



The Internal EU Market: *How Public Administrations can Do Better*

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41

Introduction

Market integration is one of the primary objectives of the European Union. The separate markets of the Member States are to be unified into a single area where there are no barriers to the movement of goods, services, labour and capital – the so-called 'four freedoms'.

This is the intention as expressed in the EU Treaties. But intentions and reality do not always coincide. In 2009, Jose Barroso, the President of the European Commission, asked Mario Monti, a former Member of the Commission, to prepare a report on how to achieve the completion of the internal EU market and eliminate remaining barriers. Professor Monti wrote in his report that 'a robust single market is key to the overall health of the European Union, because it represents the very foundation of the integration project'¹.

The Commission followed the Monti report with a bold initiative, aptly named the 'Single Market Act'. The basic premise of the Single Market Act is that the 'construction of one big market is at the heart of the European project envisaged by the founding fathers'².

The internal or single market is not just at the heart of the EU. It is the heart of the EU. But, like the human heart, the internal market performs a crucial but largely invisible role. Like the human heart, it is neglected until something goes wrong.

The Commission's strategy paper for 'Europe 2020' succinctly observes that 'the recent financial crisis has added temptations of 'economic nationalism' and that it had to act to prevent 'a drift towards disintegration'³.

While there is recognition that the single market is fragile, there is also determination to press on with its completion so that it can be the basis of a more innovative and competitive European economy. In the strategy for 'Europe 2020', the Commission commits itself to 'fully mobilize' 'EU-level instruments, notably the single market, financial levers and external policy tools' to 'tackle bottlenecks and deliver the Europe 2020 goals'⁴. To reach those goals, the Commission makes fifty proposals in the Single Market Act to eliminate remaining barriers and contribute towards sustainable growth.

However, the benefits from integration cannot be fully reaped if the rules that safeguard trade and investment are not implemented or are implemented incorrectly. In this connection, the role of public administrations is pivotal. They are the ones that mostly bear the heavy responsibility for correct application of the internal market rules.

In this article I examine a proposal of the Single Market Act that concerns directly the performance of national authorities. If the proposal is adopted it could have far reaching and surprising implications. Although it does not aim to create 'hard' law, it relies on a sort of peer review that can create benchmarks of quality for public policy and institutional performance. The internal market has always been perceived as the place where companies compete. It may now be transformed into an arena of contest for public administrations.

The Single Market Act and public administrations

The Single Market Act that was published in November 2010 covers a wide range of policy areas. Naturally, all of the proposals affect in some way or another public administrations. However, proposal 44 is of direct and immediate concern to them.

It states: 'The Commission and the Member States will cooperate in continuing to develop the internal market by stepping up the procedure for evaluating the *acquis*, in particular using the 'mutual evaluation' process set out in the Services Directive and currently being implemented by the Member States and the Commission. The experience gleaned from the mutual evaluation process of the Services Directive will also be applied to other key single market legislation'.

42

To appreciate the significance of this proposal one has to understand what happens when a Member State fails to comply with a provision in the Treaties or secondary legislation. The Commission initiates the so-called 'infringement' procedure which starts with a 'letter of first notice' to the Member State concerned outlining the problem and requesting information. If the Member State disagrees or fails to cooperate, the letter is followed by a 'reasoned opinion' which explains in detail why the Commission believes that that Member State acts contrary to EU law. If there is still no satisfactory response, the procedure culminates in the referral of that Member State to the Court of Justice.

The infringement procedure is cumbersome. It is also time consuming. The pre-litigation stage may last for a year or two. Then it normally takes the Court another one to two years to deliver its judgement⁵. But even that is not the end of the story. The Court merely finds that the Member State fails to apply EU law correctly. Then it is the Member State that has to bring the infringement to an end. If it does not comply with the judgement of the Court, the Commission has to initiate the infringement procedure all over again. By the time the Court gets to decide whether that Member State has complied or not with its earlier judgement more than five to six years may have passed from the point the Commission first detected the infringement.

To avoid this complex and slow process, the Commission has done something whose true significance is only now becoming clear. When it drafted the Services Directive⁶ it included a provision for 'mutual assessment' of the compatibility of national measures with EU law. The aim of the Directive was to remove barriers to cross-border movement and establishment in the services sector. The European Parliament and Council retained the provision for mutual assessment when they adopted the Directive. Since the deadline for the transposition of the Directive was December 2009, the mutual assessment took place only in the Spring of 2010. Member States were divided in groups and each described their measures that regulated services, the measures they removed or adjusted and those they retained and why. The results were published in early 2011⁷.





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They confirm that the service sector is riddled with regulatory barriers and statutory restrictions. According to the Commission, more than 34,000 measures were reported by the Member States during the mutual assessment⁸. Bearing in mind that services account for more than 65% of the EU economy, the impact of those barriers on economic prosperity must be substantial.

In addition to listing the measures they eliminated or adjusted, Member States also identified the measures they maintained because they thought they were justified for achieving important public policy objectives. Article 52 of the Treaty on the Functioning of the EU allows Member States to impose restrictions on service providers if they can be justified by 'overriding reasons of public policy'⁹.

The most surprising aspect of the mutual assessment report is that it shows that even where Member States pursued exactly the same objective, sometimes they chose diametrically opposite instruments. One Member State would remove all restrictions to stimulate competition, while another would maintain restrictions to prevent competition. In the eyes of one Member State competition was good, while in the eyes of another it was harmful. For example, some Member States regarded minimum tariffs for certain professional services as protecting consumers from cheaper but inferior services, while other Member States considered them as detrimental to consumers for keeping prices artificially high.

Differences in national measures are by no means limited to price regulation. They cover every conceivable aspect of delivering a service, including such things as the legal form of the service provider. For example, in the name of protecting consumers and safeguarding the integrity of the profession, in Denmark, only natural persons are allowed to act as land surveyors, while in France, only legal persons may exercise that activity.

Now, it cannot be that all Member States are right. After this exercise national authorities should consider why they rely on very different instruments to achieve apparently similar objectives. Indeed, mutual assessment should lead to self-assessment.

However, it is unclear so far how national authorities will respond to the findings of the mutual assessment. The Commission may decide to propose new legal remedies. But will the responsible public authorities in Member States use the findings to re-evaluate their practices and improve their performance?

The EU has given Member States a unique opportunity to test their policies. The use of a mutual assessment instrument for compliance purposes is unprecedented in the history of the EU. Proposal 44 does not say whether the Commission intends to back up the voluntary nature of mutual assessment with the threat of infringement proceedings.

Conclusion

The integration of the internal market has brought prosperity to all Member States. But the internal market should not be taken for granted. Nor, can it support the strategy for 'Europe 2020' unless it functions properly. Perhaps the most serious threat to the internal market is not outright opposition but neglect. Public authorities which implement internal market rules are not always as vigilant and assiduous as they should be.

The intention of the Commission to expand the mutual assessment process beyond the area of services is a significant development. The challenge for public authorities will be ponderous.

Public authorities will have to justify their practices to their peers in a non-legal setting. The question they have to answer is not whether their measures are compliant with EU law but whether they are sufficiently effective or efficient. Their answer will partly depend on how well their peers perform. This marks a new beginning in the life of the internal market. It may bring the homogeneity in public policy that businesses have been asking ever since the European Community was established.

For years, the EU has tried to remove barriers through regulations and directives. Perhaps the approach of the next decade will become known as 'integration through mutual learning and institutional competition'.

Notes

- ¹ Monti, M., *A New Strategy for the Single Market*, 9 May 2010, p.12.
- ² European Commission, *Single Market Act*, COM(2010) 608 final/2, 11 November 2010, p. 2.
- ³ Commission Communication, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010) 2020, 3 March 2010, p. 18.
- ⁴ Europe 2020, p. 4.
- ⁵ One has to wonder why Member States persist to exhaust the legal process. Court statistics indicate that the Commission 'wins' about 95% of all infringement cases.
- ⁶ Directive 2006/123.
- ⁷ Commission Staff, Working Paper, *The Process of Mutual Evaluation of the Services Directive*, SEC (2011) 102, January 2011. See also Commission Communication on *Towards a Better Functioning Single Market for Services – Building on the Results of the Mutual Evaluation Process of the Services Directive*, COM (2011) 20 final, 27 January 2011.
- ⁸ Commission Staff Paper on *The Process of Mutual Evaluation of the Services Directive*, January 2011, p. 9.
- ⁹ Article 52 TFEU, Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:15:0047:0199:EN:PDF>