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The EU Common Market

Armin Cuyvers

9.1 Introduction

The internal market is both an end in itself and a means to a higher end.¹ Article 2 of the 1957 Treaty of Rome already declared that the (then) European Economic Community (EEC) aimed to establish a Common Market between the Member States.² The EEC, therefore, already had a clear economic objective of increasing economic integration and the living conditions in a Europe impoverished after two world wars.³ At the same time, the market was also a means to an end. It was thought that by integrating markets and economies, peace and stability would follow. Not only would Member States become accustomed to cooperation and dialogue, economic integration would also lead to a *de facto* solidarity and would make waging war *economically* impossible. The economic costs of conflict would simply become too high, preventing conflicts as long as some form of rational decision making would be in place. It was this dual purpose of the internal market that formed part of the genius of European integration.

This chapter will briefly introduce some of the main features of the EU internal market, focusing on the early stages of integration the combined use of negative and positive integration and the increasing convergence between the freedoms. Subsequently, EU chapters 10 to 13 will separately discuss the four individual freedoms underlying the internal market, being the free movement

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- 1 For a more detailed analyses of the internal market and its development see inter alia N.N. Shuibne, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice* (OUP, 2013), S.C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (4th edn, OUP 2015), or P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans, and C.W.A. Timmermans (eds), *The Law of the European Union and the European Communities* (4th revised edition, Kluwer Law International 2008).
 - 2 The objective can currently be found in Article 3(3) TEU. Note that in the early days of European integration the term Common Market was used, as currently in the EAC, before the terminology of an internal market was adopted to stress the complete removal of barriers.
 - 3 See for some economic analysis of the internal market inter alia W. Molle, *The Economics of European Integration* (Aldershot, 2006) or J. Pelkmans, *European Integration: Methods and Economic Analysis* (Longman, 1997).

of goods, services and establishment, persons, and capital. We begin, however, with the concept of an internal market as such.

9.2 The Concept of an Internal Market

Article 26 TFEU defines the internal market as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty’. This very broad concept was further developed, albeit still in a very general manner, by the CJEU in its *Schul* judgement:

The concept of a common market as defined by the court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.⁴

The essential aim of an internal market, therefore, is to make trade between Member States as easy as trade within a single state. Geographic realities such as distance and mountains aside, a Danish company should be able to sell its goods or services just as easily in Italy as in Denmark itself. The main idea is that such an internal market allows all the factors of production, labour, capital and enterprise, to move freely, generating maximum allocative efficiency and hence increasing overall wealth.

An internal market, therefore, is a far reaching form of economic integration. It goes beyond a free trade area and a customs union, as it aims to remove *all* obstacles to free movement and create a market that functions as if all Member States are one country. The ambitious nature of this aim comes into focus when one realizes that almost any national rule may be able to affect free movement, as we shall see in more detail in the coming chapters on the specific free movement rights. Creating an internal market, therefore, is not just an economic but also a major political project. An internal market, however, is not yet the most intense form of economic integration beyond statehood. For in the final step, a full economic union, an internal market is combined with the complete integration of monetary and fiscal policy as well. The EU has moved a long way towards economic union as well, as will be discussed in

4 Case 15/81, *Schul*, [1982] ECR 1982, 1409.

more detail in EU chapter 13, even though that process has run into significant challenges, which other regional systems should try to avoid.⁵

9.3 The Time Line of the EU Internal Market

Something as complex as an internal market cannot be established overnight, already because Member State economies and legal systems need time to adjust. Establishing an internal market, therefore, requires several phases and transition periods. The first step in the development of the EU internal market was the creation of a customs union, on which the internal market, according to Article 28 TFEU, remains based:

The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.⁶

The crux of a customs union, which forms one step up from a free trade area, is that not only the tariffs and quotas internally, so between members, are removed, but that the members also agree to apply a common tariff externally, so on goods entering the union from outside. Once goods have entered this customs union, they can be moved around freely in the entire union, *inter alia* removing the need for burdensome rules of origin.⁷ The uniformity of the customs regulation then becomes vital, as the conditions for access to the territory of the customs union must be the same in all Member States, which also explains why the customs union is an exclusive competence of the EU.⁸

The customs union was established in phases, allowing Member States to gradually reduce tariffs and adjust, whilst prohibiting new tariffs. The customs union was completed on 1 July 1968, when all 'internal' tariffs between

5 In addition, as also pointed out in Chapter 10, para. 2, these distinctions and steps are theoretical constructs, and 'In practice, regional cooperation does not fit exactly into these theoretical pigeon holes'. In practice integration can blend certain steps or only complete certain steps incompletely.

6 Compare also the former Article 23 EC, holding that 'The Community shall be based upon a customs union (...).'

7 See on the EAC challenges on this point also Chapter 10.3.4.

8 Article 3(a) TFEU.

the (then six) Member States had been removed, and common customs tariff for the entire Community had been established. At this date, however, a real internal market, originally planned to be in place by 1 January 1970, was, still a long way off. In fact, European integration was facing several political crises, and political faith in the entire project had been reduced significantly.⁹ During the political stagnation, however, it was the CJEU that picked up the integration gauntlet, as will be discussed in more detail below and the next chapters. It really was the CJEU's case law on free movement that provided the most important contribution to the development of the internal market in the 1960's and 70's. This case law probably saved the project from a complete demise, and progressively turned the internal market into a legal reality.

In the eighties, different political elites in Europe got their second European wind, as economic growth increased and political support for the internal market project picked up. The re-launch of the European internal market that followed is usually linked to an important White Paper on 'Completing the Internal Market' by the Commission that appeared on 14 June 1985.¹⁰ The White Paper laid out an ambitious agenda to create a truly internal market. It included a list of 279 legislative measures that should all be in place by 31 December 1992, the date on which the market should be 'complete'.¹¹

Partially based on the economic benefits that such integration would bring,¹² the White Paper was followed by decisive political action in the form of the Single European Union Act (SEA) 1986.¹³ Crucially, the SEA both formulated the Treaty objective to create an internal market as now formulated in Article 26 TEU, and provided the political mechanisms to actually create it. One of the most important changes was the introduction of the current Article 114 TFEU, which allowed internal market legislation to be adopted by

9 See also EU chapter 1 for a further description of some of these crises in European integration, which show that the EU has often developed in a pattern of crisis followed by deeper integration.

10 Commission White Paper 'Completing the Internal Market' COM(85)310.

11 This White Paper, therefore, creates an interesting blue print for comparison, for example with the East African Community Elimination of Non-Tariff Barriers Act 2015.

12 See for contemporary analyses for example M. Emerson, M. Aujean, M. Catinat, P. Goybet, and A. Jacquemin, *The Economics of 1992: The EC Commission's Assessment of the Economic Effects of Completing the Internal Market* (OUP, 1988), or P. Cecchini, *The European Challenge 1992: The Benefits of a Single Market* (Gower, 1988). For later analysis see *inter alia* W. Molle, *The Economics of European Integration* (Aldershot, 2006).

13 For further analysis on why the SEA could be adopted politically, aside from economic benefits, see for example P. Craig, 'Integration, Democracy and Legitimacy' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2010), ch. 1.

qualified majority. This removed the veto-power of each individual Member State, which had often blocked political decision making before.

With new political vigour and qualified majority voting, the internal market project took off, and was for the major part ‘finished’ in 1992.¹⁴ Work was then started on economic integration with the Maastricht commitment to introduce a single European currency.¹⁵ In addition, work continued to further develop the internal market, which was of course not yet fully finished even though the main aims of the 1992 project had been achieved. Currently, the main areas where the EU internal market needs to be improved concern services and the digital market.¹⁶ After all, the EU internal market was largely developed in a time where the trade in goods made up over 70% of the economy and the internet did not yet exist. In our current digital age and services-driven economic reality, however, some adjustment may be in order. The need for adjustment and modernisation also creates opportunities for more recent forms of regional integration. They can leap-frog ahead and develop their internal market law with these new challenges and opportunities in mind. In addition, newly formed internal markets may also learn from the EU struggles to include a social dimension in the internal market, as a failure to do so may undermine the legitimacy of the market in the longer run.¹⁷

9.4 Combining Negative and Positive Integration

The EU internal market depends on a combination of negative and positive integration. A full understanding of the internal market therefore requires a proper understanding of both mechanisms, as well as their interaction.

The term negative integration denotes the use of legally enforceable prohibitions that forbid Member States to restrict free movement. For example, Article 34 TFEU prohibits any Member State rule that restricts the free

14 See the Commission Recommendation of 12 July 2004 on the transposition into national law of directives affecting the internal market, O.J. [2005], L 98/47.

15 See further EU chapters 1 and 13 on this process.

16 See for more discussion EU chapter 12, as well as the newly launched Commission initiative on the Digital Internal Market, available via <https://ec.europa.eu/priorities/digital-single-market_en>.

17 See on this increasingly problematic issue B, de Witte, ‘Non-Market Values in Internal Market Legislation’, in N. Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar, 2006), 75 or the 210 Monti report ‘A New Strategy for the Single Market, At the Service of Europe’s Economy and Society’.

movement of goods unless it can be justified.¹⁸ As this prohibition is directly applicable and supreme, it allows individuals and companies to challenge any national rules that limit their free movement before a national court.¹⁹ Aided by the CJEU and national courts, negative integration therefore allows individuals and companies to act as a kind of legal bulldozers that remove all obstacles to free movement.²⁰ The functioning of negative integration, moreover, depends on courts and individuals, not on political action. It can therefore survive, or even thrive, in periods of political stagnation.

Negative integration in the EU is based on a collection of Treaty provisions that prohibit restrictions on all four freedoms and provide some exceptions for rules that serve public interests.²¹ The structure of the Treaty provisions concerning the different freedoms is very similar. First, the Treaty contains a general prohibition on any obstacles to the specific freedom, then it provides for a limited set of exceptions to the prohibition, based on such issues as public health and national security.²² As indicated above, the Court of Justice has played a key role in making negative integration effective in the EU. For example, it was the CJEU that found all these prohibitions had direct effect, allowing them to be effectively enforced. In addition, the CJEU developed a very wide definition of restriction, meaning that the free movement clauses could be used to challenge an extremely broad array of national rules that *de facto* limited free movement, even if they were not even indirectly discriminatory.²³ Exceptions, on the other hand, were interpreted narrowly, meaning that it becomes harder for Member State to justify restrictions on public interest grounds.

Negative integration, however, has its limits. To begin with, it can only remove national obstacles, it cannot create new, better laws to replace the ones that have been disapplied. Negative integration also depends on individual actors, which may lead to incoherence as some restrictions are challenged and others are not. In addition, negative integration cannot harmonize

18 See for a further discussion of this prohibition EU chapter 10.

19 See EU chapter 4 on the concept of direct effect and its pivotal importance for EU law.

20 On the importance of national courts in this process also see K. Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice', in M. Adams, H. De Waele, J. Meeusen and G. Straetmans (eds), *Judging Europe's Judges, The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2013), 40, as well as EU chapter 9.

21 Articles 30, 34, 35, 45, 49, 56, 63 and 110 TFEU.

22 See generally C. Barnard, 'Derogations, justifications and the Four Freedoms', in C. Barnard and O. Odudu (eds.) *The Outer Limits of European Union Law*, (OUP, 2009).

23 See for example Case 8/74, *Dassonville*, [1974], ECR 837, and EU chapters 10–13.

the restrictive laws that are justified and remain in place. After all, many rules that restrict free movement, such as consumer protection or food safety rules, are highly desirable, and can also be justified under EU law. Free movement is not the same as total deregulation. Where all Member States adopt different but justifiable laws on, for example, food safety, however, free movement of food stuffs would still be seriously undermined. A Dutch dairy producer, for instance, would still have to deal with different food laws in each Member State, which *de facto* undermines the free movement of his product.

For all these reasons, negative integration needs to be complemented by so-called positive integration.²⁴ The concept of positive integration essentially denotes the use of EU legislation to harmonize or replace national laws.²⁵ Such EU rules can then serve the required public interests, such as food safety, without creating unnecessary obstacles to free movement. For example, the EU could adopt a directive on the minimum standards for dairy products. This directive could provide effective and uniform protection to all consumers in the EU, but would also allow producers that meet these minimum standards to sell their product throughout the entire EU. By harmonizing the level of protection at the EU level, therefore, legislation that protects public interests does not have to create differences between national laws that hinder free movement. Under the *Tedeschi* principle, moreover, free movement prohibitions no longer apply once secondary EU legislation is in place. The free movement clauses cannot be used, therefore, to challenge national restrictions to free movement that are based on EU legislation.²⁶

The introduction of harmonization by qualified majority voting under the Single European Act, therefore, was so important because it enabled the

24 Negative integration also creates its own push towards positive integration, for as national rules are set aside, the need arises for EU law to replace them. The East African Community Standardisation, Quality Assurance, Metrology and Testing Protocol and the 2006 East African Community Standardisation, Quality Assurance, Metrology and Testing Act can also be seen as an example, or at least anticipation, of this process.

25 This is often done via directives, usually under Article 114 TFEU, which require all Member States to adopt certain national laws. As a result, all national laws adopt similar provisions, and hence are 'harmonized'. See for the instrument of a directive EU chapter 3.

26 See Case C-5/77 *Tedeschi* ECLI:EU:C:1977:144 and Case C-573/12, *Alands* ECLI:EU:C:2014:2037. Naturally the validity of the EU legislation itself can be challenged, for instance for a violation of free movement principles, under Article 263 TFEU. See EU chapter 7 and K.J.M. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market: Towards a Concordance Rule' (2002), *CMLRev*, 1303.

necessary positive integration to complement the negative integration already spearheaded by the CJEU. In addition to qualified majority voting, however, successful future positive integration also depended on more effective *methods* of harmonization. Initially, the main method used was that of total harmonization. Member States would for instance try to exhaustively regulate all product requirements for a certain product. Such total harmonisation, however, could take a very long time to reach agreement, as all details needed to be agreed upon.²⁷ After the SEA, therefore, the EU also moved towards a new approach towards harmonization that depended more on the setting of minimum standards and mutual recognition.²⁸ This new approach significantly sped up harmonization and improved the quality and effectiveness of the legislation adopted.

In line with the interaction between negative and positive interaction described above, each of the different freedoms discussed in the next chapters will show a similar pattern. First, negative integration is used, with the support of the CJEU, to challenge a host of national regulations. Subsequently, EU legislation is gradually developed to harmonize or replace national legislation, whereby increasingly more modern forms of harmonization are employed. Again, more recent forms of economic integration may learn from some of the detours and dead ends in this process of European integration, as they may try to jump directly towards more effective forms of negative and positive integration.

9.5 Convergence in Negative Integration

Before the next chapters discuss each individual freedom separately, however, it is useful to highlight one further overarching development in internal market law, being the gradual convergence of the different freedoms.²⁹

27 See already J. Pelkmans, 'The New Approach to Technical Harmonization and Standardization' (1987) 25 *CCMS*, 249 as well as the White Paper of the Commission on this point COM(85)310.

28 See <www.newapproach.org>. See also more generally C. Janssens, *The Principle of Mutual Recognition in EU Law* (OUP, 2013), F. Kostoris Padoa Schioppa (ed), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave MacMillan, 2005) or (on the difficulties of this approach) J. Pelkmans, 'Mutual Recognition in Goods: On Promises and Disillusions' (2007) 14 *JEPP*, 699, and M. Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 *CMLRev*, 853.

29 See also Niamh Nic Shuibne, *The Coherence of EU Free Movement Law. Constitutional Responsibility and the Court of Justice* (OUP, 2013).

Each freedom depends on different Treaty prohibitions and exceptions. In addition, there are obvious differences between the different freedoms, since goods, services, capital and especially people have some rather significant differences. Nevertheless, the different freedoms also have a lot in common, and share the purpose of creating an internal market. In line with these commonalities, the case law of the CJEU is showing an increasing convergence and unity in the application of free movement prohibitions and exceptions.³⁰

This convergence can first of all be seen at the general level. In all freedoms, for example, the CJEU has interpreted the prohibitions very broadly, whereas the exceptions that can justify restrictions are interpreted very narrowly. Equally, for all freedoms the CJEU has accepted a category of non-Treaty based exceptions, the so called Rule of Reason exceptions. The CJEU also applies the principle of mutual recognition to all freedoms, even though it was established in the context of the free movement of goods.³¹ Lastly, in most free movement cases, the actual assessment eventually comes down to the proportionality test, which is normally very similar in all freedoms.³²

By now, however, the convergence extends even further than just the general structure of free movement provisions. Case law from different freedoms is now often used interchangeably. *Futura*, for example, concerned the freedom to provide services, yet the CJEU also refers to case law on establishment, workers, and goods, which apparently are also relevant for services.³³ Such convergence can help to increase legal certainty and promote the unity of internal market law. In light of the differences between the freedoms already referred to above, convergence can of course not be total, and differences do and will probably remain. These for example concern direct horizontal effect, the extra-territorial scope of the freedoms or the detailed legislation regulating free movement of persons. Equally, the Keck-exception has so far not been

30 See inter alia S.C. Barnard, *The Substantive Law of the EU. The Four Freedoms* (4th edn, OUP 2015), 24, or already J. Snell, *Goods and Services in EU Law. A Study of the Relationship between the Freedoms* (OUP, 2002) and H.D. Jarass, 'A Unified Approach to the Fundamental Freedoms', in M. Andenas and W.-H. Roth (eds), *Services and Free Movement in EU Law* (OUP, 2002).

31 Case C-120/78, *Cassis de Dijon* ECLI:EU:C:1979:42.

32 For an overview of this ordinary structure as well as an example of a deviation in the context of games of chance see S.C.G. Van den Bogaert and A. Cuyvers: 'Money For Nothing: The Case Law of the EU Court of Justice on the Regulation of Gambling' *Common Market Law Review* 48 (4), 1175.

33 Case C-250/95 *Futura* ECLI:EU:C:1997:239. For further examples of convergence also see Case C-379/87, *Groener* ECLI:EU:C:1989:599, Case C-340/89, *Vlassopoulou* ECLI:EU:C:1991:193, or Case C-19/92, *Dieter Kraus* ECLI:EU:C:1993:125.

applied outside the freedom of goods, and in certain areas the CJEU seems less and less committed to its position that Rule of Reason exceptions can only justify non-discriminatory restrictions.³⁴

The following chapters will further explore these similarities and differences, as they systematically discuss the four different freedoms and their development over time. Considering the comparative objective of this book, moreover, these chapters will focus on the initial and foundational case law in the earlier stages of European integration and the basic structure this case law provided to get the European internal market going.

34 Joined Cases C-267 & 268/91, *Keck and Mithouard* ECLI:EU:C:1993:905, Case C-2/90, *Commission v. Kingdom of Belgium* ECLI:EU:C:1992:310, and Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160.