THE ROLE OF ARTICLE 114 TFEU IN BALANCING FUNDAMENTAL RIGHTS AND PRODUCT SAFETY IN THE AI ACT

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Abstract:

This paper explores the legal foundation of the EU's AI Act, with a specific focus on the use of Article 114 TFEU as its legal basis. It argues that the role of Article 114 TFEU – in the Digital Single Market, and more specifically AI Act – represents a shift from merely facilitating a common market to constructing a common regulated market that embeds public interest objectives, particularly the protection of fundamental rights. Through analysis of the evolving scope and function of Article 114 TFEU, the paper examines how the AI Act navigates the balance between harmonising internal market rules and addressing ethical and societal concerns posed by AI technologies. The contribution also discusses the strength of Article 114 TFEU as a legal basis, especially when the regulation extends into non-economic domains like privacy, non-discrimination, and transparency. Finally, this contribution concludes that the AI Act reflects a new governance approach, acknowledging that the complexity of harmonising emerging technologies within the EU's Digital Single Market framework involves market building as well.

Keywords: Article 114 TFEU, AI Act, Fundamental Rights, Common Regulated Market, Reflexive Harmonisation

1. Introduction

The galloping development of artificial intelligence (AI) technologies – that is being witnessed in real time – has proven to be a challenge for lawmakers around the world. In the European Union (EU) this challenge has been met with dual imperative. The first being the safeguarding of fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union (Charter),[1] and the second being the ensuring the safety and integrity of products

[1] Charter of Fundamental Rights of the European Union [2008] OJ C 326/391 ('Charter').

circulating within the internal market. The new Artificial Intelligence Act (AI Act)[2] aims to address this challenge by establishing a harmonised regulatory framework applicable across the EU – and its Member States.

In the centre of this effort to create a harmonised regulatory framework rests Article 114 of the Treaty on the Functioning of the European Union (TFEU).[3] Article 114 TFEU has been a cornerstone of the EU internal market enabling the approximation of national laws that affect the functioning of the internal market. In 1996 Bernard[4] dubbed the use of this article as a tool for creating a *common* market, rather than a tool for creating a common *market*. In 1996 this sentence held true. The EU's physical internal market was subject to differing national laws that had proven themselves to be a hindrance in the free circulation of goods, services and persons. The EU had an internal market, what was lacking – in certain spheres – was commonality of rules. Fast forward to 2015, and to the launch of the Digital Single Market Strategy for Europe,[5] the contours of Bernard's sentiment become blurred, and the question arises – is the strategy of Digital Single Market one of creating a *common* market, or one of creating a common *market*.

The use of the words 'common', 'single' or 'internal' when referring to the market established in the territory of the EU should not be interpreted as a reference to different markets. These words should be understood as interchangeable since they are used in the EU law parlance to signify the same market. The term 'digital market' refers to the market framework made possible by digital technologies – such as the internet – and is used in the Single Market Act[6] (a document that was issued to highlight the transition to digital market) to refer to this framework that is operational on the territory of the 'common', 'single' or 'internal' market.

The idea that this contribution is putting forward is that in the digital manifestation of the internal market, Article 114 TFEU has been used for market building through establishment of common rules. Here the constellation is not mutually exclusive as Bernard suggested in 1996. It is rather mutually

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[2] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance) OJ L 2024/1689 ('AI Act').

[3] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 326/47 ('TFEU').

[4] Bernard, N. (1996), *Future of European economic law in the light of the principle of subsidiarity* 33(4) CMLR 633, 640-1.

[5] Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe' COM(2015) 0192 final ('Digital Market Strategy').

[6] Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Single Market Act Twelve levers to boost growth and strengthen confidence - „Working together to create new growth"' COM(2011) 0206 final (the 'Single Market Act').

inclusive – creating a *common* market is interlocked with the creation of a common *market*. This contribution will explore this idea on the example of the AI Act, an act that signifies a seminal development in the supranational regulation of emerging technologies, seeking to establish a harmonised legal framework to govern the development, deployment, and use of AI systems within the internal market. With this – both creating a regulated market for AI systems within the EU, as well as common rules. Granted, market building – in its basic form – only requires a venue where buyers and sellers can meet to facilitate the exchange or transaction of goods and services. This contribution acknowledges this fact, while focusing on the concept of regulated market – one on which government bodies or, less commonly, industry or labour groups, exert a level of oversight and control.

In order to make the argument for market building through establishment of common rules – and with it balancing fundamental rights and product safety – this contribution first looks into the scope and the meaning of Article 114 TFEU, which is followed by the approaches to harmonisation, concluding with the discussion on the strength of Article 114 TFEU as a legal basis and its relationship to the AI Act.

2. The Scope and the Meaning of Article 114 TFEU

In order to legislate in any specific area of law – and hence regulate a market, the legislator must possess the necessary competences to undertake such action. Under the principle of conferral of powers,[7] the EU is granted legislative authority only when the Treaties[8] explicitly empower it to act in order to achieve the objectives outlined therein. As a result, any legislative measure must be grounded in a specific Treaty provision, providing a clear legal basis.

However, the Treaties – that form the regulatory framework of the EU – have been written in the 1960s, and amended last in 2009. The Treaties makers did not envisage, yet alone regulate, the proverbial explosion of technological progress. Therefore, the Treaties lack express conferral of competence in digital matters – more specifically AI technologies. In the absence of a dedicated AI clause, harmonisation efforts in this field have been pursued primarily under the objective of establishing and enhancing the internal market. More specifically, Recital 3 of the AI Act stipulates *'...[a] consistent and high level of protection throughout the Union should therefore be ensured in order to achieve trustworthy AI, while divergences hampering the free circulation, innovation, deployment and the uptake of AI systems and related products and services within the internal market should be prevented by laying down uniform obligations for operators and guaranteeing the uniform protection of overriding reasons of public interest and of*

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[7] Article 5 consolidated version of the Treaty on European Union OJ C 326, 26.10.2012, p 13-390 ('TEU').

[8] Consolidated version of the Treaty on European Union [2008] OJ C 326/13 ('TEU'); Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 326/47 ('TFEU'); Charter of Fundamental Rights of the European Union [2008] OJ C 326/391 ('Charter') ('Treaties').

rights of persons throughout the internal market on the basis of Article 114 of the [TFEU]...'. As seen in this snippet from Recital 3 of the AI Act, the internal market approach stems from the fact that the *possibility* of differences in national legislation may obstruct the free movement of goods and services that involve AI.

Article 114 TFEU contains a functional competence rule,[9] since it has no normative or substantial content. By this, this provision is quite a flexible competence norm, in the meaning that it enables the EU to harmonise a wide range of subjects, as long as these subjects can be linked with the idea of the internal market. However, this flexibility can be seen as making the harmonisation process dependent on the legislator's discretion, creating a situation of what Weatherill calls a competence creep.[10]

The scope and the meaning of Article 114 TFEU has been clarified by the Court of Justice of the European Union (CJEU) that stated that this article could be used to adopt EU measures in two situations. The first is when such a measure can contribute to the elimination of obstacles to the exercise of fundamental market freedoms – that of goods, services, persons and capital. In *Tobacco Advertising I*[11] the CJEU made clear that not only could Article 114 TFEU be used to adopt measures dealing with actual obstacles to trade, but it could also be used to address future obstacles to trade which might emerge due to 'multifarious development of national laws'. In this case the emergence of such obstacles had to be 'likely' and the measure in question had to be 'designed to prevent them'. In *Inuit II*[12] the CJEU added that the preamble of the measure need only to indicate the general situation which led to its adoption and the general objectives it was intended to achieve; there was no need to identify the number and identity of the Member State whose national rules were the source of the measure. This 'likely' and 'general situation' is visible in the formulation of Recital 3 of the AI Act that states *'...[c]ertain Member States have already explored the adoption of national rules ... Diverging national rules may lead to the fragmentation of the internal market and may decrease legal certainty for operators that develop, import or use AI systems...*'.

The second situation is where the EU adopts the measures to remove distortions of competitions arising from the diverse national rules. From the above formulation of 'certain Member States have already explored the adoption of national rules' the conclusion comes to forefront that this situation does not apply to the present example.

From the above, an interim conclusion can be made that Article 114 TFEU has been used as a functional competence rule to pre-empt the diverging national

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[9] Ramalho A. (2016) *The Competence of the European Union in Copyright Lawmaking - A Normative Perspective of EU Powers for Copyright Harmonization*, Springer, 20.

[10] Weatherill S. (2010) *Union legislation relating to the free movement of goods*, In: Oliver P (ed) *Oliver on the free movement of goods*, Hart Publishing Oxford, 639.

[11] Judgement in *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paras 97-98.

[12] Judgement in *Inuit Tapiriit Kanatami and Others v Commission*, C-398/13 P, EU:C:2015:535, para 29.

solutions in regulating AI technologies. More importantly, since it is a harmonising measure which aims to pre-empt divergence, question arises on what type of approach the legislator can take to use this legal basis.

3. The New Governance Approach to Harmonisation

The start of the 1990s witnessed a growing interest to a more procedural approach to regulation in the EU. This approach is characterised by legislation that does not seek to achieve its aim by direct norm giving prescription – for example exhaustive harmonisation of a field – but it is centred on empowering the local actors in promoting diverse local-level approaches to regulatory problems. This approach was set in contrast – or rather nuance – to legislation which was done in order to make the market function better. This 'market function' approach was based on focusing on the substantive approach to legislation that presupposes that there exists an 'optimal' legislative solution which can be identified – and then prescribed – by the legislators. Within the sphere of AI technologies – as well as other disruptive market occurrences – this type of approach possess a challenge to legislators since it is quite difficult to identify an 'optimal' legislative solution.

This is why, the 'reflexive harmonisation' – a term coined by Deakin[13] – where the legislation seeks to devolve or confer rule-making powers to self-regulator practices, gained traction. The reflexivity of the norms can be seen in minimum standard setting, which allow Member States or other actors to exceed them by taking into account national interest. A gentler tool in the reflexive harmonisation toolbox is the open method of coordination that involves fixing guidelines for the EU (such as code of practices) and establishing quantitative and qualitative indicators and benchmarks as a means of comparing best practices that can be translated into national and regional policies (for example by setting targets). What is important is that the open method of coordination is explicitly about experimentation and learning.

An interesting development regarding the reflexive harmonisation approach is that within the framework of approaches to legislation under Article 114 TFEU this technique has been reinforced in the harmonisation of the Digital Single Market, most notably the AI Act and the regulation of AI.[14] To be precise, to implement the AI Act effectively, the EU has established a multi-layered governance structure that fosters cooperation among institutions, stakeholders, and society. Central to this structure is the newly created European AI Office (AI Office), launched in February 2024. This office, housed within the European Commission, plays a crucial role in building AI expertise, overseeing enforcement of the AI Act, and coordinating with both national and international bodies – for example creating and drafting ethical

[13] Deakin S., (2006)Legal Diversity and Regulatory Competition: Which Model for Europe?,12(4) ELJ 440.

[14] de Vries S., (2024) *Recent trends in EU internal market legislation* In: van den Brink and Passalacqua (eds) *Balancing Unity and Diversity in EU Legislation,* Edward Elgar, 17, 24.

guidelines, best practices or codes of conduct and similar. It focuses especially on general-purpose AI models, developing tools to evaluate risks, investigating violations, and aligning AI policy across the EU. Supporting the AI Office is the European Artificial Intelligence Board (Board), composed of representatives from each Member State. This Board works to ensure consistency in applying the AI Act and facilitates the exchange of best practices and regulatory advice. In addition, two key advisory bodies (an advisory forum of stakeholders and a scientific panel of independent experts) provide technical insight and balanced perspectives from industry, academia, civil society, and small and medium size enterprises. At the national level, each Member State must designate competent authorities to enforce AI regulations domestically. These authorities must operate independently, be well-resourced, and have deep expertise in relevant AI domains such as data protection, cybersecurity, and ethical standards.[15]

The significance of the reinforcement of the reflexive harmonisation approach – within the legislation on the basis of Article 114 TFEU – is acknowledgment of a more complex reality of harmonisation, particularly the harmonisation of the Digital Single Market. To paraphrase de Vries[16] this complex reality of harmonisation now consists of market building (regulated market) intertwined with public interests (such as preservation of fundamental rights).

The AI Act exemplifies this approach, emphasising the EU's commitment to safeguarding fundamental rights through a risk-based framework for product safety. With this the EU creates a specific type of regulated market for AI with an aim of balancing the importance of fundamental rights – especially in terms of high level of protection of health, safety, and fundamental rights. How this legislative logic applies to the AI Act, and whether reflexivity balances innovation with oversight or creates a competence creep will be analysed in the following section.

4. 'Strength' of a Legal Basis for Harmonisation

Article 114 TFEU, as a functional competence rule, has been dubbed a rule that is capable of creating a competence creep.[17] This sentence provides an indirect reflection on the quality of a legal basis. If a provision is capable of creating a competence creep, is that legal provision 'not strong' enough i.e. is it 'weak' to be used as a legal basis for harmonisation? This section discusses when Article 114 TFEU can be described as 'strong'.

As a general rule, and as fleshed out in the above sections, the strength of a legal basis for harmonisation can be measured in its legal sufficiency as well as the constitutional appropriateness under EU law.

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[15] For more detail see Cancela-Outeda C (2024) *The EU's AI act: A framework for collaborative governance* 27 Internet of Things (doi.org/10.1016/j.iot.2024.101291).

[16] de Vries (n 14), 27-40.

[17] Weatherill (n 10).

The meaning of legal sufficiency should be understood to encompass the understanding that a strong legal basis must be appropriate and sufficient to justify the aim and scope of the proposed legislation.[18] This can be viewed, in the context of Article 114 TFEU, through the following elements: The first one is the objective of the measure. Within the framework of Article 114 TFEU that would encompass the idea whether the objective of the legal instrument improves the internal market. The second one is the provisions that are contained in the measure. Here, the focus is on the content of the provisions of the measure – their formulation and scope or in other words, what does the measure regulate. Within the framework of Article 114 TFEU that would be differing (potential) national laws that are proving (or could prove) to present obstacles to trade or significant distortions of competition. Lastly, the actual effects of the measure – does the measure bring change or harmonises the differences that cause obstacles – in practice. Conversely, the use of Article 114 TFEU as a 'weak' legal basis would entail a situation where these objectives are only marginally served, or where the regulation seems to pursue entirely different goals (such as protecting fundamental rights) without a clear link to internal market functioning.

A strong legal basis also entails that the article used must respect the EU's constitutional limits and values. This would mean that the proposed measure is in line with the principles of subsidiarity and proportionality (Article 5 TEU), respects fundamental rights (as per the Charter), and there exist a competence boundary between the EU and Member States.[19] Conversely, if the EU uses Article 114 TFEU to pass legislation that deeply affects areas traditionally reserved to Member States (e.g., fundamental rights, criminal law, or healthcare), the legal basis might be challenged as being too weak or overreaching. In other words, a legal basis that has an effect of creating a competence creep.

Therefore, a 'strong' legal basis in EU harmonisation would entail all of the above ingredients. The legal provision that is used as a legal basis would clearly align with the objectives of the cited article, and would be legally defensible in terms of content and effect. Most importantly, it would respect the constitutional framework, including fundamental rights. How does the AI Act factor in within the above framework through the lenses of reflexive harmonisation – and the issue of balancing innovation with oversight – will be analysed in the following section.

5. The AI Act and Article 114 TFEU

The above analysis fleshes out the fact that the AI Act is a regulation, created on the basis of Article 114 TFEU – a legal basis for harmonising laws to ensure the functioning of the internal market. The aim of this regulation, as

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[18] See for example the obiter dictum in Judgement in *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paras 95-118.

[19] Bernard C., (2019), *The Substantive Law of the EU: The Four Freedoms* Oxford University Press 6th ed, 576-578.

cited in Recital 3 is *'...to achieve trustworthy AI, while divergences hampering the free circulation, innovation, deployment and the uptake of AI systems and related products and services within the internal market should be prevented...'*. In other words, the AI Act introduces a risk-based approach to AI regulation, focusing particularly on 'high-risk' AI systems, and includes some provisions aimed at protecting fundamental rights.[20]

However, concerns have been raised about whether Article 114 TFEU provides a strong enough legal foundation for a law that reaches deeply into areas like privacy, non-discrimination, freedom of expression, and human dignity[21] – areas traditionally protected through fundamental rights instruments, not market regulation.

As stated in the above section, a case can be made for Article 114 TFEU to be a 'strong' legal basis, and a 'weak' legal basis. In essence, to be a strong legal basis, the use of Article 114 TFEU must genuinely serve the internal market. The AI Act does aim to remove fragmentation by preventing diverging national AI rules, and in that sense, it does support harmonisation. Echoing Bernard's[22] sentiment, the AI Act does create a *common* market, and therefore it is a strong legal basis to use.

In *Tobacco Advertising I*[23] the CJEU made clear Article 114 TFEU should not be used as a legal basis in the situation where the real purpose of the law is something else, for example public health or, in this case, fundamental rights, and market harmonisation is only incidental. A similar problem could be raised against the AI Act. This is since relaying solely on Article 114 TFEU may – as a consequence – lead to weaker fundamental rights protections, as the AI Act suggests a slight preference for safety over fundamental rights concerns.[24] Secondly, a fundamental rights protection could be affected due to a technical and procedural framing of rights issues – for example through conformity assessments – rather than one based on substantive human rights law.[25] Lastly, an issue of legal clarity

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[20] Ebbers M., (2024), *Truly Risk-based Regulation of Artificial Intelligence How to Implement the EU's AI Act*, European Journal of Risk Regulation, 1.

[21] See for example Almada M., Petit N., (2025) *The EU AI Act: Between the rock of product safety and the hard place of fundamental rights* 62(1) CMLR, 85; Castets-Renard C., BesseP. (2023), *Ex Ante Accountability of the AI Act: Between Certification and Standardization, in Pursuit of Fundamental Rights in the Country of Compliance*, in Castets-Renard C. and Eynard J. (eds), *Artificial Intelligence Law. Between Sectoral Rules and Comprehensive Regime. Comparative Law*, Bruylant, 597; Hildebrandt M., (2024) *The Risk Approach: Risk of Harm or Violation?*,ERA Annual Data Protection Conference; Gornet M., and Maxwell W., (2024) *The European Approach to Regulating AI through Technical Standards* 13 Internet Policy Review.

[22] Bernard (n 4).

[23] Obiter dictum in *Tobacco Advertising I* (n 11) paras 95-118.

[24] Almada and Petit (n 21) 95.

[25] See for example Paul R., (2024) *European Artificial Intelligence „Trusted Throughout the World": Risk-based Regulation and the Fashioning of a Competitive Common AI Market*18 Regulation & Governance, 1065.

and judicial oversight might arise given the fact that Article 114 TFEU does not create new rights obligations, only regulatory procedures.[26]

Recital 3 to some extent covers these concerns in data privacy by adding a secondary legal basis in the form of Article 16 TFEU – a right that grants all individuals the right to the protection of their personal data. Nevertheless, situations under provisions that regulate areas like law enforcement, administration of justice, education and vocational training and critical infrastructure – to name a few, that fall out of the scope of threshold of 'harm'[27] – remain problematic (in relation to the legal basis for competence).

Nevertheless, this contribution advocates that Article 114 TFEU – in the digital market sphere – both creates a *common* market while at the same time creating a common (regulated) *market*. By this, confirming de Vries[28] sentiment that Article 114 TFEU – today – addresses the complex reality of harmonisation by market building intertwined with public interests. With this in mind, the AI Act, in Recital 3, declares to establish a harmonised framework for AI across the EU by eliminating (potential) regulatory fragmentation between Member States. From this perspective, it clearly aligns with the objective of Article 114 TFEU, which enables the EU to adopt measures for the approximation of national laws to ensure the establishment and functioning of the internal market. However, it is necessary here to distinguish between two subtly different notions: a *common* market and a common *regulated market*, and to discuss which of these the AI Act truly supports.

The *common* market dimension, as previously discussed elsewhere in the text, refers to the removal of barriers to the free movement of goods, services, capital, and persons across Member States. A measure that facilitates such free movement, by removing national restrictions or divergent technical standards, is typically considered to support the creation or functioning of the *common* market. In this context, the AI Act does create uniform rules for placing AI systems on the EU market. With this, the AI Act prevents a patchwork of national laws that could otherwise lead to legal uncertainty and trade barriers. More importantly, by harmonising conformity assessments, transparency obligations, and risk classifications, it enables cross-border provision of AI products and services.

However, the AI Act goes beyond merely facilitating trade; in Recital 1, it aims to regulate '*...the placing on the market, the putting into service and the use of artificial intelligence systems (AI systems) in the Union...*'. Not only this, but the use of AI systems – according to the same Recital should be '*...in accordance with Union values, to promote the uptake of human centric and trustworthy artificial intelligence (AI) while ensuring a high level of protection of health,*

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[26] Almada and Petit (n 21) 97.

[27] Hildebrandt (n 2) 19.

[28] de Vries (n 14) 27-40.

safety, fundamental rights as enshrined in the Charter...'. In other words, the AI Act's aim is to regulate the design, development, and use of AI systems according to ethical and legal standards – especially in 'high-risk' contexts like education, law enforcement, and employment. This transforms the legal framework from simply enabling a *common* market to constructing a common *regulated market*. A common *regulated market* in this sense refers not only to harmonised conditions of access but also to normative constraints placed on market actors in the name of public interest objectives, such as protection of fundamental rights, non-discrimination and human oversight of automated decisions, and obligations around data governance, transparency, and accountability. To quote Almada and Petit,[29] the result is a product safety instrument heavily couched in fundamental rights language.

This shifts the AI Act into a more intrusive regulatory domain, where it no longer merely facilitates the *common* market but also reshapes its parameters, particularly by embedding fundamental rights considerations that are not purely economic in nature. Thus, supporting the creation of a common *regulated market*.

6. Conclusion

The dual character of the AI Act, as both a facilitator of a *common* market and a constructor of a common *regulated market*, creates legal tension in its reliance on Article 114 TFEU. While, the *common* market rationale may support harmonisation of product standards and compliance mechanisms, the common *regulated market* introduces measures whose justification is fundamental rights protection, not market efficiency. Although, the Recital 3 points to the secondary nature of fundamental rights protection, Recital 6 paints a different picture. Recital 6 stipulates that '*...[g]iven the major impact that AI can have on society and the need to build trust, it is vital for AI and its regulatory framework to be developed in accordance with Union values as enshrined in Article 2 of the Treaty on European Union (TEU), the fundamental rights and freedoms enshrined in the Treaties and, pursuant to Article 6 TEU, the Charter. ...*'. In other words, it places the fundamental rights squarely in the centre of protection. According to the *common* market / common *regulated market* divide – as explained in the text above, the strength of Article 114 TFEU as a legal basis (in *common* market) weakens where the substance of the regulation prioritises fundamental rights rather than trade facilitation. The CJEU has repeatedly emphasised that the true aim and content of the measure must align with the Treaty article used. If fundamental rights protection becomes the core aim (rather than an ancillary effect), the AI Act risks being based on an inappropriate legal foundation.

Nevertheless, what this contribution advocates is that the aim and the content of Article 114 TFEU – in the digital market sphere, and the AI Act – is a

[29] Almada and Petit (n 20) 104.

different creature. While the AI Act undoubtedly contributes to the development of a *common* market for AI technologies by harmonising national rules and preventing fragmentation, it simultaneously establishes a common *regulated market* that embeds non-economic values, particularly fundamental rights. This regulatory ambition, while normatively desirable, may strain the limits of Article 114 TFEU, whose primary function is market integration, not rights enforcement. As such, the strength of Article 114 TFEU as a legal basis depends on whether the AI Act's rights protections are seen as incidental to, or constitutive of, its market building function.

The use of Article 114 TFEU as the legal basis for the AI Act suggests a prioritisation of market integration and product safety over the explicit articulation and enforcement of fundamental rights. The AI Act largely frames AI systems as products, subject to conformity assessments and risk management procedures, with fundamental rights protections often embedded indirectly through risk classifications and procedural safeguards. This approach, although aimed at market building, raises significant concerns about whether the AI Act can effectively address the deeper societal, ethical, and legal challenges posed by AI technologies.

Moreover, by embedding rights protections within a market-oriented legal framework, there is a risk that the AI Act's protective measures will remain secondary to economic objectives. For instance, the focus on 'high-risk' AI systems may lead to a regulatory blind spot regarding lower-risk systems that nonetheless affect rights such as privacy, freedom of expression, or non-discrimination. This market-centric framing potentially compromises the full realisation of rights guaranteed under the Charter. The main question here might be – does the supplementary legal basis in Article TFEU (on data protection) raise the bar of market building.

To put it simply, does the use of this legal provision as a supplementary legal basis create an equilibrium in insertion of public interests (in form of fundamental rights) and the new market building capabilities of Article 114 TFEU. In other words, can Article 114 TFEU, as a legal basis, stand alone in the creation of a common *regulated market* and be capable of balancing fundamental rights and product safety on its own. And the answer that the AI Act – in Recital 3 – provides is a negative one.

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