

THE ROLE OF SOFT LAW IN THE EVOLUTION OF RULES
FOR A SINGLE EUROPEAN MARKET: THE CASE OF RETAILING

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ABSTRACT

The paper considers the rule-following behaviour of firms in the single European market within the theoretical framework of soft law. With particular reference to the European retail sector, the concept is reviewed and characterised as a co-ordinated behavioural response to existing or proposed rule changes, providing the mechanisms through which norms can be set without recourse to intervention by outside agents. Soft law is found to enhance the credibility of firms lobbying for change in the external rules and provide an expectation of particular behavioural outcomes. The potential impact of self-regulation and the extent to which firms can facilitate the acceptance of a dominant rule system outside the confines of a state's jurisdiction are discussed and the conclusion reached that soft law must be considered a key element in the process of evolutionary change in the single market.

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1 INTRODUCTION

Regulation of the single European market has involved the introduction of a wide range of new and far-reaching legislative measures by European Community (EC) institutions and member state governments. Yet many of the adjustments actually taking place in the single market are not legally binding instruments at all. Instead, they are changes in arrangements between firms themselves, developed at a local or European Community level without recourse to legal structures or intervention by outside agents as behavioural responses to change in the regulatory systems that affect them. These are the 'soft law' conventions and codes of conduct which underpin commercial activity throughout the Community and create the reality of a single European market.

Soft law is an imprecise, still developing concept which has been used to describe a wide range of arrangements between international organisations, national governments, economic actors and individuals. In the absence of a clear definition, the distinction between soft and the much 'harder' law contained in legislative provisions remains a difficult one to make. A wide range of agreements and undertakings between economic actors already display some of the characteristics of soft law, and the purpose of this paper is to consider precisely how firms use soft law as a rational behavioural response to external change in the European retail sector.

Our initial research on the evolution of a single European market for retailing focused on how firms in the sector respond to change. This indicated that the retail sector would provide a number of appropriate case studies of how self-regulatory soft law operates in practice. Firms' soft law rules to extend shop opening hours, for instance, have helped facilitate the revision of Sunday trading laws in the UK. In other policy areas, such as vocational training, non-binding agreements have been adopted, while in food safety self-regulation by retail firms has been a common response as part of the process of complying with new Community legislation. Finally, the response of firms to German regulations on the recycling of packaging has also led to self-regulation by retailers and suppliers to the industry, in many cases with the introduction of new non-legislative rules which are more stringent than the law originally intended.

By looking at each of these instances of self-regulated co-ordinated action by firms in the retail sector, we address a series of important questions

which inform our understanding of the evolution of rules in the single European market. Key areas for analysis include the extent to which soft law is a response to regulatory change, or the extent to which it is industry's attempt to influence policy formulation at the national or Community level. The process by which soft law becomes a self-enforcing behavioural rule for a group of actors and the extent to which the geographical scope of soft law agreements can be expanded are also highly relevant in the single market context. The paper will therefore assess the extent to which a 'spillover' effect of dominant soft law traditions from one member state to another can occur.

Since soft law is primarily an agreement between a limited group of actors (in this case retail firms) there is no guarantee that it will be in the wider public interest. It may be to the advantage of producers at the expense of consumers. In other cases voluntary codes may be considerably better for consumers than a free for all, but not necessarily better than what could be achieved by compulsion. Our analysis therefore considers whether the examples dealt with in this paper enhance the basic hard law framework of the Single Market for the general benefit or weaken its favourable impact.

In an attempt to answer these questions, the remainder of the paper will take the form of a characterisation of what we understand by 'soft law', followed by an analysis of its application in the context of Community and national rules on shop opening hours, vocational training, food safety and the recycling of packaging products. This list of regulatory issues affecting the European retail sector is not exhaustive. An overview of EC legislative initiatives within the single market programme has already been given in Mayes and Shipman (1992) and will not be duplicated here. The mutual recognition of national product safety standards, the removal of border controls, and the harmonisation or convergence of VAT rates are all important but will not be discussed in this paper. Instead, by focusing on a number of specific rule changes this paper is an analysis of how the evolution of the European retail sector is being influenced by industry-led behavioural rules.

In the context of the framework set out by Shipman and Mayes (1991), the final section of the paper then reassesses the role of the firm in the evolution of rules for a single European market in retailing and, using the specific examples discussed, draws some general conclusions about the role of soft law in determining company responses to regulatory change.

2 THE EVOLUTION OF RULES IN THE SINGLE EUROPEAN MARKET

2.1 Scope of the research project

By providing a framework for the analysis of change in firms' rule-governed behaviour, Shipman and Mayes (1991) suggest that the way companies behave is directly related to their regulatory environment. A 'rule system' is a set of rules guiding one sphere of an agent's decision-making activity, such as the commercial operations of the firm. Similar rules will generally be followed by a number of other agents engaged in the same activity, with the result that a 'rule-following' group can often be identified. Some rules for the group will be external, imposed on the group from outside or created by the activities of the group members themselves, while others will be internal rules relating to the decision processes which take place within companies.

Using the evolutionary approach to the analysis of rule systems, this study of the retail sector is the second of nine¹ which examine the evolutionary character of rule changes and the corresponding changes in company behaviour which result from the legislative attempts to create the conditions in which a single European market can evolve.

The first study in this research project, focusing on the leasing industry (Matthews and Mayes, 1993), dealt specifically with the extent to which firms adopt new modes of behaviour as they attempt to influence the Community rule-setting process. This paper on retailing focuses on the next phase in the rule-setting process: the extent to which a whole range of industry-specific or generally applicable Community-level and national rules encourage the emergence of new modes of corporate behaviour, either collectively by all firms in the sector, or individually as particular firms seek to gain competitive advantage by responding to rules as the regulatory environment changes over time.

¹The nine industry studies within this research project are: leasing, retailing, insurance, water supply, construction (services), air transport, machine tools, pharmaceuticals and motor vehicles.

2.2 Responding to regulatory change

The adoption of measures designed to achieve completion of the single European market (SEM) constitutes a change in the rules which govern the way in which national governments and individual firms behave. By introducing a whole range of rule changes across a large number of policy areas and industry sectors, the overall objective of the SEM programme is the removal of remaining barriers to the free movement of goods, services, workers and capital, either by establishing the conditions in which sufficient levels of openness can exist to allow competition between rules to take place in previously highly regulated markets or, in other cases via the harmonisation of differing national regulations. As new EC rules are introduced, national governments are obliged to transpose them into national law and ensure consistently high levels of compliance with the measures by effective enforcement mechanisms within their field of jurisdiction. Each phase of this process of national implementation and enforcement constitutes part of the 'hard' law through which each member state seeks to ensure compliance with EC legislation. The success of hard law rules is dependent upon firms operating within each national rule system then adapting their own organisation and strategic planning rules either in anticipation of, or in response to, these regulatory changes.

Even within regulatory regimes, the extent to which rules impinge on firms will vary considerably depending on the particular organisational characteristics of the company concerned. This is certainly true of the retail sector, where the impact of national and EC rule changes varies according to the size of a firm and the nature of its commercial activities. National planning rules, for instance, not only have an impact on environmental protection, but also influence the commercial behaviour of small and large firms since independent retailers are effectively protected from market entry by larger stores if the latter are prevented from opening a new outlet in a particular geographical area. Rules are thus capable of having a number of direct and indirect consequences for individual firms operating under each regulatory regime.

Firms themselves are not merely passive actors who always respond to a set of rules imposed upon them in the way intended by the regulator. By their very nature, legal rules set the boundaries of what is and what is not legally permissible behaviour. Within these boundaries firms often have considerable leeway to develop a strategic response capable of maximising

the benefits and minimising the costs of regulatory compliance. Such a response may be in the form of either internal or external behavioural changes. Internal changes in the firm's organisational structure may avoid the costs of compliance by meeting the letter, if not the spirit, of the law – a type of 'creative compliance' (McBarnet & Whelan, 1992) which national or Community-level regulators must seek to detect and respond to with further modifications of legal rules.

In other instances, a firm's response may be external, in the sense that it requires modifications in the way that firm interacts with other commercial players and conducts its business activities. Such external change may be undertaken unilaterally, by one firm differentiating itself sufficiently from its rivals in order to achieve a degree of competitive advantage, or collectively, by a group of firms acting together to achieve an integrated strategic response to an external rule change in the form of new regulatory provisions. Where a collective response is undertaken, either as the result of collusion (a co-ordinated response) or because one firm acts in an innovative way, others subsequently adopting the same behaviour in response (an unco-ordinated response), internationally accepted codes of conduct or conventions become the norm. This is an industry response to the evolution of rules in the single European market which displays many elements of the soft law tradition.

2.3 Soft law and regulatory change

Nelson and Winter (1982) suggest that an analysis of external rule changes can be related to the internal decisions taken by companies and the interaction between external rules, either in the form of regulation by governments or technological and economic rules (such as new innovations or changes in customer demand) must be considered together with firms' internal (decision) rules.

That each firm operates within its own internal rule system in response to externalities had previously been recognised by Schumpeter (1934) and in this sense, technological, managerial and commercial progress may all be seen as what Marshall (1920) characterised as manifestations of differentiation and integration as individual firms, collected together in 'industrial districts', exchange and develop ideas, and where each agent seeks to benefit from its own interpretation of the conventional wisdom in that sector.

The question of how each firm then responds to new legal or non-legal external rules was addressed by Nelson and Winter (1974) in their earlier work on the 'behavioural approach' to the evolutionary theory of the firm. Nelson and Winter's view was that firms at any one time operate according to a set of decision rules which link environmental stimuli to a range of responses on the part of the firm. Each firm's response is then likely to be dependent on its own perceptions of the market and its regulatory environment. These perceptions will themselves be determined by a firm's own administrative structure and experience, and are also likely to be based on an incomplete and, in some respects, false view of the world (Loasby, 1990).

Firms' decisions are not, therefore, taken in isolation. Instead firms, markets and governments all comprise 'learning systems' (Loasby, 1991) in which evolutionary change is constantly taking place and where conventions, codes of conduct and legal rules all play an influential role. Within these learning systems, rules are often created to regulate those firms who themselves influence and determine the outcome of the rule-setting process. Firms exert this influence either by lobbying key political and administrative actors, or via firm-led responses to commercial pressures in the form of self-enforced rules which determine conduct, themselves creating conditions which the regulator is then obliged to respond to. Firms' responses may be in the form of either unilateral, unco-ordinated activity by one company acting alone (in Marshall's terms 'differentiated' activity) or co-ordinated action by a group of firms (Marshall's 'integrated' activity).

This paper is an attempt to carry the debate on the role of the firm in the process of regulatory change further by introducing the legal concept of 'soft law'. In undertaking this task, we have deliberately included some elements which might not conventionally be considered soft law in the strictest sense. There are nevertheless many instances where the concept has been used to characterise co-ordinated behaviour by firms in the domestic context² and by embedding our own analysis within the theoretical

²See, for example, *Implementing the Consumer-Supplier Dialogue Through Soft Law?*, Special Edition of the Journal of Consumer Policy, Vol. 7, No. 2, June 1984.

framework of soft law, it is our intention to provide a greater understanding of how non-legal and quasi-legal rules adopted by a group of actors in a particular sector can influence the way that rule systems evolve.

2.4 The concept of soft law

Soft law is a term most commonly used in the context of international economic relations (Gruchalla-Wesierski, 1984) but may equally be used to describe arrangements between organisations, firms or individuals in a domestic context. It is used as an alternative to the legislative 'hard law' approach enforced by the governments and their agents. Although soft law displays some of the elements of hard law (Wellens & Bochart, 1989) it differs from legal statute in a number of important respects. Unlike state regulation, there is no necessary requirement for soft law to be in a particular form - although characterised by Chinkin (1989) as a written agreement - since it is rarely legally binding³. A verbal agreement or habitual behaviour may create an equivalent expectation that soft law 'rules' will be followed.

Like hard law, it sets down common standards of behaviour, but unlike formal legal rules does not establish *obligations* to follow a set of rules (Tanmes, 1983). Most typically soft law tends to occur where circumstances provide sufficient impetus to require a collective response from a group of actors, either legal or natural persons, but in a form which stops short of legal contractual agreements. The preference instead will be for a general agreement on self-regulation by a group of actors via codes of conduct, conventions or 'gentlemen's agreements' which will govern their future behaviour and relations with one another. Soft law therefore constitutes an agreement between actors with the intention that each will benefit from collective action. Because it is not the result of any democratic process, however, there is no requirement that it serves the public interest. Collective action may result in circumstances which do serve the public interest, if only to avoid the alternative of state regulation, but there is

³Gruchalla-Wesierski (1984) suggests the possibility of legally binding soft law agreements, for instance between international organisations, with the overall benefit being the ability to seek recourse to legal sanctions when non-compliance is detected.

no presumption that welfare benefits will accrue to those outside the participating group. Voluntary action may be better for the wider public interest than the complete absence of rules, but it does not necessarily follow that soft rules are preferable to hard law in all instances.

Yet by creating the expectation that a group of actors will follow a particular course of action, soft law does have the potential for conflict avoidance. There are already examples of the use of soft law in the Community context, particularly in acceptance of the *acquis communautaire*. Non-binding rules cannot, however, override legal provisions, although they may provide more detailed regulation to control behaviour more closely where legislation already exists (Chinkin, 1989). Neither can soft law be expected to solve disputes between actors if different interpretations are attributed to the content of rules (Seidl-Holenfeldern, 1979). Indeed, Gruchalla-Wesierski (1984) found few instances where soft law could be enforceable via objective interpretation for the purposes of establishing non-compliance, largely because the content of such rules generally remains open to subjective interpretation by those bound by the agreement.

Nor can self-regulation modify rights and obligations which are legally enforceable (Wellens & Bochart, 1989). Parties to soft law agreements retain a considerable amount of discretion in interpreting their own obligations, and those of others, under the rule since the subjective elements of soft law often outweigh those elements which are enforceable. In a strictly legal sense, therefore, compliance with soft law is at the discretion of the parties concerned. In practice, however, important economic and political sanctions may be imposed for non-compliance, while the main mechanism for ensuring compliance with soft law in fact remains the psychological expectation (Gruchalla-Wesierski, 1984) that actors will behave in a particular way.

Since parties generally choose soft law in response to hard law as an option which avoids state intervention or recourse to legal enforcement procedures, what self-regulatory soft law can achieve in this circumstance, via agreements between natural or legal persons, is therefore the *expectation* of commitment to a set of norms (Verwey, 1984), combining restraint in economic dealings with the flexibility for strategic change when circumstances so require (Chinkin, 1989).

Firms might therefore co-operate where existing arrangements do not work or

where the opportunity for more efficient behaviour can be identified. Where this opportunity is across borders, international soft law arrangements may be desirable if the potential benefits of co-operation outweigh those of open competition. The costs, however, must be borne by all actors, 'freeloading' being effectively discouraged by soft law agreements which exclude non-participants from the gains. Soft law may thus be adopted as an appropriate response to economic and regulatory change by firms in the single market context.

Retailing provides a number of examples of how firms in a particular sector respond to change in the single market. In the remainder of this paper, therefore, inter-firm agreements on shop opening hours, vocational training, food safety and the recycling of packaging waste are reviewed and the degree to which each displays the characteristics of soft law considered in turn.

3 SOFT LAW AS A RESPONSE TO REGULATORY CHANGE

3.1. Shop opening hours

By *de facto* establishing new modes of acceptable behaviour, soft law has the ability to qualify the rules of a member state, particularly where codes of conduct are used to provide the necessary safeguards for liberalisation of the market. Recent developments in the retail sector's strategy on opening hours are a case in point.

Except in specific cases where minimum or fixed hours of opening are laid down the hours a firm may legally open are either unrestricted or subject to maximal limitation. Inside these limits firms may choose how to act. However, it is rarely the case that firms behave particularly differently in any one market even though they may be free to do so.

A firm which opens longer hours than others could expect to gain market share, up to a point when the number of potential customers diminishes. Yet any firm stepping out of line can expect its competitors to retaliate. One might therefore expect that this would be a simple example of a prisoner's dilemma game, possibly in a dynamic framework. If open competition takes place without co-operation, the expected outcome would tend to be an expansion in hours, a rise in unit costs and hence an overall welfare loss in price terms for both producers and consumers, with margins cut and prices higher, offset by the increased convenience of longer hours to the consumer

(net of any non-compensated disadvantage endured by the employees). Although the interests of consumers are clearly not always the same as those of business, it is often in the interests of business itself to collude either explicitly or implicitly or for a lead to be set by the major players. There is a strong incentive to operate a soft law convention.

As more and more firms seek to attract custom at peak shopping times in the evenings and at weekends, longer store opening hours have become a discernible trend in some national retail sectors (see Table 1). This symmetry between retail firms' behaviour implies an interdependency of expectations of gain which, in turn, establishes the credibility of firms' rules in its relations with other (governmental) agents. The legitimacy of longer shop opening hours is thus established as the norm.

The propensity of stores to open longer hours has made the sector particularly sensitive to proposed Community-wide legislation on working time, which first appeared as part of the Commission's Social Action Programme, and many firms see the likelihood of working time restrictions as hindering this aspect of group-acquired behaviour, with the result that commercial activities will be adversely affected.

Table 1. Weekly contractual hours and retail opening hours in ten member states 1989/90.

Country	Average opening hours	Full-time working hours
Belgium	51	38
France	56	38
(West) Germany	48	39
Greece	n/a	n/a
Ireland	n/a	n/a
Italy	49	38
Netherlands	52	40
Portugal	51	44
Spain	45	43
UK	58	39
Average	53	39

Source: European Industrial Relations Review (EIRR), October 1990.

Although the trend of firm-led behavioural rules in some member states is towards longer shop opening hours, most member states have national rules governing the length of time that each employee may work. The UK is unique in the Community in having no statutory maximum working week (although working time is not regulated in Denmark, collective agreements are an important determinant of hours worked in that country). There are, therefore, existing national rules which, in addition to Commission proposals, also conflict with the notion that longer shop opening hours and concentration of staff during peak periods can be achieved via increased hours for existing workers.

The impact of statutory provisions governing working time in the retail sector is inextricably linked to national rules on shop opening hours, in particular the issue of Sunday opening, which are the subject of considerable debate in a number of member states. During initial discussion of the working time directive in 1991, for instance, UK retailers pressing for a relaxation of Sunday trading laws were particularly concerned by the German proposal that Sunday be set down as a rest day. This response is compatible with the behaviour anticipated by Shipman and Mayes (1991), whereby firms affected by the new rule will try to send a credible signal that it will have a detrimental impact on their commercial activities and will seek to negotiate a more favourable outcome with rule-setters accordingly.

The response of firms to new rules, or the desire for new rules, may be co-ordinated as a group via codes of conduct and self-regulation, or unco-ordinated and on a unilateral basis, depending on the perceived gain of collective or individual action.

In France, for instance, where the Government announced in July 1993 that it did not intend to change legislation which lays down Sunday as a day of rest, the issue has been rekindled by the action of one retailer, Virgin. Having been given temporary authorisation to open its Megastore shop on the Champs Élysées in Paris on Sundays, this licence was not renewed on grounds that employment had not grown sufficiently to justify the derogation from national law. In response, Virgin took the unilateral decision to open all its French outlets on Sundays. The French Minister of Labour then responded by announcing that he would not be hostile to Sunday opening by Virgin, provided this creates additional jobs as a result (see EIRR 235, August

1993, pp. 7). Unilateral action by one retailer thus facilitated a revision of hard law rules to the specific benefit of that firm. Hard law can be challenged by either single or collective action when companies from one member state want to follow their home country rules in another. Thus Virgin, essentially a UK retail firm operating in the French market sought to gain market share by breaking with the conventional behaviour of French retail firms.

Alternatively, where firms view unilateral action as an insufficient means of achieving a rule change, acting collectively may be the preferred option. The objective of collective action in this instance will be to send a credible signal to rule-setters that certain rule changes are both necessary and desirable, and that the desired rule changes may be achieved without a detrimental effect on consumers, employees or other sections of the community.

In Germany, where shop opening hours are regulated by Federal law, the primary aim of rules is to ensure that employees do not work excessive or unsocial hours. The national rules also act as an instrument for regulating competition between retailers, preventing excessively long store hours, particularly in the evenings. Following co-ordinated pressure from within the German retail sector that longer opening hours were necessary to meet customer demand and create employment opportunities, since late 1989 retailers have been able to remain open until 8.30 pm one night a week, normally Thursday, provided that they continue to comply with the maximum period of weekly opening, stipulated to be 64.5 hours⁴.

Despite the intended benefits of this rule change for firms and for employment creation, no additional demand for labour arising from this extension of opening hours has yet been identified. Only 10 per cent of retail firms have taken up the option to open until 8.30 pm, while only 5 per cent of consumers make use of the extended opening hours (IFO, 1993). The behavioural convention which has evolved amongst German retail firms has

⁴Despite the intended benefits of this rule change for firms and for employment creation, no additional demand for labour arising from this extension or modification of opening hours has yet been identified (IFO, 1993). Rule changes themselves are not enough to guarantee the modification of firms' behaviour or, it seems of customer behaviour.

thus been that longer opening is not worthwhile.

Shop opening rules have been a similarly contentious issue in the UK. Much as retail firms in Germany have lobbied collectively for the liberalisation of shop opening hours, in the United Kingdom pressure for rule change has been for reform of the 1950 Shop Act which, with certain exceptions, imposes a general ban on Sunday opening. Many UK retail outlets which open on Sundays have done so in contravention of this law (soft law can contradict hard law, indeed in areas of competition policy its very existence can be a contravention of hard law).

Unlike Germany, however, lobbying for rule changes by UK retailers has been augmented by a strategic approach which stresses the ability of firms to impose non-statutory (soft law) rules voluntarily on their own behaviour. In September 1993 the large food multiples, together with their counterparts in the DIY sector, acting under the auspices of the Shopping Hours Reform Council (SHRC), committed themselves for the first time to premium payments for Sunday working and the right not to work on Sundays – an attempt to allay concerns that the employment rights of shop workers would be eroded by reform of the 1950 Shop Act to allow Sunday opening.

Opinion research for SHRC had suggested that concern about workers rights was the main impediment to a change in the law and thus sought to address this through recourse to soft law arrangements. In a survey commissioned by the SHRC, the Institute for Retail Studies (1993) found that 54 per cent of those already working on Sundays had no objection to doing so and that 70 per cent received at least time-and-a-half pay for Sunday work. Following the SHRC declaration on a code of best practice the shop workers union (USDAW), previously concerned that statutory protection of employees be safeguarded, consequently ended its opposition to Sunday opening under pressure from its own members who want to benefit from the financial gains of an extra day's pay. By providing a quasi-legal undertaking by retail firms that employees' terms and conditions of employment would not be adversely affected by this particular rule change, recourse to the soft law option gave credibility to the SHRC's campaign to overcome opposition to Sunday opening.

A separate group of retailers, including Marks and Spencer, Kwik Save and Netto (collectively acting as the Retailers for Shop Act Reform) sought a rather different rule change, proposing that Sunday opening be limited to

the peak period of the four weeks preceding Christmas for all but the smallest shops. What the differing strategies of the two groups of UK retailers to regulatory change accurately reflects is whether they are edge-of-town supermarkets and DIY stores, or high street groups, the former benefiting from Sunday opening to a larger extent. B & Q DIY stores, for instance, claim to achieve 23 per cent of their weekly sales on Sundays.

In a free vote in the House of Commons on 8th December 1993 the option before Parliament for shops to open for up to six hours on Sundays (campaigning for by the Shopping Hours Reform Council) was approved in preference to the more restrictive option (supported by the Retailers for Shop Act Reform group). The causal link between the achievement of partial deregulation and voluntary self-regulation by those companies associated with the SHRC is impossible to unpack, but nonetheless it does appear that recourse to soft law contributed to the final policy outcome, in the sense that, by removing concerns about the possible excesses of a deregulatory approach, political opposition ceased to be a barrier to regulatory change.

However, while the interests of shopworkers can be articulated through trade union representation, those of the general public cannot since the behaviour of members of the public as consumers may not reveal their preferences in full. Given that shops are open on Sundays, consumers may find it convenient to use them, but nevertheless retaining a conflicting ideological preference that shops should actually remain closed. Such externalities are difficult to take into account through soft law instruments.

Nevertheless, overall in France, Germany and the UK the trend appears to be towards greater freedom of supply, with more flexibility in shop opening hours, the common element being that intensified intra-firm competition in the retail sector is leading to commercial pressure for longer shop opening hours and the liberalisation of rules on Sunday trading. But while the pressure for change in the UK and Germany has largely been in the form of co-ordinated action by retailers, supplemented in the UK by the assurances of a code of conduct, in the case of Virgin we see a firm operating across borders, in doing so trying to operate under a different system of rules by challenging French law and in the process temporarily gaining a competitive advantage over other retailers in that market. Change is therefore being driven by retail firms themselves, acting either unilaterally (in Virgin's case), lobbying collectively (in the case of German firms) or lobbying in

conjunction with a soft law approach (the SHRC in the UK) to achieve the desired modification of national rules⁵.

What is most interesting about recent changes in statutory shop opening hours has been the extent to which it has not been driven by cross-border competition but by general pressure, whether from consumers, producers or new entrants. One could argue that greater integration in the sense of more people becoming familiar with retail systems in other member states has contributed to a climate in which change can take place.

3.2 Vocational training

The creation of new codes of conduct or conventions is not limited to instances where a group of firms seeks to respond to, or encourage the amendment of, legislative hard law rules. Where there are convincing reasons for the adoption of new modes of behaviour, but where binding rules are considered inappropriate, firms may set non-binding guidelines which acknowledge the diversity of traditions in the member states⁶.

⁵The focus on national rules was confirmed by the European Court of Justice (ECJ) which, in a series of preliminary rulings involving UK retailers, considered the compatibility of national rules restricting Sunday trading with Article 30 of the Treaty of Rome, which prohibits quantitative restrictions on imports between member states and all measures having equivalent effect. The Court has now made clear that national rules restricting Sunday opening are compatible with EC law, although it remains less clear why this is so (for a survey of recent ECJ rulings on this issue see Arnall, 1993). Community rules to safeguard the health and safety of workers may, however, impinge on the intended course of action of firms, should they attempt to achieve longer opening hours by adapting (internal) organisational rules to re-distribute employees to times when customer demand is greatest. Since the two sets of rules are not compatible, change will be required from the firms themselves, possibly the employment of more workers rather than simply increasing the hours of those presently employed in order to meet demand.

⁶Arrangements for the provision of vocational training in the member states vary from universal state schemes, partial systems, voluntary systems, or work-based job experience.

In its attempts to promote vocational training across the Community, the formalised agreement reached by retail firms at the European level is a case in point. Vocational training is considered an appropriate area for co-ordinated policy both because of a requirement for the economic success of the firm, and because of a social requirement for development of employee's skills, while acknowledging that differing national provisions may be designed to achieve the same policy outcome, in this case a better trained workforce. This is part of the general issue of EC social policy, since comparability of skills is required for international mobility. But while objective comparison of qualifications is possible, on a practical level what is required is a decision based at the level of the firm, since training clearly constitutes a non-wage labour cost for each individual employer.

In the context of retailing therefore, training constitutes a key element in non-price competition. In the UK, for example, while retail firms such as Marks and Spencer prefer to employ a well-trained semi-skilled workforce, others have chosen the low cost route, employing young temporary workers at low cost to carry out a defined task after minimal instruction.

Jarvis and Prais (1989) found that in the UK and France most firms in the retail sector considered only minimal training necessary, technological developments (particularly electronic advances affecting the work of cashiers) and the trend towards self-service shops all contributing to this process. Furthermore, Jarvis and Prais found that because rates of labour turnover were extremely high (although lower during the economic downturn) individual employers did not generally find it worth investing in training. Cost-effective training, with the employer bearing a high proportion of the cost, was therefore precluded. For part-time employees the difficulties are compounded by the problem of organising training during a shorter working day, despite the fact that turnover of staff is often lower than for full-time employees.

Pressures to reduce costs of distribution, which have increased relative to the cost of manufacturing goods,⁷ also have an impact on the level of

⁷Retailers sell individual items to the final consumer whilst manufacturers costs remain lower because they sell mass-produced goods.

vocational training in retailing. Jarvis & Prais (1989) found that, in order to compete, the time spent with customers by sales assistants has consequently been reduced to economise on staff-time per unit sale. The required mix of retailing skills also continues to change, with the growth of self-service shops and EPOS influencing firm's demand for labour in terms of both quality and quantity. Changes in commercial and technological rule systems are therefore both contributory factors in explaining poor staff training the retail sector, although clearly we should be careful to avoid sweeping generalisations since the situation varies depending on the type of product sold.

In an attempt to provide an appropriate basis of skills for the retail sector countries have established substantial national rules in retail training, often in the form of government-funded programmes to supplement firms' internal rules on staff development. In France, for example, the system of training for the retail sector relies heavily on full-time vocational schools (Lycées professionnels) for 14-18 year olds. The qualification most widely taken is the Certificat d'aptitude professionnelle (CAP). In the UK, recent trends in retail training have been towards employer-certified, on-the-job instruction, through National Vocational Qualifications (NVQs).

In Germany, on the other hand, the number of young people with qualifications in retail distribution is much higher. The German system is almost entirely work-based, with training mainly on two-year or three-year part-time courses under a day-release system for those in work and under 18 years of age. Jarvis and Prais (1989) point out that the consequence of a non-school-based system is that individuals must secure a trainee's post with a retail firm before arranging vocational schooling, while in France the search for employment is postponed until the trainee has completed a course. The firm-led system in Germany thus determined the numbers and quality of trainees in the retail sector to an extent not found in France.

The impact of varying national rules and company policies on the quality of staffing is impossible to measure in terms of store productivity. This is because sales turnover cannot be related to staffing levels since store type (for instance self-service stores or those with automated check-out facilities) is as significant a factor as internal or external rule systems when determining company competitiveness.

Yet despite the difficulties in quantifying the advantages of good staff training in the retail sector, tangible benefits clearly do exist for the firm in the terms of quality of service, customer satisfaction and increased sales through greater product knowledge and, recognising this, in 1988 a memorandum on vocational training, which formalised the agreement reached by Confédération Européenne du Commerce de Détail (CECD) and the International Federation of Commercial, Clerical, Professional and Technical Employees (EUROFIET), was adopted by employers' and employees' representatives.

By issuing a non-binding declaration, the objective is to encourage firms to adopt more positive internal policies on staff training, stressing the long-term economic importance of a skilled workforce able to cope with new technology and adapt to new working practices.

While European-level agreement on training constitutes an extremely general declaratory statement, it can be considered a loose form of soft law since it gives expression to a collective belief that improved training is a desirable objective. This is undoubtedly a view which retail employers share, but each firm is also subject to competing pressures on cost and quality which necessitate an extremely broad, flexible policy toward vocational training. Non-binding rules which acknowledge the diversity of traditions in the member states and the requirements of individual firms were thus considered to be the most appropriate response. It is this soft law process which subsequently received fresh impetus through the Community's own non-binding guidelines on vocational training in 1993.

3.3 Food safety

Where firms choose self-regulation in response to new national or Community legislation, their decision may imply that self-regulation and full compliance are perceived to be the most efficient behavioural response to a rule change.

While most EC-level rules are generally applicable across a range of sectors in the Community, a number have the specific intention of regulating particular industries. Community rules on food safety standards, which directly regulate the commercial activities of food manufacturing and retailing firms across the EC, fall into this latter category and, as firms seek to comply with the new statutory requirements, responses have been characterised by self-regulation.

Prior to the Single Market Programme, the thrust of Community rules on food safety had been towards defining detailed requirements for the composition of specific foodstuffs, the so-called 'recipe' laws on products such as chocolate, fruit juice and jam. Reaching agreement on the scope and applicability of these composition directives, and of the meaning of words in different languages, proved a slow and laborious process and, firms argued, resulted in rules which were so detailed as to restrict product innovation and ultimately limit the range of foods available to consumers (or at least make product pricing prohibitively high).

Instead of setting rigid rules on the contents of specific foods Community legislation within the Single Market Programme sought to create the conditions in which the free movement of foodstuffs across the EC could take place, subject to certain common criteria to protect the safety of the final consumer: the 'new approach' of ensuring mutual recognition for differing national rules of equivalent effect. Community legislation on the harmonisation of national laws on the safety and hygiene of food products in this manner constituted a substantial part of the SEM Programme, establishing broad new rules on food labelling, food additives, foods for particular nutritional uses, materials and articles in contact with food and the official inspection of foodstuffs. These rules took the form of a number of framework directives which set down general principles and, where appropriate, provided for more detailed legislation, the overall aim being the removal of all quantitative restrictions, or technical measures with equivalent effect, to the free movement of foodstuffs in the EC, but without requiring legislation which is overly prescriptive in form.

Within the ESRC Single European Market Research Programme, a team of researchers at Glasgow University and the Institute of Advanced Legal Studies (IALS), seeking to understand how the implementation of EC food safety rules is affected by experience on the part of both governmental and economic actors, have focused on the impact of the Official Control of Foodstuffs Directive, one of the group of measures specifically directed at the food manufacturing and retail sectors (Burrows & Hiram with Brown, 1994).

The Directive provides for a framework of official control to ensure the uniform application of Community rules on foodstuffs in all member states. The concern was that, without EC-wide rules, the elimination of remaining

quantitative restrictions on trade between national markets in Europe could not be verified. The Directive thus seeks to establish a comparable standard of food safety inspection in all member states.

Analysing food retailers' responses to the new directive, the team at Glasgow University and the IALS found that while firms in the UK contained no practical or financial concerns or objections to compliance requirements, they were worried that inspectors tend to concentrate on larger retail firms which, because of better hygiene and safety regimes, actually represent a lower risk to consumer health than do smaller retail firms. The compulsory registration of all food premises and the introduction of new national guidelines within the UK 1990 Food Safety Act was expected by the Glasgow/IALS team to go some way towards addressing this problem by establishing higher inspection rates for small food retailers. There was, therefore, evidence of a positive response overall from larger firms in the UK retail sector. Firms' behaviour hence corresponded with the intended outcome of this particular rule change, as retailers sought to comply with Community and national food safety rules in the face of more effective official control.

Most significantly, the Glasgow/IALS team also noted firms' recourse to self-regulation as the dominant behavioural response to the control of foodstuffs Directive. The development of this pattern appeared to have arisen because the general legal requirement that retail outlets should be able to demonstrate due diligence to take all reasonable precautions or face legal sanctions for failure to ensure the standard of hygiene and safety of foodstuffs created a new operational challenge for firms.

Self-regulation was seen as the most efficient strategic response. The establishment of credible self-enforcing rules may be either in the form of internal rule changes within individual firms acting independently, for instance through total quality management techniques, through informal external rules co-ordinated by a particular group of firms, in the sense of a behavioural convention to which all should adhere.

In this instance, the notion of behavioural change by UK food retailers involved both elements. In terms of an independent response, the self-regulatory soft law approach which the Glasgow/IALS team outline therefore not only envisages firms being in a position to respond to the regulatory rigors of an inspector's visit, should the need arise, but sees

firms anticipating inspectors' requirements and revising their internal rules accordingly. This model of firm behaviour assumes that it is in a firm's interest to undertake changes in its internal rule systems to comply fully with nationally or locally-enforced Community rules because the threat of sanctions for non-compliance is real and the cost substantial.

The Glasgow/IALS group suggest self-regulated activity has been chosen as the most efficient behavioural response by firms in this instance, particularly for those larger retail companies likely to be the subject of more frequent inspection as a result of new EC rules. They do also acknowledge, however, that since inspectors are few in number the incentive for some, particularly smaller, retail firms to respond positively to this rule change may not be great.

The British Retail Consortium (the UK retail industry's interest grouping) has co-ordinated the industry's response by stressing that the self-regulatory option as the most appropriate enforcement mechanism for the sector. This notion of voluntary self-regulation as a lobbying instrument accords closely with the soft law 'code of conduct' approach adopted by the UK Shopping Hours Reform Council, the implication implicit in this response being that the industry is, under normal circumstances, capable of co-ordinating self-enforcement procedures without recourse to excessive levels of external intervention by state authorities.

3.4 Packaging regulations

Soft law rules are not only capable of achieving the intended results of controlling or altering the behaviour of actors within a target market. Unintended consequences of a rule change may also result if the accompanying collective response of firms within that rule's jurisdiction is so fundamental as to necessitate changes in firms' behaviour in other markets. Ultimately this situation may require to new national or Community rules capable of overcoming the resulting market distortions.

The German Packaging Ordinance of 12 June 1991 (Verpackungsverordnung) obliges retailers to take back and dispose of packaging materials, the overall aim being to reduce waste, encourage the use of more ecologically friendly packaging and promote reusable containers. In addition to setting quotas, firms are required to offer adequate guarantees for the acceptance and recycling of this packaging waste and, since 1st December 1991, have

been obliged to take back packaging, such as pallets, boxes, and cartons, used for the transportation of goods. Since 1st April 1992 customers must be able to dispose of unwanted wrapping in bins provided behind store check-outs and, since 1st January 1993, have had to take back and refund deposits on containers for drinks, cleaning materials, detergents and paints.

In response to the new rule system – and specifically in order to share the cost burden⁸ of the Packaging Ordinance – German retail firms, manufacturers and waste companies jointly set up the Duales System Deutschland – Gesellschaft für Abfallvermeidung und Sekundärrohstoffgewinnung mbH (DSD), a private company with the role of organising a network for the collection of waste from households and stores and arranging for its recycling according to given quotas. Firms participating in the DSD scheme pay a fee for this service and are eligible to put a green spot (Grüner Punkt) on their products to signify that packaging will be taken back and recycled as part of the DSD system. Since participation in the Dual System is voluntary, retail firms taking part in the scheme have sought to provide suppliers with an incentive to adopt the green dot on all packaged goods by declaring, via the German retail industry association, that following a transitional period they will exclusively stock products bearing the green spot.

This rule-governed policy change by retail firms is of a contractual nature which is more strictly 'legal' in the hard law sense than is normally understood to be soft law. Yet while the arrangement between German firms is of a contractual nature, the unwillingness to accept products without the Grüner Punkt constitutes a soft law arrangement in the sense that, though not required by legislation, what German firms' response to the rule change did lead to was sufficient market pressure to alter the behaviour of all domestic and foreign manufacturers intending to supply the German retail sector.

The degree to which DSD regulations have become established as a rule system in its own right thus illustrates the potential impact of a co-ordinated response by firms to new national rules. A significant number of firms were

⁸Klepper and Michaelis (1993) estimated that, even if the amount of packaging material used is reduced by 50 per cent, by 1995 additional costs of collecting, sorting and recycling waste will amount to DM 2 billion.

prepared to follow the DSD rule system because it was financially efficient to do so. Their behaviour in turn established a self-enforcing rule, with a high degree of interdependency ensuring that retail companies, manufacturers and suppliers all acted in accordance with the new system.

It has, however, been widely acknowledged in Germany that the industry-set policies of retailers have constituted far more rigorous rules than the Packaging Ordinance itself, with manufacturers facing lost orders if they fail to meet the requirements of retail customers. Indeed, in a survey of all companies participating in the DSD scheme (DSD, 1992) only 62 per cent of manufacturing firms selected packaging without consideration of retailer's needs, while 86 per cent of German retailers claimed to have some influence over packaging specifications. Internal company rules have proved more detailed and rigid than those specified in the Packaging Ordinance regulation itself, firms using their market position to require high standards from their suppliers, who in turn change product packaging accordingly.

Initial concerns that some manufacturers would seek to offer cheaper products without the green spot, thus offering a cost advantage for non-DSD products, have largely proved unfounded (Klepper and Michaelis, 1993). This is mainly because a small number of multiples holding a large market share have provided sufficient incentives for suppliers to participate in the DSD scheme. Indeed, such is the success of retail firm's buying power that the tobacco industry, often an effective lobby group in the EC and originally opposed to DSD, has become the latest participant in the scheme, with most brands of cigarettes now bearing the green spot.

The position of foreign manufacturers is, however, somewhat different since German retail firms may constitute only a small part of their total sales area. Despite the absence of discriminatory trade practices - foreign firms may participate in the DSD scheme provided they pay the licence fee - the Packaging Ordinance can effectively hinder market access by non-German manufacturers by imposing higher costs upon them in certain respects, particularly in the case of packaging used in the transportation of goods, which is not covered within the DSD scheme. All retailers must continue to bear the costs of this element of secondary packaging on an individual basis but the cost of recycling is potentially higher for non-German firms. As the rule system develops, additional costs borne by non-German manufacturers may rise if German suppliers prove more responsive to the new rules by

developing more environmentally friendly forms of packaging. The use of starch-based packets, for example, is already being investigated as an alternative to plastic packaging in Germany. Product innovation is thus another secondary consequence of the packaging regulation.

Both the European Commission and the German Cartel Office have ruled that the German waste packaging regulation does not constitute a distortion to trade or a barrier to the free movement of goods in the single market. The German Cartel Office is, however, still investigating instances in which recycling companies which are not DSD-registered have lost market share because of DSD's dominant market position.

Quite apart from the implications on recycling in other member states, the regulations on waste packaging have placed a disproportionate burden on non-German suppliers to the retail sector in that country, who must comply with the requirements of DSD even though Germany may constitute only a small part of their total sales area.

The far-reaching impact of the German Packaging Ordinance shows that unilateral action in the form of new national rules is not only capable of altering the behaviour of firms in the domestic market, but the resulting industry-led rules co-ordinated by firms in one national market may also force changes in the rules of a number of other member states. In the German case, the Packaging Ordinance not only altered consumer behaviour by encouraging the return of packaging to the point of sale, but also led to fundamental reorganisation of the way in which retail firms and their suppliers (both German and foreign) run their entire operations. By voluntarily entering into commercial relationships with DSD in Germany, firms have provided evidence of the potential impact of behaviour complying to dominant rule systems in the soft law tradition.

4 THE ROLE OF SOFT LAW IN THE EVOLUTION OF A SINGLE MARKET

Although most commonly the focus of studies on the single European market, the enactment of EC law is only one of a series of factors contributing to its evolution. In other instances, a co-ordinated behavioural response to existing or proposed rule changes has been in the form of soft law mechanisms through which norms can be set without recourse to intervention from outside agents. In many respects it has been these agreements between companies which have been more important in determining what the single

market will look like.

The influence of co-operation between companies is being exerted in a number of respects. In areas where Community legislation relies upon the 'new approach' to technical harmonisation, mutual recognition is intended to provide the route to an eventual single market. Yet the process by which mutual recognition is to be achieved is not spelt out. In these circumstances soft law has the potential to make this explicit. Food retail firms, for example, have advocated the self-regulatory approach in order to comply with the control of foodstuffs Directive.

In other instances, 'soft' rules are chosen in preference to more rigid legal provisions where hard law is not considered appropriate for the different processes used in individual member states. Operating under the principle of subsidiarity requires an acknowledgement that differing national systems are of equal value and, as in the case of vocational training, a non-binding undertaking to seek improvements in employees' skills may be the most appropriate way forward.

Where existing national law is inhibiting a more 'European' approach, new informal modes of behaviour may similarly enable the development of more appropriate forms of commercial activity, some change of national laws being encouraged in the process.

In their attempts to influence the process of regulatory change on shop opening hours, firms displayed a variety behavioural responses. These ranged from unco-ordinated unilateral action by one firm (Virgin), acting independently to gain competitive advantage by obtaining a derogation from the general prohibition on Sunday opening in France, co-ordinated lobbying for longer opening hours by retail firms in Germany, and co-ordinated lobbying supplemented by a code of conduct - soft law in the domestic context - to ensure that an extension of Sunday opening would not be to the detriment of employees' working conditions in the UK. Self-regulation through a code of conduct was thus seen as one of a range of options open to firms seeking to change the rules under which they conduct their business activities.

But while co-operation agreements, codes of conduct or conventions between firms may contribute to the formulation of a single market, in other instances its presence may actually inhibit integration by discriminating

against companies from other parts of the Community. The decision of German retailers and suppliers to organise their own system for the recycling of packaging waste was in response to the financial burden of complying with new national legislation in that country. This co-ordinated response by German firms ultimately had an impact on the rules under which firms based in other national markets operated. Non-legal agreements between firms thus have the potential to operate across national boundaries, changing rules in the process.

Some of these examples constitute non-legal soft law rules. Others, such as the German recycling arrangements have their origins in legal obligations. They nevertheless all display many of the characteristics of soft law in their application as self-imposed regulating instruments operated by a group of firms and creating an additional expectation that all parties to the rule will behave in an agreed way.

A common element in each of the cases cited is that, in response to change, retail firms have sought recourse to self-regulation broadly within the soft law tradition outlined at the beginning of the paper. In each case, retailers perceived 'soft' rules as being the most efficient response to existing or proposed rules, creating the expectation of particular behavioural responses and providing a flexible framework capable of coping with regulatory change in the single European market.

Rules devised by national governments or at the Community level are thus themselves often influenced by the very firms that they seek to regulate. This linkage exists largely because of the commercial behaviour of firms, either acting alone or collectively via some form of institutionalised soft law arrangement, is of a rule-setting kind with implications for the behaviour of other actors and the operation of regulatory instruments throughout the Community. While the single market involves both sharing national sovereignty and limiting how it can be applied, soft law contributes to the complex interweaving of EC and national legal arrangements through non-statutory means. The greatly under-studied concept of soft law should be seen a key element in the competing pressures which influence the evolution of rules in the single European market.

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