

# **A DISPASSIONATE LOOK AT THE EUROPEAN INTERNAL MARKET**

**(Prof. Paul Demaret – Natolin 30 April 2019)**

## **Introduction**

Purpose of the presentation: to provide an analytical framework in order to assess the strengths and remaining weaknesses of the European internal market

## **I. THE CONCEPT OF “INTERNAL MARKET”**

**A. From the concept of “Common Market” (see the Coal & Steel Treaty 1951 & the EEC Treaty 1957) to the concept of “Internal Market” (see the Single European Act 1986 and today the Treaty on the Functioning of the European Union)**

- Is there a difference in nature between the two concepts?
- Why was the concept of “internal market” introduced in the Single European Act (SEA) of 1986 and why did it gradually replace that of “common market”?
- Where and when did the concept first appear?
- Is there still a reference to the “common market” in the TFUE?
- What about the US market? A common market? An internal market?

## **B. The necessary external dimension of the internal market**

- The concept of customs union v. the concept of a free-trade area (see GATT Article XXIV, par. 8)
- In the EEC Treaty and now in the TFEU, is the concept of customs union used as synonymous with free movement of goods?
- Could a true internal market function in the absence of a common external regime regarding goods, services, natural and legal persons, capital and investments ?
- From the perspective of third country citizens, the important difference between natural persons and legal persons
- Did the SEA of 1986, which introduced the concept of internal market in the EEC Treaty, emphasize its external dimension?
- Is the European Economic Area a *bona fide* internal market?
- Was the EEC common market, launched in 1958, devoid of any external dimension?

- In the TFEU, which are the provisions which reflect the fact that the internal market either possesses or could acquire an external dimension? Why was article 116 of the EEC treaty deleted at Maastricht?
- Could UK remain in the European customs union and negotiate freely its own trade agreements with the rest of the world?
- Assuming UK leaves the European Union, how can one avoid a hard border being reinstated between the Republic of Ireland and Northern Ireland, which is part of UK? The so-called backstop and the different trade regimes envisaged for respectively Northern Ireland and the rest of the UK.

## **II. INSTRUMENTS PROVIDED BY THE SUCCESSIVE EUROPEAN TREATIES IN ORDER TO ESTABLISH, MAINTAIN OR DEEPEN THE INTERNAL MARKET: THE CONCEPTS OF “NEGATIVE” AND “POSITIVE” INTEGRATION**

### **A. “Negative integration”**

“Negative integration” are terms that could be misleading. Actually, as understood here, this concept is not meant to cover steps that would lead the integration process backwards, as Brexit, for instance, does. As used by J. Pinder, “negative integration” refers to the direct and indirect enforcement of the various prohibitions against obstacles to free movement which are listed in the EEC Treaty, now the TFUE, to which one should add the enforcement of competition rules applying to undertakings and to State aids.

- Which are the main institutional actors involved in the process of “negative integration” ?
- Identify the main contributions of the Court of Justice to that process.

In the US, see the role of federal courts, the Supreme Court in particular, in maintaining the US common market under the *dormant commerce clause* (US Constitution Art. I, section 8, par. 3)

### **B. Positive integration”**

“Positive integration” is meant to cover the enactment of secondary legislation (directive and regulations), that are needed in order to remove obstacles to free movement arising from the diversity of national regulations, and which do not necessarily fall within the scope of the prohibitions mentioned in the TFUE.

- Which are the main institutional actors involved in the process of “positive integration”?
- Why did “positive integration” considerably progress after the SEA of 1986? See the current article 114 of the TFUE (and other TFUE articles providing for the use of the “ordinary legislative procedure”).
- Which very significant exception to the use of the “ordinary legislative procedure” remains to this day and why?

- Is there too much European secondary legislation? Discuss the matter. Isn't it true that, by itself, replacing 28 different national regulations by a single European regulation actually reduces the amount of regulations in the EU, and this, for the benefit of the citizen or the business firm? A word concerning subsidiarity.
- Legally speaking, does the European Union enjoy exclusive competence over all matters relating to the internal market?

In the US, article I, section 8, par. 3, grants Congress explicit competence to “*regulate commerce with foreign nations, and among the several States*”.

### **C. The interface between the European judge and the European legislator in the making of the European internal market**

In enforcing directly (infringement proceedings) or indirectly (preliminary rulings), Treaty prohibitions, the Court of Justice deals with primary law, which is superior to secondary law, i.e. directives or regulations enacted by the European legislator. In other words, the interpretation of Treaty provisions by the Court trumps secondary legislation adopted by the Council and the European Parliament on the proposal of the European Commission

- Can it be said that the Court of Justice is, sometimes, a *de facto* legislator?
- How can unnecessary conflicts between the European judge and the European legislator be avoided?

### **D. Implications for third countries in Europe which, to a various degree, take part or wish to take part in the European internal market, without becoming a member of the EU**

Willy-nilly, these countries have to take up part of, or all, the past and future EU legislative *acquis* as well as to conform to the case law of the Court of Justice concerning the EU internal market, something which represents a significant loss of sovereignty.

Illustrations:

- The case of EFTA countries, which are member of the EEA, and the respective role of the EFTA Surveillance Authority and the EFTA Court.
- The case of Switzerland (see the EU – Switzerland draft institutional framework that was published in late 2018)
- The case of Turkey and the EU – Turkey Customs union
- The case of the Ukraine, Georgia and Moldova, which are member of the Eastern partnership, and the association agreements negotiated with the EU
- The case of Andorra, Monaco and San Marino, which are in the process of negotiating association agreements with the EU, whose scope would be much more comprehensive than that of the EEA.

- The case of the United Kingdom, first, assuming an orderly Brexit, during the transition period following Brexit and then thereafter (customs union or FTA, internal market in part or in full?). In terms of sovereignty, does it make sense for UK to leave the EU, but to remain in a customs union with the EU or to join the EEA?

### **III. HAS THE EUROPEAN INTERNAL MARKET BEEN FULLY COMPLETED BY NOW?**

#### **A. What was achieved between 1986 and 1993**

##### **1. On the internal side**

Quite an ambitious legislative program was launched by the Commission and endorsed by the Council with the objective of harmonizing a great many national technical regulations, this in order to facilitate trade in goods and services and to remove border controls between Member States.

Among the most important pieces of legislation:

- The 1988 directive on free movement of capital? Why was that directive of special importance?
- The 1989 regulation on merger control. Why was that regulation important and why did it take so many years for the EEC to set up a procedure in order to control large mergers?

##### **2. On the external side**

Steps were taken in order to close remaining loopholes in the Common Customs Tariff (the case of Germany and bananas and the long trail of legal disputes which ensued both, internally, i.e. before German courts and the European Court of justice, and, externally, before the WTO DSB) and in the common import and export regimes (national import and export regimes such as with regard to textiles or Japanese cars...).

##### **3. In sum**

- Was the internal market fully completed by 1993? Is it today?
- Has the removal of border controls regarding trade in goods in 1993 made the European internal market the functional equivalent of a national market? Analyze, for instance, the European VAT system in that respect. What conditions would be needed to make the VAT system consonant with the idea of a true internal market?

#### **B. What has been further achieved since “the establishment” of the internal market in 1993?**

##### **1. On the internal side**

Important legislative activity in different sectors, among other:

- Services, establishment (see in particular the services directive) and recognition of diplomas
- Intellectual property (despite the many travails it went through, the unitary patent is about to come to life)
- Banking and insurance, including, as part of the Banking Union, the setting up of European supervisory authorities and the establishment of a mechanism for the winding up of failed banks
- In the field of indirect taxes, a large amount of harmonization and coordination regarding VAT, a lesser amount regarding excise duties. As far as indirect taxes are concerned, there is something like a true internal market for the private consumer (with important exceptions, as with respect to the purchase of cars, why?).

## 2. On the external side

Extension of the scope of commercial policy beyond trade in goods (see article 207 TFEU). Commercial policy now encompasses trade in services, intellectual property and investments (with some qualifications), this following the Uruguay Round and the advent of the WTO.

Since then, the EU has negotiated several comprehensive trade agreements with third countries (Korea, Japan, Canada, Singapore), which deal with goods, services, investments and IP. There remains, however, the enduring problem arising from the practice of “mixed agreements”, which require the approval of trade agreements not only by the EU, but in addition by each Member State (the case of the EU - Canada trade agreement – Ceta - and the Walloon Region in Belgium).

Schengen: a common system concerning entry and short stays of third country nationals in the EU, which permitted the removal of intra-border checks for natural persons. Why is Schengen at times under threat?

## C. Persistent weaknesses

- Taxation and the high “cost” of unanimity
- There is still not yet a common European base for corporate taxes, nor *a fortiori* a measure of harmonization of tax rates. However, the Court of Justice has developed a sizable case law regarding the taxation of workers, self-employed and corporations involved in cross-border activities: an indirect form of harmonization.
- Energy and the lack of enthusiasm of several EU Member States for the establishment of an effective common energy policy, see North Stream 2.
- Direct foreign investments, even though they are now the subject of certain recent EU trade agreements with third countries and there is the prospect that a measure of coordination could be put in place at the EU level regarding the control of foreign direct investments by the Member States.

- The lack of a truly common immigration policy. The failure of the Dublin regime concerning asylum seekers. Comparison with a federal State, such as the US.

#### **D. A serious failure**

The likely departure of UK from the internal market, with negative consequences for both.

### **IV. THE INTERNAL MARKET AND MONETARY UNION**

Reasons underlying the creation of Monetary Union?

Can Monetary Union be seen as a natural follow up to the establishment of the internal market?

Under what conditions can the European internal market function when some Member States stay outside Monetary Union?

Could the internal market survive in the hypothetical case where either Greece or Italy would abandon the euro?

After the financial crisis of 2008 which affected several banks and several Member States, Monetary Union has been shored up. However, certain weaknesses remain:

- The absence of an effective form of European economic government, which is, only in part, offset by the adoption of strict budgetary rules for all Member States, whose enforcement is entrusted to the European Commission.
- The absence of a federal budget allowing for financial transfers to Member States in need.
- The disparity between the respective economic situation, economic culture and the needs of Northern and Southern Member States (see, in this regard, the difficulties attending the creation of a common guarantee scheme for bank deposits, a missing piece in the European banking union and in the internal market ).

### **V. THE ECONOMIC AND POLITICAL IMPACT OF THE EUROPEAN INTERNAL MARKET AT THE WORLD LEVEL**

In the absence of a common European Defence (at least in the foreseeable future), which is the necessary basis for an effective European foreign policy, the EU is capable of speaking with one voice to the world at large only when it relies on its large internal market and uses it as a leverage.

The effect of the development of the internal market on enlargements.

The leverage given to the EU in the Brexit talks thanks to the fact that its market is much larger than that of the United Kingdom.

In the WTO and in trade matters in general, the EU is an actor as important as the US (except when defence matters loom in the background) or China. The EU as an initiator of trade agreements and its use of the internal market for opening up foreign markets.

The impact of EU technical standards beyond the European Union and why?

The case of Iran and the US trade sanctions: why has the US the upper hand?.

The internal market and the role of EU supranational institutions (Commission and Court of Justice) as instruments for controlling the behaviour of large private actors, something which no single Member State is capable of achieving alone. The internal market fosters the pooling of sovereignties. Positive and negative illustrations:

- The merger projects between respectively Boeing and McDonnell Douglas and Honeywell and Hewlett Packard. A word concerning the Boeing decision of the Commission.
- The abuse of power of a large sport federation. The *Bosman* judgment of the Court of Justice.
- The abuse of power of very large multinationals such as Microsoft, Apple, Google, Facebook, Amazon (and in the future of large Chinese firms, among them State firms?). How can they be tackled except at the EU level?
- The antitrust proceedings started by the Commission against Gazprom, a very large foreign and state owned energy supplier.
- The Commission proposal for taxing more effectively large multinationals active in the IT sector, such as Microsoft, Google or Amazon (a proposal, which foundered because of the opposition either from some free riding Member States or from other Member States (Germany, for example) which do not want to antagonize the US for economic or political reasons. Taxation remains, at any rate, a matter subject to unanimity in the Council.
- Political significance. The internal market can and should be used in order to support freedom of expression in Europe and to ensure the protection of personal data (compare with what China does in the same fields, also taking advantage of its large and expanding internal market, but there in order to restrict freedom of expression and to gain control of all kind of personal data). See the General Data Protection Regulation which was recently adopted by the EU.

## CONCLUSION

The EU internal market can be seen as the major economic accomplishment of the European integration project, together with Monetary Union, and whose significance extends beyond pure economic matters.

However, it still suffers from weaknesses caused by the insufficient level of European economic integration and the lack of an effective European foreign policy (see for a very recent example, the different attitudes taken by Germany on the one hand and France and UK on the other hand vis-à-vis Saudi Arabia and the consequences for the internal market in military wares).

Paul Demaret