the prior ambition of any regulatory measure adopted on that basis, and a protection of those interests mentioned in Article 114(3) TFEU. Taking a look at the concept of man in economic regulation, in particular the requirement to consider concerns of health, (product) safety, and consumer protection may be of relevance. However, the internal market legislature enjoys a wide margin of discretion in performing this balancing assignment.<sup>119</sup> In search of normative guidance for an exercise of this discretionary power one may refer in particular to the provisions on fundamental rights. Therefore, regulatory measures concerning the protection of the physical integrity of market players (“health”, (product) “safety”) should tend to be characterized by a relatively higher protective standard than measures that are only related to the pure financial interests of market players.

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<sup>116</sup> *Claus Dieter Ehlermann*, The internal market following the Single European Act, 24 *Common Market Law Review* (1987), 361, 388; *Craig and de Búrca*, *EU Law*, 5<sup>th</sup> ed. 2011, p. 592.

<sup>117</sup> See supra note 41.

<sup>118</sup> Cf. ECJ, 13 May 1997, Case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, [1997] ECR I-2405, para. 48: “Admittedly, there must be a high level of consumer protection [...]; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State.”

<sup>119</sup> *Claus Dieter Ehlermann*, The internal market following the Single European Act, 24 *Common Market Law Review* (1987), 361, 389.

To sum up briefly, Article 114 TFEU neither allows internal market regulation to completely neglect individual weaknesses, cognitive restraints etc. and to impose, for example, the informational burden completely upon each individual market player, nor does it require a “behavioural turn” from the EU legislature, i.e. a focus on regulatory measures that aim at countering effects of bounded rationality etc. Rather, Article 114 TFEU demands from the legislature that it balances the objective interest in establishing a functional internal market that entails a tendency towards a lower degree of regulatory intervention with the protective purposes laid down in Article 114(3) TFEU. The EU institutions thereby enjoy a wide margin of discretion.

### **Regulatory Consideration of Concerns of Behavioural Sciences: Some Sceptical Remarks**

EU law provides for a normative basis that legitimizes or to some extent even demands that the legislature considers in issuing economic regulation also the individual weaknesses, cognitive limits and biases of market actors as well as the potential effects of bounded rationality. Yet we have also seen that the decision for such regulatory intervention and the way it is implemented remain largely at the discretion of the legislature.

Any kind of regulatory intervention faces a number of obstacles along its way to successful implementation,<sup>120</sup> and regulatory ambitions in response to individual cognitive and behavioural deficits constitute no exception in this regard. It is in the nature of regulation that it requires the lawmaker to find a standardized protective level that applies for all addressees,<sup>121</sup> in the case of internal market regulation across Europe. But risk perception is different among people and cultures, and it may change without there being observable patterns.<sup>122</sup> A centralized rule-making in Brussels that produces harmonized economic regulation may in particular not account for heterogeneous preferences that are influenced by quite strong divergent cultural and social backgrounds throughout the Union. Persuasion, acceptance, and ultimately the effects of such regulatory measures will accordingly vary to a high degree, and therefore such regulation bears significant risks of being ineffective and inefficient or even of producing counter-productive results and undesired side-effects.

A negative long-term effect that has particularly been associated with a “behavioural universe” is that market actors “don’t learn much” where regulation does not expect learning processes from individuals in their role as market participants but seeks to steer their behaviour in the “right” direction from the outset.<sup>123</sup> Thus, regulation with a “behavioural impetus” risks decreasing the capacity of self-control, phasing out the possibility to let market players become confident market actors who learn from their positive and negative experiences.<sup>124</sup> Market players whose conduct have constantly been influenced by regulation that aims at counteracting cognitive biases and effects of bounded rationality, will ultimately become more and more dependent on regulation as they may no longer be able to take responsibility for matters regarding their own welfare. There seems to be a risk that regulation which attempts behaviour modification might result in a regulatory spiral, confirming its own legitimacy, and even creating a need for constantly stronger regulatory interventions.<sup>125</sup>

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<sup>120</sup> See for some accounts *inter alia* Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk*, 2001, pp. 26-27.

<sup>121</sup> See Cass Sunstein, *Free Market and Social Justice*, 1997, pp. 130-132.

<sup>122</sup> Barbara Bottalico, *Cognitive Neuroscience, Decision Making and the Law*, 2 *European Journal of Risk Regulation* (2011), 427-432.

<sup>123</sup> Adam Burgess, “Nudging” Healthy Lifestyles: The UK Experiments with the Behavioural Alternative to Regulation and the Market, 3 *European Journal of Risk Regulation* (2012), 3, 12.

<sup>124</sup> Luc Bovens, *The Ethics of Nudge*, in Till Grüne-Yanoff and Sven Ove Hansson (eds.), *Preference Change*, 2009, 207, 211.

<sup>125</sup> Margo Trappenburg and Marie-Jeanne Schiffrers, *How to Escape the Vicious Circle: The Challenges of the Risk Regulation Reflex*, 3 *European Journal of Risk Regulation* (2012), 283-291.

Potential impediments to an effective implementation of a regulatory concept that seeks to counter cognitive biases and the effects of bounded rationality, as well as likely counter-productive effects and negative side-effects have to be taken into account by European institutions when they define the protective standard of a harmonizing measure, and when they balance individual rights to free trade and the objective interest in a functioning internal market on the one hand with the objective to prohibit a race to the bottom in pursuing certain protective purposes on the other. A call for regulatory intervention must not become a sort of knee-jerk reaction to results of behavioural sciences. Regulators are encouraged not to take these findings as a welcome excuse to expand their field of activities, as a justification to optimize rules that are supposed to counter market failures or to implement market-rectifying intervention. Rather they should consider conceiving those insights as a cause for lowering regulatory ambitions to a realistic level.<sup>126</sup>

## Conclusion

(1) The economic rationale behind the legal concept of an internal market rests upon classical free trade theory as it aims at an enhancement of allocative efficiency through removing barriers of cross-border trade. Yet functioning markets also require positive economic regulation, for example regulation that counters the risks of adverse selection due to systematic information deficits. The ECJ's decision in "Cassis de Dijon" reflects a potential trade-off between the liberalizing impetus of internal market regulation and the protective objectives pursued by economic regulation, be it of domestic or EU law origin: the stricter the level of the latter, the more the diversity of products available in the internal market as well as the flexibility of production factors will be reduced.

(2) Therefore, the fundamental freedoms subject the implementation of positive protective goals through economic regulation to a proportionality test on the basis of which the Court developed *inter alia* the normative concept of an internal market consumer as "reasonably well-informed and reasonably observant and circumspect." This concept implied that for reasons of internal market benefits, market players have (at least to some extent) to bear the burden of perceiving and processing information that is transaction relevant as well as disadvantages should they be ill-equipped to cope with this assignment. The internal market legislature echoed this concept of internal market actors as it explicitly referred to it in secondary legislation but also as it implemented a preference for giving market actors free access to information over content related regulation.

(3) EU institutions have never adopted a normative market player concept solely guided by the liberalizing rationale of internal market law. In particular, the Court stated exceptions in circumstances where misconceptions on the part of consumers posed health risks, and various examples illustrate how the EU legislature assists market players in perceiving and processing information and even seeks to steer their decision-making process in a certain direction. In this respect, a clear-cut distinction is not possible as there is nothing like a purely informational but content-neutral rule since every regulatory choice as to which information has to be provided on the market and in which form involves an element of paternalism as it influences the informational basis that may establish the ground for the decision-making process of market players. Thus, any rule that is meant to facilitate perceiving and processing information contains a "behavioural facet," if only implicitly or as a matter of fact, and weak in its nature. In contrast, only exceptionally internal market regulation reveals paternalism in a strong form, i.e. instances where the internal market legislature conceived the individual addressees of its economic regulation as inapt to a market conduct that served their own best interest due to cognitive biases or effects of bounded rationality. Thus, looking at positive internal market law no "behavioural turn" may be diagnosed.

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<sup>126</sup> Jens-Uwe Franck, Vom Wert ökonomischer Argumente bei Gesetzgebung und Rechtsfindung für den Binnenmarkt, in Karl Riesenhuber (ed.), Europäische Methodenlehre, 2nd ed. 2010, 159, para. 47.

(4) Internal market regulation and the normative market player concept embodied therein are the result of a balancing assignment attributed to the internal market legislature by EU primary law. It is essentially fundamental rights that may oblige regulators to take into account individual weaknesses, cognitive limits and biases as well as the effects of bounded rationality as revealed by insights of behavioural sciences. Therefore, the internal market legislature must not take an optimization of allocative efficiency according to the free trade rationale enshrined particularly in the fundamental freedom as its sole guidance for economic regulation. Yet normative requirements as they follow from the fundamental rights and as they are also reflected in Article 114(3) TFEU neither demand nor legitimize a “behavioural turn,” i.e. a change in the policy of internal market regulation according to which an impetus to actively steer market players’ conduct in their own best interest should become an essential ambition. Such a paternalistic shift in regulatory policy would conflict with the internal market rationale that only grants the regulatory competence to EU institutions in the first place, which, however, enjoy a wide margin of discretion in this regard.





