

The Rise and Fall of Daylight Saving Time: The Uncertainties of Internal Market Harmonisation

In 2018, the European Commission came out with a proposal to discontinue daylight saving time EU-wide. The Commission argued that the reason for this proposal was the apparent demand on the part of citizens, the European Parliament, and some Member States to abolish the bi-annual clock change. In order to abolish the biannual clock change – currently required and regulated by a 2000 Directive – a new legal act has to be adopted amending or repealing the current one. This new legal act needs to be adopted under Article 114 TFEU, which requires that the act concerned has as object the establishment and functioning of the internal market. Does switching from time-change to a permanent winter or summer time really contribute to this objective, bearing in mind that a changed system might cause even more fragmentation in the internal market? Is it possible, under EU law and by virtue of the relevant case-law of the Court of Justice of the European Union, to switch to a probably less beneficial system under Article 114 TFEU? This paper aims to address this issue presenting the reasons and objectives of the new proposal and the related case law.

I Introduction

Currently, seasonal changes of time are regulated in the European Union by Directive 2000/84/EC.¹ This Directive provides that clocks have to be changed by one hour in advance every last Sunday of March and set back every last Sunday of October. The historical roots of Daylight Saving Time (DST) stretch back to Benjamin Franklin, who wrote an essay in which he suggested that Parisians could economise candle usage by getting people out of bed earlier.² Although Benjamin Franklin was only joking, the story of summer-time arrangements in Europe became real and started during the First World War, when Germany and France

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¹ Directive 2000/84/EC of the European Parliament and of the Council of 19 January 2001 on summer-time arrangements OJ L 31, 2.2.2001.

² Steve P. Calandrillo, Dustin E. Buehler, 'Time Well Spent: An Economic Analysis of Daylight Saving Time Legislation' (2008) 43 (1) Wake Forest L. Rev. 45.

introduced daylight saving time in order to conserve coal.³ However, modern DST only appeared in the 1970s. EU legislation targeted summer time arrangements for the first time in 1980; since then, seasonal changes of time have been harmonised at European level.

In recent years there has been a trend to discontinue seasonal changes of time, China and Iceland ended this system in 1991, Russia and Belarus in 2011, and Turkey in 2016.⁴ The European Union seems to follow this trend; first the European Parliament asked the Commission to conduct an assessment of the Directive and, if necessary, come up with a proposal for its revision.⁵ In December 2018, the Commission presented its proposal for a ‘Directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC’⁶. This new proposal’s objective is to abolish time switch, and give the possibility to every Member State to choose whether they apply summer or winter time as a permanent time. In order to abolish biannual clock changes, new legislation has to be adopted. The new legislation – as the current one - needs to be adopted under Article 114 TFEU, which enables EU legislation to harmonise altering national legislations, by adopting a legal act which has the establishment and functioning of the internal market as its object.⁷ Although currently there are no diverging national legislations, since Directive 2000/84/EC is already regulating this field, Article 114 TFEU would still be the appropriate legal basis to amend it. The legislative procedure is still in process under Article 294 TFEU; the European Parliament has already adopted its position at first reading⁸ and has communicated it to the Council.⁹

Although the economic impacts of creating a well-functioning single market without barriers have pushed Member States in the direction of giving more and more competences to the EU,¹⁰ the EU has no power to enact general regulations on the internal market.¹¹ The measures adopted under Article 114 TFEU have to improve the conditions for the establishment and functioning of the internal market.¹² From time to time, Member States and

³ Commission, ‘Proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC’ COM(2018) 639 final 1.

⁴ Ibid.

⁵ European Parliament, 2017/2968(RSP) European Parliament resolution of 8 February 2018 on time change arrangements.

⁶ Commission, ‘Proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC’ COM(2018) 639 final.

⁷ László Blutman, *Az Európai Unió joga a gyakorlatban* (HVG-ORAC 2013, Budapest) 278.

⁸ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)].

⁹ See <[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0332\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/0332(COD))> accessed 4 February 2020.

¹⁰ Somssich Réka, ‘Jogszabályok közelítése’ in Osztovits András (ed), *Az Európai Unióról és az Európai Unió Működéséről szóló Szerződések magyarázata II.* (CompLex 2011, Budapest) 2160–2161; Isidora Maletić, *The Law and Policy of Harmonisation in Europe’s Internal* (Edward Elgar 2013, Cheltenham UK) 1–7.

¹¹ Case C-376/98 *Germany v Parliament and Council* (ECLI:EU:C:2000:544) 83.

¹² Ibid.

private entities question whether this harmonising competence is well used by the EU.¹³ In these cases, the stakes are high, Member States do not want the EU to exceed its competences; they aim to maintain their sovereignty,¹⁴ and meanwhile private entities are interested in who the lawmaker is because that determines the content of the adopted provision, especially if the measure in question would have an impact on their financial status and business activity.

II The Use of Article 114 TFEU as a Legal Basis in General and in the Specific Case

Article 114 TFEU states that

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.¹⁵

The Court of Justice of the European Union (CJEU) developed a case-law on the interpretation of the scope of Article 114 TFEU.¹⁶ This case-law provides different insights on the application of Article 114 TFEU.¹⁷

First, it is necessary that a legal act based on Article 114 TFEU actually contributes to eliminating obstacles to the free movement of goods, the freedom to provide services, and to remove distortions of competition.¹⁸ A measure adopted on the basis of Article 114 TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.¹⁹ If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 114 TFEU as a legal basis, a judicial review of compliance with the proper legal basis might be rendered

¹³ Case C-376/98 *Germany v Parliament and Council*; Case C-58/08 *Vodafone and Others* (ECLI:EU:C:2010:321); Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* (ECLI:EU:C:2002:741); Case C-151/17 *Swedish Match* (ECLI:EU:C:2018:938); Case C-358/14 *Poland v Parliament and Council* (ECLI:EU:C:2016:323); Case C-434/02 *Arnold André* (ECLI:EU:C:2004:800); Case C-477/14 *Pillbox 38* (ECLI:EU:C:2016:324); Case C-547/14 *Philip Morris Brands and Others* (ECLI:EU:C:2016:325).

¹⁴ Florian Sander, 'Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or A Substantial Step Towards EU Federalism?' (2006) 12 (2) *Colum. J. Eur. L.* 517.

¹⁵ Article 114 TFEU.

¹⁶ Damian Chalmers, *Gareth Davies and Giorgio Monti, European Union Law: Cases and Materials* (Cambridge University Press 2010, New York) 95.

¹⁷ Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2016, Oxford) 558–559; Stephen Weatherill, *The International Market as a Legal Concept* (Oxford University Press 2017, Oxford) 167–175.

¹⁸ Case C-376/98 *Germany v Parliament and Council* para 95.

¹⁹ *Ibid.*, 84.

nugatory.²⁰ The Court would then be prevented from discharging the function entrusted to it, of ensuring that the law is observed in the interpretation and application of the Treaty.²¹ Advocate General Poiares Maduro held that further objectives pursued by legislation do not have to be limited to market integration, even if the latter is necessary to justify the exercise of EU competence.²² This means that a difference has to be made between the content and the reasons for the legislation.²³

According to the above conditions, the Commission, in its proposal on the abolishing of time adjustment, held that the objective of the proposal is to ensure the proper functioning of the internal market, Article 114 TFEU is therefore the adequate legal basis.

The Commission has examined available evidence, which points to the importance of having harmonised Union rules in this area to ensure the proper functioning of the internal market and avoid, inter alia, disruptions to the scheduling of transport operations and the functioning of information and communication systems, higher costs to cross-border trade, or lower productivity for goods and services. Evidence is not conclusive as to whether the benefits of summer-time arrangements outweigh the inconveniences linked to a biannual change of time.²⁴

The European Parliament relied on these conclusions of the Commission with one difference; the European Parliament's amendment proposed to remove the last sentence on the inconclusive benefits of ending DST.²⁵ The Commission stated that the benefits of the abolition are not conclusive because the evaluations found counterbalancing effects of DST. Energy savings generally became marginal thanks to technological evolution; however, the amount of energy saving vary from Member State to Member State, due to different geological locations. The impact of time change on health is also controversial: while clock change can cause harm to the human body, summer-time arrangements can generate positive effects linked to more outdoor leisure activities. These effects counterbalance each other, thus overall health impacts remain inconclusive. Although some studies found that sleep deprivation, caused by clock change, can increase the number of road traffic accidents, the Commission concluded that it is generally difficult to attribute the direct effect of summer-time arrangements on accident rates as compared to other factors. In the sector of agriculture, there have been concerns about the disruption of the biorhythm of animals caused by clock change. The Commission found that those concerns appear to progressively disappear due to the deployment of new equipment, artificial lighting and automated technologies.²⁶

²⁰ Ibid.

²¹ Ibid.

²² Opinion of Advocate General Poiares Maduro in case C-58/08 *Vodafone and Others* para 11.

²³ Ibid, 8.

²⁴ Commission (n 6) 9.

²⁵ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] [Am. 3].

²⁶ Commission (n 6) 3–5.

Overall, on one hand, having a harmonised system is crucial; on the other hand, there is no evidence that the abolition of the biannual time change would be profitable. Since a harmonised system is already guaranteed by the current DST system, why would the abolition effectively contribute to the functioning of the internal market? For these reasons, the new proposal seems to be a political decision rather than a measure purely based on internal market considerations. That notwithstanding, it should still be justified under Article 114 TFEU.

As a result of ending clock changes, each Member State will be required to choose its own standard time and whether it will change its standard time to coincide with its current summer-time on a permanent basis.²⁷ It can, however, not be excluded that these standard time choices might lead to a more fragmented internal market than it is with the existing legislation. The European Economic and Social Committee issued its Opinion on the Proposal, and in it the Committee expressed concern about this risk of fragmentation.

The risk is that if there is not unanimous time alignment by all countries, ensuring the same level of harmonised implementation as at present, the costs arising from different times between countries would have a serious impact on the internal market (fragmentation), generating more problems than benefits. The Commission recognises this problem in its impact assessment and the Committee considers necessary to achieve a wider consensus in advance, before the official presentation of the Commission proposal.²⁸

One can assume that, if the risk of fragmentation is real, it can undermine the main goal set by Article 114 TFEU, namely to pursue a better functioning of the internal market. Since a measure adopted on the basis of Article 114 of TFEU must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market, repealing seasonal time changes in the proposed scheme might not pass this test.

Second, where an act based on Article 114 TFEU has already removed any obstacle to trade in the area that it harmonises, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty. In that respect, the Court held that, by using the expression ‘measures for the approximation’ in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result.²⁹ Advocate General Poiares Maduro held in its Opinion in the *Vodafone and Others* case that it would be absurd and undemocratic if the EU legislature were unable to revisit earlier political choices taken in the context of legislation passed on the basis of Article 114 TFEU in order to reflect changes in

²⁷ Ibid, 2.

²⁸ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

²⁹ Case C-58/08 *Vodafone and Others* para 34 and 35; C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* para 77–80.

public opinion and advances in knowledge or to address unforeseen negative consequences of harmonising measures.³⁰

The field of seasonal time changes is already covered by EU legislation; thus the EU legislator cannot be deprived of its right to address legislative amendment. As the proposed Directive might cause more obstacles to the internal market than the current legislation, the Proposal might mean a step back from the level of harmonisation already achieved. Such an obstacle would be the fragmentation of the internal market, which could cause higher prices and problems in transportation and communication.³¹

It is unclear whether such a step back would be possible under Article 114 TFEU. The question is whether the amendment should ensure a higher degree of harmonisation compared to the current level, or compared to a non-harmonised situation on the market. The United Kingdom House of Lords, in its reasoned opinion, stated that ‘the existing Directive 2000/84/EC already ensures harmonization of time across the Union and the Commission does not demonstrate how the proposal would enhance this.’ The Opinion also reported that the Government of the United Kingdom therefore concluded that the proposal could not be justified on the grounds of harmonisation alone and that ‘strong evidence’ was not provided for other benefits to the Union, Member States or citizens.³²

However, if such a step back would be possible, the amendment could still not be based on arbitrary considerations. The amendment has to reflect changes in public opinion and advances in knowledge or to address unforeseen negative consequences of harmonising measures.³³

Changes in public opinion were measured by the Commission and, as a result, both the Commission and the Parliament found the support of EU citizens relevant as a reason for the proposal. The Commission launched a public consultation on stopping summer-time, and this online survey has become the most successful survey of all time, by receiving 4.6 million valid replies.³⁴ Although this number seems to be quite high, it only represents 1% of the EU’s population. In addition, these kinds of consultations are not statistically representative. Most of the answers (70%) came from one Member State (Germany), and an additional 14.6% from France and Austria. The outcome of the public consultation was that 84% of citizens voted against the biannual time switch.

³⁰ Opinion of Advocate General Poiares Maduro in case C-58/08 *Vodafone and Others* 11.

³¹ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

³² Reasoned opinion of the United Kingdom House of Lords on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)].

³³ Opinion of Advocate General Poiares Maduro in case C-58/08 *Vodafone and Others* 11; C-374/05 *Gintec* (ECLI:EU:C:2007:654) 29; Case C. 491/01 *British American Tobacco (Investments) and Imperial Tobacco* 80.

³⁴ Commission Staff Working Document: Public Consultation on EU Summertime Arrangements, Report of Results [Swd (2018) 406 Final] <https://ec.europa.eu/info/consultations/2018-summertime-arrangements_en> accessed 4 February 2020.

Only in Greece and Cyprus, a small majority of citizens prefer keeping the current system (56% and 53% respectively). Conversely, more than 90 % of citizens' replies from Finland (95%), Poland (95%), Spain (93%), Lithuania (91%), and Hungary (90%) were in favour of abolishing the current arrangement. The main reason highlighted by all respondents in favour was human health (43%), followed by lack of energy-saving (20%), while for those in favour of keeping the current arrangements, the main reason highlighted is leisure activities in the evening (42%). The question was asked that, if the biannual time switch were to be abolished, would respondents favour permanent summertime or permanent standard (winter) time. Answers show that the overall preferred option was permanent summertime. 2,529,000 of all respondents (56%) would prefer permanent summertime and 1,648,000 of respondents (36%) would be in favour of permanent standard (winter) time, if the biannual time switch were to be abolished. 377,000 respondents (8%) had no opinion on this matter.³⁵

Even Jean-Claude Juncker (President of the Commission at the time) in his speech ('State of the Union 2018') in front of the European Parliament mentioned time switch:

Clock-changing must stop. Member States should themselves decide whether their citizens live in summer or winter time. It is a question of subsidiarity. I expect the Parliament and Council will share this view. We are out of time.³⁶

However, some voices have questioned the importance and the reliability of the outcome of the Commission's consultation. Not only the survey's methodology is problematic but also the fact that most of the answers arrived from one Member State makes the results unbalanced. According to the European Economic and Social Committee's Opinion, the Commission did not take the facts that a large majority of participants were from a single country, and that the proposal was rejected in certain Member States into adequate account.³⁷ The Danish Parliament and the United Kingdom House of Commons also shared this view in their opinions.³⁸ Altogether, it can be concluded that changes in public opinion are not fully proved, thus remain uncertain.

Advances in knowledge or to address unforeseen negative consequences of harmonising measures can also underpin the adoption of new legislation. Several studies have been carried out over the years to examine different fields and the Commission's conclusion was that it cannot be decided whether a biannual clock change or a permanent time system is more

³⁵ Commission Staff Working Document (n 34).

³⁶ Annual State of the EU address by President Juncker at the European Parliament: State of the Union 2018, <https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2018_en> accessed 4 February 2020.

³⁷ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

³⁸ Reasoned opinion of the United Kingdom House of Commons on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)]; Reasoned opinion of the Danish Parliament on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)].

convenient.³⁹ Energy savings are marginal; the effects of time switch on human health are inconclusive, and the negative impacts of time switch on the agricultural sector might disappear with automated technologies. As referred to before, it is surprising that, while the Commission proposed the abolition of the biannual clock change, it states that this measure will probably not be beneficial.

Third, as the internal market is one of the areas of shared competence, the principles of subsidiarity and proportionality shall apply.⁴⁰ The limits of Union competences are governed by the principle of conferral. Under it, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein; competences not conferred upon the Union in the Treaties remain with the Member States.⁴¹ In the case of shared competences, the use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.⁴² The Protocol (No 2) on the application of the principles of subsidiarity and proportionality states, in paragraphs 6 and 7, that the EU is to legislate only to the extent necessary and that EU measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty.⁴³

The Commission saw the respect of the principle of subsidiarity in ending DST in the Union by leaving the decision to each Member State as to its standard time, and in particular as to whether it will change its standard time to coincide with its current summer-time on a permanent basis, or whether it will apply the standard time that corresponds with its current ‘winter-time’ on a permanent basis.⁴⁴ The Amendments voted by the European Parliament confined Member States’ margin of discretion by establishing a coordinating mechanism, which would consist of one representative of each Member States and one representative of the Commission. This coordinating mechanism would help to ensure a harmonised and coordinated approach to time arrangements throughout the Union. Therefore, the coordination mechanism should discuss and assess the potential impact of any envisaged decision on a Member State’s standard times on the functioning of the internal market, in order to avoid significant disruptions.⁴⁵ The Parliament sees the fulfilment of the requirement of subsidiarity

³⁹ Ibid.

⁴⁰ Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* 179.

⁴¹ Article 5 TFEU

⁴² Ibid.

⁴³ Case C-58/08 *Vodafone and Others* para 73; Case C-151/17 *Swedish Match* para 64–76.

⁴⁴ Commission (n 6) 2.

⁴⁵ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] [Am. 2], [Am. 22] – [Am. 26].

by the single fact that the objectives of this Directive as regards harmonised time arrangements cannot be adequately achieved by the Member States but can be better achieved at Union level instead.

In its Opinion, the European Economic and Social Committee reports that the Commission hopes that all the countries will, without exception, adopt the same summer and winter time in order to retain the current harmonisation and avoid fragmentation of the internal market.⁴⁶ This opinion of the Committee highlighted the contradiction between the satisfaction of the requirement of subsidiarity and the risk of fragmentation. These considerations might have led the Parliament in the direction of establishing the coordination mechanism and to redefine compliance with the principle of subsidiarity.

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.⁴⁷ With regard to judicial review of compliance with those conditions, the Court has accepted that, in the exercise of the powers conferred on it, the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. As such, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate, having regard to the objective which the competent institution is seeking to pursue.⁴⁸ The Parliament, in its legislative resolution, stated that the planned Directive does not go beyond what is necessary to achieve the Directive's objectives. For this reason, the Parliament found the planned Proposal to comply with the principles of subsidiarity and proportionality.

In conclusion, the Proposal's compliance with Article 114 TFEU can be questioned from different perspectives. The most important argument against the compliance is the risk of fragmentation of the internal market. This risk might undermine the essential goal of Article 114 TFEU. In that regard, it is noteworthy that even the Commission seems to be hesitant with regard to the benefits of the Proposal. The main reason for the Proposal identified by the Commission was the support by the European citizens. This argument might be weakened by the fact that the above support was explicitly given by 1% of the EU's population. The Danish Parliament, the House of Common, and the House of Lords shared the same concerns in their opinion on the compliance with the principles of subsidiarity and proportionality.

⁴⁶ Opinion of the European Economic and Social Committee on Discontinuing seasonal changes of time, TEN/685-EESC-2018.

⁴⁷ Article 5 TFEU.

⁴⁸ Case C-58/08 *Vodafone and Others* para 52.

III Health Concerns

By virtue of Article 114 (3), legal acts adopted under Article 114 TFEU must envisage a high level of health protection. Time switch has been criticised for its potential harmful effects on human health. Even in the Commission's public consultation, 42% voted for the abolition, because of health concerns. Sticking to the facts, the Commission came to a conclusion that there is no scientific proof of overall health impacts being harmful. Although time switch can interfere with the human biological clock and cause sleep deprivation, these negative effects seems to be balanced by the positive effects of the outdoor activities possible thanks to long summer nights.⁴⁹

Despite the conclusion of the Commission, the European Parliament saw the seasonal time change as an existing health risk. The Parliament, in its legislative resolution, added to the proposal the following findings:

The biorhythm of the human body is affected by any changes of time, which might have an adverse impact on human health. Recent scientific evidence clearly suggests a link between changes of time and cardiovascular diseases, inflammatory immune diseases or hypertension, linked to the disturbance of the circadian cycle. Certain groups, such as children and older people, are particularly vulnerable. Therefore, in order to protect public health, it is appropriate to put an end to seasonal changes of time.⁵⁰

From the perspective of Article 114, this is an important added consideration, because the Court held that the EU legislature cannot be prevented from relying on Article 114 TFEU on the grounds that public health protection is a decisive factor in the choices to be made. Types of measures available under this legal basis, and the discretion of the Union legislature as regards the most appropriate method of harmonisation justify the adequacy of Article 114 as a legal basis.⁵¹

The Court, in the *Swedish Match* judgment,⁵² held that the EU legislature must take account of the precautionary principle, according to which, where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are inconclusive, but the likelihood of real harm

⁴⁹ Commission (n 6) 4.

⁵⁰ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] (4a) [Am. 7].

⁵¹ Anatole Abaquesne de Parfourus, "Breaking Through the Foul and Ugly Mists of Vapours" – Regulation of Alternative Tobacco and Related Products by the New Tpd and Exercise of Eu Competence' (2018) 19 (6) German L.J. 1291; Case C-380/03 – *Németország kontra Parlament és Tanács* (ECLI:EU:C:2006:772); Case C-151/17 *Swedish Match*; Case C-434/02 *Arnold André*.

⁵² Case C-151/17 *Swedish Match*.

to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.⁵³ Thus, even though discontinuing seasonal time changes might cause more fragmentation to the internal market, the high level of health protection requirement hand in hand with the precautionary principle might make the new Directive fit under Article 114 TFEU.

IV Conclusions

The first and most fundamental requirement of Article 114 TFEU is that a legal act based on it must contribute to eliminating obstacles to the free movement of goods, and to the freedom to provide services. Although a coordinating mechanism is planned to be established, the new Directive risks the fragmentation of the internal market. This could lead to higher costs and disruptions to the market and so the functioning of the internal market could become worse. At present, no case-law by the Court is available on whether such ‘step back’ legislation would be possible under Article 114 TFEU. The question is whether such an amendment should ensure a higher degree of harmonisation compared to the current level or compared to a non-harmonised situation on the market.

It is quite surprising why the Commission proposed such a directive while itself stating that the benefits of the abolition of biannual clock change remain inconclusive. In conclusion, the Proposal is likely to be more a political decision, than a measure aiming to improve the functioning of the internal market. The European Parliament, with its Amendments to the Proposal, pushed the proposal to seem more compliant with Article 114 TFEU. The Parliament deleted the passage stating that the abolition’s benefits are inconclusive, added health protecting provisions, and provisions establishing a coordinating mechanism. Stephen Weatherill found that the case-law of the Court created a ‘drafting guide’ for the EU legislator, who only has to apply the formulas given by the Court in order to fit in the scope of Article 114 TFEU.⁵⁴ Observing the Parliament’s amendments, this theory seems to give a fair view. The Parliament not only introduced a mechanism which might counterbalance the risk of fragmentation, but also added health protecting objectives to the Directive. In the case-law of the Court, health protection with the precautionary principle became a strong bulwark of the EU’s wide discretion in determining the adopted measures. Thus, adding health-protecting goals to the Proposal might ensure EU’s wide discretion for determining the content of the legislation. Conclusively, stating that health protection is envisaged by the Proposal might justify such a ‘step back’ directive.

The concerns of the Danish Parliament, the House of Commons and the House of Lords seem to be well-founded: the benefits of abolition are not substantiated; the Europeans

⁵³ Ibid, 34.

⁵⁴ Stephen Weatherill, “The Limits of Legislative Harmonization Ten Years After Tobacco Advertising: How the Court’s Case Law Has Become A “Drafting Guide” (2011) 12 (3) German L. J. 827.

citizens' support, measured by the Commission's survey, does not seem to be representative; and the principle of subsidiarity and the risk of fragmentation are in conflict. However, these concerns could only be answered by the Court and currently it is uncertain whether it will ever have the opportunity to adjudicate on the validity of the new Directive, if adopted.

At the time of writing this article, the EU is awaiting Council's first reading position, and, if the Council adopts the Proposal, Directive 2000/84/EC will be repealed with effect from 1 April 2021.⁵⁵

⁵⁵ European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council discontinuing seasonal changes of time and repealing Directive 2000/84/EC [COM(2018)0639 – C8-0408/2018 – 2018/0332(COD)] [Am. 32].