EDITORIAL

INTERNAL MARKET LEGISLATION AS EUROPEAN PUBLIC POLICY

La legislación del mercado interior como política pública europea

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Internal market legislation has gradually become an instrument by which the EU institutions seek to achieve a number of broader public policy goals that stretch way beyond market integration. European directives or regulations that harmonise national law in order to improve the functioning of the internal market are a very traditional instrument of EU policy, but their content and significance have changed over time. Today, the adoption of internal market legislation is still about improving the functioning of the market but it is also about other things, other policy aims, that sometimes are the dominant policy aims and are only marginally related to the functioning of the market.

The EU's internal market competence is a functional or purposive competence (Davies, 2015). Unlike other EU competences, it is not defined by reference to a particular sector of economic activity (such as agriculture or transport), or by the existence of a policy field (such as environment or immigration), but by its underlying purpose, namely to improve the smooth functioning of the internal market. Yet, that internal market purpose need not

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be, and cannot logically be, the only purpose of internal market legislation. If national rules are being replaced by common European standards, the European legislator must make a choice as to the content of those standards, and that choice is informed by ideas about how the market should operate. That legislation is therefore also "about something else" than the market, and that something else may in fact be the main reason why the internal market measure was adopted.

This reality is reflected in the way in which internal market law is defined in the European treaties. According to Art. 26 (1) TFEU: "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market". And the concrete legal bases for doing this are given elsewhere in the Treaties, most prominently in Art. 114 TFEU, stating that the European Parliament and the Council "shall, acting in accordance with the ordinary legislative procedure …, adopt the measures for the approximation of the provisions [of national law] which have as their object the establishment and functioning of the internal market". In both these Treaty provisions, we find the same expressions: the harmonisation of national laws is justified by the need to ensure the establishment and the functioning of the internal market.

"Establishment of the internal market" means essentially negative integration (or deregulation), which happens by removing national regulations that obstruct the trade in goods or services with other EU countries or that obstruct the mobility of persons exercising economic activities. The aim is to create one market instead of up to 27 separate national markets. "Ensuring the functioning of the internal market" has a broader and more indeterminate meaning, namely making that Europe-wide markets work smoothly and properly. This essentially happens by means of positive integration, whereby EU-wide standards regulate economic activity, that is, the production of goods, the provision of services and the mobility of businesses and workers. Whereas, during the first decades of European integration, the emphasis was very much on removing national barriers, these days most of internal market legislation is about regulating the Europe-wide market. The crucial point then is the following: when the European Union adopts measures for the harmonization of national law to regulate the internal market, it makes choices that very often go beyond an economic cost-benefit calculation and address also other policy aims (one can call them "non-market aims") such as the protection of public health, or the protection of the environment, or of the social rights of workers. So, one can say that internal market legislation is always about the market but also, almost always, about something else than the market (De Witte, 2012).

Let me illustrate this with a well-known example, namely the European regulation of tobacco. Based on the internal market competence, the

European Union has adopted a wide range of measures in this field, including a Directive banning advertisements for tobacco products[2], and another Directive regulating various aspects of their production and marketing, including a ban on the sale of flavoured (menthol) cigarettes, rules on the size and nature of health warnings on the packages, and rules on the marketing of electronic cigarettes[3]. All these matters are now harmonized through European law. The "market" argument behind this legislation is that national rules on these matters used to be different, and this led to an impediment to the trade in tobacco products: as the producers and advertisers had to adapt their activity so as to comply with different national rules, this complicated their business. So, having common European rules simplifies the regulatory framework for them but, in this case, the rules also restrict their freedom to conduct their business as they wish. They might well prefer to sell cigarette packages without any health warnings, but the European legislator imposes them. In setting common rules, the European legislator necessarily had to make a policy choice which was inspired by non-market considerations, namely how much protection should be given to public health. So, the formal competence for the European Union to act here was based on the argument that these were measures that improved the functioning of the internal market, but the real political drive behind these directives had little to do with the market and everything with the protection of public health.

Is this legitimate? Can the European Union use a competence which is about ensuring the good functioning of the internal market for a purpose such as the protection of public health (which is a policy domain that is normally left to the member states)? There is in fact a justification for this approach in the text of the Treaties. Art. 114 TFEU itself states the following, in its para. 3: "The Commission, in its proposals concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection … Within their respective competences, the European Parliament and the Council will also seek to achieve this objective". So, the drafters of this Treaty text (which dates from the Single European Act, in 1987) were well aware, already then, that internal market harmonization

[2] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ L 152/16 20 June 2003).

[3] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (OJ L 127/1 29 April 2014).

regularly involves policy choices concerning the subjects mentioned there: health, safety, environmental and consumer protection. And we have indeed numerous examples of this kind of "double-aim" legislation. Think for instance of the European regulations on the noise level or the carbon emissions of cars: they set Europe-wide standards to facilitate the operation of the market for car producers, but at the same time these standards seek to offer better protection for the environment.

But there is more. In other provisions of the Treaties, particularly in Title II of the TFEU, we find a number of mainstreaming clauses (also called horizontal integration clauses). There, the Treaty text states that in all its actions, the Union must take into account the aims of social protection (Art. 9 TFEU), of combating discrimination (Art. 10), of protecting the environment (Art. 11), of protecting animals (Art. 13) and cultural diversity (Art. 167). The words "in all its actions" include, obviously, the enactment of internal market legislation. The policy impact of these mainstreaming clauses varies a lot (Ippolito *et al.*, 2019), but they may help to justify the enactment of internal market legislation. One example is the Directive on the posting of workers. This directive harmonises national laws dealing with the conditions for the posting of workers, that is, the possibility for a firm based in one member state to send its employees to another state for the duration of a service that the firm provides there, for example building a bridge or a tunnel. The directive wants to make sure that posting of workers is possible, as a legitimate way to provide cross-border services in the internal market. At the same time, the revised version of this directive, adopted in 2018, sought to reinforce the rights of posted workers by requiring that, during the time of posting, they should receive the same pay as the local workers in the same branch of business[4]. This revised directive was challenged before the Court of Justice by Hungary and Poland. Those countries were unhappy with the revision, they had been outvoted in the Council, and they argued before the Court that the new version of this directive actually made the provision of cross-border services more difficult and thus hindered the functioning of the internal market rather than improving it. The Court found, in its twin judgments of December 2020, that the European legislator could very well decide that the smooth functioning of the internal market requires not only that posting of workers should be made possible but also that there should be no distortion of competition between low-pay and high-pay countries and that the rights of

[4] Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ L 173/16 9 July 2018).

posted workers should be strengthened[5]. In coming to that conclusion, the Court made use of Art. 9 TFEU, the mainstreaming clause on social protection.

So, one may conclude that EU constitutional law *allows* and even *requires* the EU institutions to take into account a whole range of non-market values when adopting internal market legislation. This is especially important when it is difficult for the EU to directly address those non-market values, in the absence of a dedicated legal basis, so that internal market legislation based on Art. 114 offers an attractive alternative.

This leads me to consider a phenomenon of recent years that shows once again the adaptability of the concept of smooth functioning of the internal market. Art. 114 TFEU is now used regularly as the legal basis for new European rules that have little to do with the functioning of the internal market, and also go beyond the sort of public policies listed in the mainstreaming clauses, but serve entirely new policy agendas such as the EU's strategic autonomy, the digital transition and the defence of democracy. Take for instance the European Media Freedom Act, a regulation based on Art. 114 TFEU and adopted in codecision by the Council and the European Parliament on 11 April 2024[6]. Its Art. 1 describes its subject matter in general terms: "This Regulation lays down common rules for the proper functioning of the internal market for media services … while safeguarding the independence and pluralism of media services". So, the European legislator spells out here that the regulation has a double aim, as usual. The internal market aim is the trigger that allows for the use of Art. 114 TFEU: the claim is that harmonising national laws that regulate the media is necessary for the good functioning of the internal market. But the other aim, namely protecting the independence and pluralism of the media, is politically the leading one: the reason why the Commission proposed this regulation and why the Council and Parliament adopted it is that they were worried about threats to media pluralism. The rules contained in this Regulation are all about that: protecting the independence of the public service media from the government, ensuring transparency of the ownership and funding of private media, imposing a duty for the member states to assess media market concentrations, and the creation of

[5] Judgments of the Court of 8 December 2020, Hungary v Parliament and Council and Poland v Parliament and Council, C-620/18 and C-626/18, EU:C:2020:1001 and 1000.

[6] Regulation 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), (OJ L 2024/1083 17 April 2024).

a European Board for Media Services. It is beyond doubt that the main aim of this piece of legislation is trying to make sure that the media systems of the member states function in a way that protects the pluralism of opinions and, ultimately, the functioning of the democratic system.

This policy initiative fits within a broader policy agenda of the Commission, namely the European Democracy Action Plan published in 2020, which was complemented in 2023 by another Commission Communication tellingly entitled "on Defence of Democracy"[7]. Another piece of this democracy action plan, also adopted on the basis of Art. 114 TFEU, is a Regulation of March 2024 on the transparency and targeting of political advertising[8]. In addition, there is another pending legislative proposal (not yet adopted), again based on Art. 114, which seeks to make the lobbying for third countries more transparent[9]; here, use of the legal basis is justified by the argument is that lobbying is a service provided against payment, and thus regulating the conditions for lobbying in a uniform way throughout Europe serves for the good functioning of the internal market. But this is just a thin legal veil behind which the real purpose of this text is hidden: to protect political decision-making against interference by Russia, China or other less than friendly countries.

The European Union's historical project to integrate the national economic markets into one single market allows for the formulation of European public policies that extend beyond the economy. In many cases now, the non-market objective of internal market legislation is the dominant one. And in some of the very recent cases, the functioning of the market is really the least of the preoccupations of the European legislator.

Internal market law is a story of constitutional flexibility: EU constitutional law is constantly adapted and re-interpreted so as to allow the Union to achieve common policy goals within the framework of the (limited) competences granted by the European treaties. There are other examples of this, such as the legal construction of the Next Generation EU programme. This evolution has happened without modification of the constitutional text, the

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7 Communication from the Commission on the European democracy action plan, COM(2020) 790 of 3 December 2020; Communication from the Commission on Defence of Democracy, COM(2023) 630 of 12 December 2023.

8 Regulation 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (OJ L 2024/900 20 March 2024).

9 Commission Proposal for a Directive of the European Parliament and of the Council establishing harmonized requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937, COM(2023) 637 of 12 December 2023.

text of the Treaties (except for the easing of decision making by the SEA, and the addition of the mainstreaming clauses)

This does not mean that "anything goes". When making EU policies, the EU institutions also "take a view" of the constitutional constraints. It is the task of the legal services of Commission, Council and Parliament to advise on "what can we do, and how", making sure that the decisions can stand up against scrutiny by the Court of Justice. If one of those pieces of internal market legislation is contested in court, as happens occasionally, either by business companies or by a member state that was outvoted in the Council (as with the directive on posting of workers or with the European Media Freedom Act[10]), then the EU institutions must be able to argue that they acted within the limits of their competence as enumerated in the Treaties. In other words, that the directive or regulation that they adopted really contributes to a better functioning of the internal market, which is the condition allowing for the use of Art. 114 TFEU. Is the recent practice stretching the limits? I do not believe so. What we are observing here is a continuous recalibration of the very idea of the internal market. The market is seen not only as tool to increase economic benefits but also to help ensuring a more sustainable European society and a more resilient European democracy. However, the official documents produced by the European institutions tend to downplay this legislative practice, and continue to affirm above all the traditional market-making aims of internal market law.

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[10] The validity of the European Media Freedom Act is challenged in the pending case C-486/24, *Hungary v Parliament and Council*, action brought on 10 July 2024 (OJ C, C/2024/5088, 26.8.2024).