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THE SINGLE MARKET

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Introduction

The single market, a governance architecture accompanied by the Commission's executive power in competition policy, is the cornerstone of European integration. Since the early days of integration in the 1950s, the building blocks of what was then a Community of six countries were identified in the elimination of barriers to market competition and monopolistic conditions, legal measures to prevent distortions to the free operation of markets (such as the harmonization of legislation), and a robust competition policy with executive power bestowed on the European Commission.

The single market has always had a double political valence. One is in terms of the direction of integration and the role of the Commission in furthering integration. The agenda of deepening and completing the single market has allowed the Commission to expand its regulatory tasks in a number of policy domains. After the crisis of the sovereign debt in the euro area, some authors have cautioned about how much the single market regulatory creep or opportunism of the Commission can achieve today (Camisão and Guimareas, 2017). However, the current agenda for the digital single market signals a re-formulation of the Commission's ambition, rather than stalemate or retreat.

The other is about the political contestation of single market, often fuelled either by fears of welfare national regimes being gradually eroded by the 'EU regulatory state' (Majone, 1994), or sheer economic nationalism – or both, with odd coalitions of actors attacking

market integration in this or that sector with different motivations. In this chapter we review the evolution of the single market project (with some but limited references to competition policy), discuss its achievements, look at the innovations brough about by the digital single market, and provide a compass to read analytically this governance architecture of markets.

A bit of history

The Treaty of Rome (1957) enshrined the ambitious goal of creating a robust common market with a two-pronged approach. First, the elimination of custom duties and barriers to mutual trade and a common tariff on trade with countries outside the European Community. Second, the freedom of movement inside the single market.

Thus, the single market had since its inception an internal dimension as well as an external dimension. The projection outside the EU has over the decades become the basis for the formidable presence of today's European Union (EU) of 27 Member States in international trade and global regulatory standard setting. Indeed, the 'Brussels-effect' described by Anu Bradford (2020) and Chad Damro's 'market power Europe' (Damro, 2012) point to the external reach of the single market. EU internal regulations and competition policy have shaped the international business and trade environment in areas as diverse as consumer health, environmental standards, anti-trust and data privacy – but see Young (2015) for a different opinion on what trade negotiations achieve in pushing EU rules worldwide.

However, how deep the second element (freedom of movement) should go has been an element of controversy. This is because, as the original European Community expanded to accommodate different models of capitalism, the heterogeneity of preferences about the exact equilibrium between public intervention and market forces has increased. The four freedoms have been legally binding since 1986. They define free movement in relation to goods, capital, services, and people.

The categories covered by free movement are not the same – politically, socially and culturally. And over time their salience and political effects on the Member States have

varied – to the point that the single market has been described as 'an incomplete contract' (Egan, 2020). Let us see why, by taking a rapid historical excursus.

To begin with, the removal of tariff barriers has proved simpler than the removal of non-tariff barriers, covering a huge range of national product regulations, licenses, public purchasing rules (Egan, 2001; Vogel 1995). Often presented as legitimate public concerns (an example: alcohol monopoly presented as necessary to protect health), non-tariff barriers have unleashed their own political struggles, involving pressure groups, governments, courts and public opinion (Vogel 1995; on alcohol monopoly see Ugland, 2003). Economically and politically crucial sectors like the postal service and gas were given special protection because of the argument of 'universal service provision'. It was only through the combined operation of competition policy, court decisions and pressure from the Commission that the utilities were gradually liberalized.

Further, moving goods and migrant workers in a Community of six in need of, among other things, Italian miners migrating into Belgium, meant that the single market needed at least an embryonic social policy to allow labour markets to work across nations. Capital market liberalization (articles 63 to 66 of the Treaty on the Functioning of the European Union) was not to be achieved in one day – in fact, the First Capital Directive of 1960 had limited reach. It was only in 1988 that the free movement of capital made a genuine leap forward (but also creating worries that without EU direct corporate tax coordination there would have been harmful tax competition). And in 2020 the Commission was still in the process of moving forward, this time with the Capital Markets Union – significantly the official website of the Commission talks about *building* a single market for capital, 60 years after the first legislative measure[1]

The four freedoms left for a long time a gap in the area of direct taxation. Without EU rules or common standards to define and tax cross-border savings and corporate profits, the double pressure of international double taxation (of categories of income in companies

[1] https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union_en

operating across the single market) and harmful tax competition is detrimental to the single market. Before the 1990s, was done in the domain of direct corporate taxation – see Radaelli 1997 on the limited initiatives against international double taxation of 1990; Radaelli 1999 on the logic of the EU code of conduct against harmful tax competition. Even today this has been a very difficult set of policy issues to handle, as shown by the discussion on taxing internet-based companies.

What about the category of free movement of people? The free movement of workers of the 1950s and 1960s, historically, did not have the same political salience witnessed after the Eastern enlargement, the same ambition of mutual recognition of diplomas, and freedom to provide services – three dimensions where progress has taken time. And to carry on: No-one could have envisaged that integration would have led to single market considerations applying to sport policy – yet, by the early 2000s, this was already a reality involving complex constellations of courts and political actors (Parrish, 2003).

Politicization

Further, in the last fifteen years or so, there has been contestation as to whether all the four freedoms (including the accompanying legal measures and the fundamental Court decisions to make them fully enjoyable) are inevitably synonymous of progress, and if so for whom. In other words, the scope and depth of the single market has become an element of social and party-political contestation.

This means that the politics of the single market is not only a question of inter-state bargaining, different governmental preferences, and the political opportunism of the Commission (Cram, 1993), but also one of politicization, concerning social movements, political parties, and segments of the society. The question ‘has the single market gone too far’ has been raised in different terms, from the race to the bottom in social standards to the claim that unconstrained capital movement creates financial crises. If we observe the single market from the perspective of compliance and implementation on the ground, it is not surprising that its achievements are by no means the same across the four freedoms and across the 27 Member States, although the direction has been one of increasing the scope of the regulatory framework (Egan, 2019, 2020).

Two major steps contributed to the widening of the scope and breadth of the single market. One was the Single European Act (SEA) and the related 1992 programme, a package of 283 proposals agreed at the Milan Intergovernmental Conference of 1985. The SEA introduced qualified majority voting in areas previously subject to unanimity (significantly, not in direct taxation), making it easier to carry on with the discussion and approval of the set of legal measures . 1992 was identified as the deadline for the 'completion of the single market'. Under the 1992 programme, measures of certification and technical standards were delegated to technical bodies, thus avoiding the political problems of introducing legislation via the complex EU law-making process. Introducing and adapting standards to a changing world of innovation and technology is easier if done via technical institutions – as opposed to the political institutions of the EU.

The SEA big bang strategy was revitalized in the Monti Report on The Future of the Single Market (Monti, 2010). Former Commissioner Mario Monti re-defined the single market as foundation of the social market economy and warned against complacency and single market 'fatigue'. As Michelle Egan notes (Egan, 2020, 159), the report adopted the narrative of *safeguarding* the single market, a clear indication of the anxieties about the diffusion of economic nationalism that are still present today. This report was followed by the Single Market Act I (2011) and Single Market Act II (2012) – but with much less political determination then the original SEA, also because during the 2010s the EU was coping with the financial crisis and speculative attacks on the sovereign debt of some countries of the euro area. The problem at that time was to save the Euro.

The second step was the court-driven push towards mutual recognition – an approach on which the Commission has capitalized by extending its regulatory power. Let us what it entails. The creation of harmonized legislation and common European standards is a political task often riddled with stalemate and blockages to agreement, even with qualified majority voting in the Council. This road can be blocked, and in any case it is an obstacle course, given the number of actors with veto power from impact assessment to decisions in the Commission, from approval to transposition, from implementation to infringements.

But directives and regulations are not the only way to create a level-playing-field across the EU. In a series of landmark decisions, via judicial activism the Court of Justice of the European Union introduced the principle of mutual recognition. The principle states that restrictions imposed by a Member State on a product that circulates freely and lawfully in another EU Member States are prohibited and therefore have no legitimacy in the single market. Mutual recognition can therefore have the same effect that harmonizing rules via the EU law-making process. A 'regulatory state' (Majone, 1994) can therefore emerge via mutual recognition, even if it is impossible to harmonize all rules via the EU law-making process.

The country-of-origin principle, which originated in 1979 Cassis de Dijon case, determined where a company is regulated. Based on this principle, a service provided in one country, but received in another, must regulated in the state where it originates from. Importantly this principle was integrated into the E-commerce Directive and banking and insurance Directives. This fit well with the European Commission's agenda for a one-stop-shop for regulation, thereby enabling companies to operate across Europe within negotiating 28 (now 27) different regulatory restrictions.

Obviously mutual recognition it is not an unconditional principle. The Court has always recognized that legitimate public interests (such as fair competition, public health, and consumer protection) are part of the equation when no EU rules exist in a given domain. Mutual recognition also requires a good measure of mutual trust for a Member State to accept the regulatory standards of other 26 Member States without any additional regulatory test or scrutiny (Egan, 2020: 161).

The political debate is whether the notion of equivalence of national regulations can go beyond goods and cover services too – and how robust is the public interest defence of restrictions to trade in front of the Court and the supra-national power of the competition policy operated by the European Commission. The case law in services has spawned a debate on whether the freedom of establishment of services should be prioritized over social rights and collective labour rights (Egan, 2019).

The mutual recognition principle brings us to consider that the single market reach is not limited to legal requirements imposed by EU-law. It is also a market-led process of regulatory competition (Radaelli, 2004). In an integrated market, capital and labour tend to move where the regulatory standards are more efficient – this phenomenon is possible exactly because there has been substantial integration and removal of barriers via the achievements of the single market.

How did it happen?

To understand the broad coordinates of the politics of the single market, we need an analytical compass. Why is the single market at the same time desired and resisted by different actors at different times? Why is its completion almost invariably on the agenda – does it mean that it has never been completed, that it is constantly expanding into new domains, previously unforeseen, or that increased differentiation hinders completion (Howarth and Sadeh, 2010)? Why do many single market proposals start as neutral and win-win technical solutions, only to become politically contested soon after (Harcourt and Radaelli, 1999)? We cannot address these questions in detail, and few political scientists have drilled down on empirical analysis at the granular level of individual industries and territories – one formidable exception is Andy Smith and his team at the University of Bordeaux (Smith, 2013). But, we can provide at least a conceptual compass based on two concepts: negative versus positive integration and regulatory competition.

An important dimension of the politics of the single market is positive versus negative integration. Negative integration is typically concerned with 'market-making' by striking down barriers to efficient markets. Negative integration is about the removal of national barriers in order to create a common EU policy. The four freedoms, indeed, imply that barriers are dismantled. Some important prohibitions (to barriers) are already in the Treaties (hence there is no need to create special legislation). The Commission can proceed with infringements against the breach of single market legislation. As mentioned, the Court of Justice of the European Union has historically had a big say and disposed of limitations to free markets (Vogel, 1995).

In negative integration domains, the Commission has first of all extensive powers under competition law. EU competition policy specifies what is admissible in terms of mergers or joint ventures between companies, pricing and market-sharing agreements, and other market behaviours that affect the market structure in significant ways. The aim is to enable markets to function subject to oversight by the Commission and the network of competition authorities.

Positive integration is about market-correcting policies. Since the single market vision was grounded on the four freedoms, logically it must follow that to correct the market is an objective that ought to be subordinate to having the single market in place first. To achieve positive integration, the EU institutions must agree on a given standard, be it about hygiene in farms or emissions. Given the diversity of models of capitalism, preference heterogeneity on the size and reach of the welfare state, and variation in administrative capacity, positive integration is harder to achieve than positive integration (Scharpf, 2002 on the imbalance between the two). We said that positive integration is market-correction oriented. To correct a market, there has to be first an agreement on the social model and level of welfare that the correction must achieve. How much 'social' should go into that model is the problem.

The reach of negative integration is enhanced by regulatory competition, often triggered by Court's decisions (Harcourt, 2007). Consider this: when negative integration creates a new market, for example by disposing of barriers in a policy domain previously protected by national regulations or public monopoly, the newly created market is obviously a market amongst economic actors. But it is also a sort of 'market' amongst differing national regimes. Economic players can leverage the rules of the most efficient domestic regime – and the other Member States cannot object, given mutual recognition. If a mutually recognized, legitimate domestic regime for the new media, for instance, is perceived as creating a better environment for the flourishing of this type of business, then other Member States have to adjust their national rules to prevent companies from re-locating elsewhere, where the rules are more efficient. This creates convergence via regulatory arbitrage and competition, without the necessity to introduce new EU-wide legislation.

The market-making character of negative integration creates a horizontal process of policy adjustment via the competition amongst the existing regulatory regimes. Regulatory competition operates in the shadow of EU negative integration, which prohibits certain policies (such as discrimination against other EU nationals or companies), and mutual recognition. The question is whether regulatory competition creates a race-to-the-bottom and exacerbates the imbalance between negative and positive integration. Regulatory competition is in fact generally efficient, unless it triggers a race-to-the-bottom among countries, where governments end up without the necessary level of revenue to fund infrastructure and public goods, and tax labour in inefficient and unfair proportions (Radaelli, 2004 for a review).

In the last ten years or so, the robustness of positive integration policy regimes has been questioned by the call for explicit de-regulatory 'policy dismantling' political initiatives (Gravey and Jordan 2016). The argument is that a number of Member States and a political Commission (Mérand, 2021; on the role of Commissioners see Smith and Joana, 2002) have coalesced in setting the agenda for actively reducing the scope and breadth of environmental and social policy. The better regulation agenda – one of the core complementary initiatives of the single market (as rightly observed by Egan, 2019) - has been blamed for being a de-regulatory attack on positive integration and social/environmental standards (Radaelli 2018).

But, how much dismantling has really happened? Gravey (2016) examined environmental policy for the period 1992-2014. She found that the EU dismantles some elements of a programme, but also expands another element, adds restrictions on some clauses of regulations whilst at the same time injecting exemptions. There is also dismantling by shifting responsibilities instead of budget (e.g. companies rather than regulators having to check the negative environmental effects of industrial activities, with firms possibly not in the best position to provide objective estimates) and dismantling by withdrawing proposals for social and environmental regulation.

All this makes a definitive judgement hard to make: Gravey concluded that dismantling rhetoric and policy instruments tweaked towards de-regulation exist, but their effects are

not necessarily in the direction of dismantling. The better regulation agenda has not produced wholesale dismantling of environmental policy. Radaelli (2018) reports on how the Commission has resisted the rhetoric of a 'bonfire of regulations' – after all, the Commission has carried on using instruments like consultation and regulatory impact assessment to support new proposals for environmental and social policies.

After the pandemic, the EU does not look poised for policy dismantling and a race-to-the-bottom in regulatory competition. With the ecological transition, the regulation of artificial intelligence, and plans to steer innovation in a socially-responsible direction, the already world-wide comparatively high standards of environmental and social policy are set **to go up**. There is no pressure to dismantle public health and other dimensions of positive integration – quite the opposite. With Brexit, a vocal advocate of de-regulation has left the scene of EU policy formulation. The Commission draws on the tools of better regulation to justify its proposals for new regulations covering sustainability, energy transition, climate, food, artificial intelligence and social welfare – thus the better regulation agenda cannot be seen as de-regulatory and oriented towards dismantling of environmental and social policy.

The Digital Single Market

Where is the single market today? A good angle to observe recent developments is the digital dimension. Today, the Digital Single Market (DSM) 2014-2019 is the largest component of the European Union's Single Market programme[2]. It is comprised of a considerable number of Directives, Regulations and other instruments aimed at facilitating cross border digital services. The DSM enabled access to European markets in cross-border digital services such as on-line shopping banking, gaming and content streaming to operate across European borders. Operators are regulated in one jurisdiction under the country-of-origin principle set out under DSM legislation.

The country-of-origin principle was particularly lucrative for digital services which travel easily across borders. Two-thirds of EU internet users shop on-line (Eurostat, 2021). The EU

[2] The DSM comprises one-fourth of the European Commission's (EC) single market programme as outlined in its 2015 'A Digital Single Market Strategy for Europe' strategy.

facilitates e-on-line shopping via its e-commerce, Services, e-Privacy, GDPR, ODR, Consumer rights directives and regulations. The e-commerce framework is flanked with Regulations on geoblocking and ePrivacy (including rules on data localisation), the Payment Services II Directive and modernisation of rules on product liability. However, in many cases, this liberalisation of cross border services resulted in externalities (Harcourt, 2021a). In the area of the DSM, these compromised citizen's privacy, data protection and consumer rights and, in the case of online platforms, resulted the rise of online disinformation and online harm.

This led to a push for higher level of regulation particularly for online platforms and social media outlets in the cases of protection of minors, incitement to hatred, the protection of public health, public security, and consumer protection. The EU has also established the European Consumer Centres Network which facilitates cross-border dispute resolution. The EU recently updated its e-Commerce framework with a number of initiatives including the 2016 General Data Protection Regulation (GDPR), a 2017 Competition sector inquiry into e-commerce, 2018 cross-border parcel rules[3], a 2019 Consumer Rights Directive[4], 2021 VAT rules for online sales of goods and services[5], legislative proposals for a 2021 Digital Services Act which reforms e-commerce rules and a 2021 Digital Markets Act which addresses gatekeepers.

In addition to this, the EU proposed initiatives on data ownership, free flow of data (e.g. between cloud providers) and a European Cloud e-Government Action Plan including an initiative on the 'Once-Only' principle and an initiative on building up the interconnection of business registers. Many of these initiatives comprise of self-regulatory trust schemes for e-commerce. The most important component of this package is online platform regulation. Online Platforms are currently regulated under the EU under the 2000 Directive on electronic commerce. However, this is soon to change with proposals for the Digital Services Act published in December 2020. Although the 2020 proposals retain limited legal liability for intermediary services and the COO principle for jurisdiction is not waivered. There is a marked change in the EU's approach in that there are no exemptions under subsidiarity as there were

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R0644.
[4] https://ec.europa.eu/info/law/law-topic/consumers/consumer-contract-law/consumer-rights-directive_en.
[5] https://ec.europa.eu/taxation_customs/business/vat/modernising-vat-cross-border-ecommerce_en.

under the 2000 e-Commerce Directive[6] as "harmonising the conditions for innovative cross-border digital services …can only be served at Union level" (European Commission, 2020).

Under the DSA, third countries offering services within the EU must appoint legal representatives in the European Union on the basis of "the existence of a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States". This will be determined based upon a number of factors including language, the use of a top level domain or the currency used for transactions (European Commission, 2020). The Member State where the legal representative is located will retain jurisdiction for the service provider which will be regulated by a nominated NRA "Digital Services Coordinator". The DSA contains specific rules exist for platforms reaching more than 10% of 450 million consumers in Europe which is clearly aimed at large platforms such as Google, Youtube, Facebook and Twitter. Under the Act, the proposals retain limited legal liability for intermediary services but imposes obligations to act against infringements of hate speech, terrorist content and illegally copyrighted material. Failure to intervene risks intervention under Article 51 by the European Commission and large fines.

The shift in responsibility for content regulation to online platforms can also be seen with the self-regulation of disinformation (Harcourt, 2021b). Self-regulatory measures under the EU's 2018 Code of Disinformation which has been signed by a number of social media platforms, including Google, Facebook, Twitter, Microsoft, Mozilla and TikTok, and associations, namely the European Association of Communication Agencies, the Interactive Advertising Bureau and the World Federation of Advertisers. This self-regulatory approach stemmed from the 2018 Action Plan culminating in the 2018 Code of Practice on Disinformation and 2019 Code of Practise against Disinformation under which companies voluntarily adopted the code.

Certainly, these initiatives, particularly the DSA and DMA, will greatly increase the power of the European Commission. Under Article 51 of the DSA, the Commission will be granted the power to intervene in the case of persistent infringements. Subsidiarity has been removed in

[6] UK subsidiarity exemptions to the COO principle under the 2000 E-commerce Directive were included under the 'derogations from Regulation 4': public policy; protection of public health; public security, including the safeguarding of national security and defence; protection of consumers, including investors.

favour of the promotion of the easing cross services which "can only be served at Union level" (European Commission, 2020:6). Substantial fines (10% of global turnover for the DMA and 6% for the DSA) can be levied directly by the European Commission. This entrenchment of single market logic can also be seen in a flanking proposal for the Network and Information Security directive (NIS2). As Kolkman points out, the updated Directive, which regulates domain name systems would replace the phrase "the entities providing domain name registration services" found in NIS1 with the words "operators of root name servers with a significant footprint in the EU and **"**that are of importance for the internal market". This further centralises the role of the European Commission in the governance of digital markets.

Conclusions

The single market is the core business of the EU (Pelkmans, 2016) and the terrain where supra-national opportunism (of the Commission) and the defence of Member States prerogatives are measured (Camisão and Guimareas, 2017). It is indeed a fundamental edifice, arguably the cathedral of European integration, although some have observed 'increased differentiation', 'modest revival' and 'the ever incomplete' single market, after the glorious years of the 1992 programme (Egan, 2019, 2020; for the ever incomplete theme see Howarth and Sadeh, 2010).

Like some cathedrals that started with shared beliefs, but then were shaped for decades by different achievements, wavering commitments, and contrasting interpretations of where to go next with the building work, the single market is still relatively differentiated. It is definitively more developed for goods than in the areas of labour and service. The digital single market will be the moment of truth, because it has implications for all four freedoms. As well as appraising the single market in terms of compliance, implementation, judicial activism and the role of EU rules as experienced on the ground, we have to appraise it normatively, considering multiple factors that fuel legitimacy and contestation. For these reasons, the single market will remain a formidable lens to capture the achievements as well as the legitimacy of the integration project.

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