

Barriers to Business in the Single Market

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1. Introduction

The onset of the global financial crisis raises heightened concerns that economic protectionism will undermine the achievements of the single market, threatening to derail competitiveness and productivity in crisis-hit economies in Europe. With the sovereign debt crisis assuming center stage in political and academic debates, (see Howarth et al., 2012) recent efforts to bolster the single market has elicited few commentaries (Pelkmans 2010; Egan, 2012a; Heremans, 2011). Although often viewed with 'suspicion and fear', the drive to complete the single market has once again moved to the top of the political agenda, after a series of concrete proposals aimed at promoting incentives for greater economic growth and innovation through a revitalized single market strategy (Pelkmans, 2010; Egan 2012a; Howarth and Sadeh, 2010). Despite the erosion of political and social support for market integration, due to internal market *fatigue*, the 2010 Monti Report and subsequent Single Market Acts in 2011 and 2012 have sought to reconcile market integration with social concerns and commitments

through a series of proposals to deepen the single market (Monti, 2010, European Parliament, 2010).¹

However, the global context in which the single market now operates has fundamentally changed, as economies of scale and mass production have been replaced by a knowledge and service economy based on product differentiation and global value chains. Though the new single market proposals focus heavily on opening up the single market in energy, digital, consumer and transport sectors, greater attention is clearly being given to remaining distortions to trade and innovation that affect business operations (BIS, 2011). European heads of state acknowledge "restrictive practices are rife" and that "implementation overall falls short of what is needed to open up markets fairly to competition" (House of Lords, March 18, 2011). The functioning of the single market is especially important for business exposed to international trade, as market openness impacts investment and trade patterns. Various authors have advanced that the persistence of barriers facing EU business in EU cross border trade impact on the level of trade integration. (Aussilloux et al., 2011, Chen and Novy, 2011, Fontagné et al., 2005; Vancauteran, 2002, Atkins, 1998).

Variation in rules brings additional export costs that only some firms are able to overcome (Mayer and Ottoviano, 2007). For other companies, the heterogeneity in rules protects their market share and shields them from foreign competition (Mansfield and Busch, 1995; Lejour, 2010). However, addressing regulatory barriers to trade is difficult as it is often hard to separate the protectionist intent of regulations from their purely domestic social welfare objectives (Smith, 2010).

If firms face a plethora of domestic rules and regulations that create market entry barriers and restrict trade flows, despite the adoption of European-wide rules, then the

¹ The European Commission's Communication "Towards a Single Market Act" (2010), which resulted in extensive public consultation and legislative revision, formed the basis of the Single Market Act agreed upon in April 2011 (European Commission, 2011).

single market instruments are not fully effective as various barriers continue to impede market integration. At face value, the national scorecards and transposition records produced by the European Commission suggest high rates of compliance with European laws. Generally, it is assumed that the expansion and integration of national markets have been widespread as states have coordinated their efforts to align economic and legal boundaries to allow for the free movement of goods (Siegel, 2011; House of Lords, 2011; Guimarães and Egan, 2012). However, the reality for business may be very different as several studies have highlighted that *de facto* trade integration lags far behind *de jure* integration (BIS, 2011; Lejour, 2010; Kox and Lejour, 2005).

This paper focuses on the challenges encountered by businesses operating in the single market. We use a unique data set on business complaints regarding the free movement of goods, considered one of the most integrated and successful areas of market integration, to assess the types of barriers that firms encounter and to see which strategies are most effective in resolving these discriminatory domestic trade and regulatory practices. We examine three key questions: Which are the most pervasive barriers firms encounter in trade across member states? Which dispute resolution mechanisms are utilized to address complaints of firms to improve the functioning of the single market? Under what conditions are soft or hard law enforcement mechanisms more likely to be used to resolve barriers for businesses operating in the single market? Our goal is to connect the literatures of compliance and enforcement with that of trade barriers. Although each has been the focus of extensive analysis, there has been limited systematic linkage between trade barriers and enforcement of the single market rules from a firm perspective.

The paper is structured as follows: Section 2 is a brief overview of efforts at improving the governance of the single market over the past two decades. Section 3

focuses on the functioning of the single market for firms, based on business perceptions of operating conditions in the single market, and on business complaints to the EU Commission on trade barriers they encounter in EU cross border trade. Section 4 assesses the different hard and soft law mechanisms to promote compliance with single market rules, and then conducts a probit estimation to see whether specific characteristics of the business complaints about trade barriers influence the choice of the enforcement strategy, and whether they are more likely to result in litigation rather than informal negotiations and subsequent compliance. The conclusion highlights the importance of continued market surveillance to make the single market deliver, as the empirical findings illustrate that there is not just cross-country variation in compliance rates, as demonstrated by much of the existing literature, but also states opting for different enforcement mechanisms to resolve business complaints, and variation across types of barriers that firms encounter and types of instruments used to implement them. Although common rules can reduce business uncertainty and foster reciprocal market access, the literature has predominantly focused on explaining either variations in compliance and implementation across member states (Falkner et al, 2005; Börzel et al, 2010) or the increasing differentiation of rules and policies that reflect a more variable mode of integration, undermining the uniformity of the single market (Hanf, 2008; Howarth and Sadeh, 2010(a) (b); Dyson and Sepos, 2010). These studies have offered explanations that focus on the characteristics of member states, using arguments such as high incompatibility between prior national regulation and the European standards, incorrect transposition of European laws, or domestic opposition contesting implementation and compliance. Few, if any, have focused on the problems of non-compliance from the perspective of firms (Guimarães and Egan, 2012).

2. Single Market Governance

The core economic project of the EU is the single market. Since its foundation, the single market has sought to eliminate barriers to the flow of goods, capital, services and labor, while also regulating economic activity within and across borders to deal with commercial and economic developments, both in terms of transaction costs and market entry barriers, negative externalities and socially harmful risks. The EC 1992 program reflected a large scale market liberalization effort combined with European regulation that produced much more than originally outlined in the White Paper Completing the Internal Market (Pelkmans, 2010). Aimed at addressing barriers and frontiers in highly sensitive sectors, the single market program provided early examples of innovative regulatory strategies such as mutual recognition among national authorities and delegation to private governance bodies. Though the single market was not complete with the "1992" program, the aim was to promote competition and create the political climate for the next steps at market integration. It had wide and differentiated consequences on businesses in almost all countries and sectors of the European economy.

While discriminatory regulations create some rents for domestic incumbents, the EU pursued a range of options to address market distortions, focusing heavily on improving regulatory quality and governance to improve the functioning of the single market (Radaelli, 1998). These efforts are documented by the single market review of the European Commission (European Commission, 2008). Successive Commission Presidents have pushed for regulatory reform, with Santer launching a regulatory simplification initiative (1996), Prodi promoting an action plan on better regulation (2002), and Barroso seeking to simplify regulatory initiatives and provide for regulatory impact assessment in monitoring and evaluating new legislative initiatives (Barroso, 2009). These proposals amount to a general effort to improve enforcement of Single

Market laws, simplify rules, and deal more successfully with infringements by member states. The creation of a scoreboard to pressure member states to be more responsive to their legal obligations within the internal market, a measure strongly advocated by then Commissioner Monti, highlights the growing emphasis on monitoring single market compliance (Radaelli, 1998).

For many scholars this represents a management deficit (Metcalf, 1996) where administrative capacity and coordinating mechanisms do not match that of member states, causing implementation and enforcement problems (Sutherland, 1992). Systematic sector and industry monitoring, which would help identify and address specific obstacles that firms face in the single market is scarce, with greater focusing on the net benefits given the distributional impact of market integration (Holmes and Rollo, 2010). For others, the problems reflect the increasing complexity of policy-making due to “differentiated integration” in applying the *acquis* (Dyson and Sepos, 2010, p.5), as member states need time to adjust to specific rules through temporary derogations or seek to pursue “state interests” through permanent derogations and opt outs (p.12). Indeed, if differentiated integration involves “adopting different formal and informal arrangements (hard and soft) inside or outside the EU treaty framework” (Dyson and Sepos, 2010, p. 4), then the use of trade barriers in the single market and the strategies EU member states use to address non-compliance can be seen as a response to the differential application of EU law in some policy domains (Hanf, 2008). Although such new modes of governance can be viewed as a “political tool for managing integration in the presence of diversity of interests, of institutional capacities and identities” (Dyson and Sepos, 2010, p. 9), they can also create additional costs for business in meeting multiple rules and market entry conditions.

Renewed political momentum followed the 2010 Monti Report, which proposed an ambitious "new strategy to safeguard the single market from the risk of economic nationalism" and offered a genuine *strategy* to revive the single market (Heremans, 2011; Pelkmans, 2010). Warning that "across industry lines, business is unhappy with the many remaining obstacles in terms of fragmentation and bottlenecks", Monti concluded that in the long term there is a need for a "more coherent enforcement system in which infringement procedures, informal problem solving mechanisms and private enforcement through national courts form a seamless web of remedies against breaches of EU law." (Monti, 2010, p. 9). However, in the short term, the report calls on the Commission to use its existing infringement powers with increased determination and align it with those it currently has under competition policy (Monti, 2010, p. 98).

A core feature of these is recognizing that stakeholders need to be involved in all stages of the policy process including implementation, enforcement and monitoring so that member states and local governments have a 'collective commitment' to market integration (Heremans, 2011). The goal is to draw up transposition plans for the implementation of new legislative proposals adopted as part of the newly agreed upon Single Market Act (European Commission, 2011), but equally important is delivering a functioning single market through assessment of the state of implementation of market rules (Monti, 2010, p. 94). With 55% of European laws not implemented by the deadline, with over 1200 cases subject to review and potential judicial action due to non-compliance with European rules, the law on the ground is very different from the legal framework of the treaties. To improve the credibility and effectiveness of the single market, Monti stressed the need for soft law mechanisms to deal with market access problems, and improvements in the operation of hard law mechanisms such as the infringement process to deal with non-compliance with single market directives (see

House of Lords, 2011; Heremans , 2011; Pelkmans, 2010). This is not a new issue for the single market, but it raises important concerns about the effectiveness of remedies against breaches of EU law and what dispute mechanisms work best to address persistent trade barriers (Monti, 2010, p. 97)

3. Is The Single Market Working For Firms?

3.1 Business Perceptions

Business mobilization and lobbying success is the subject of extensive analysis in the EU interest group literature (Eising, 2009; Coen and Richardson, 2009). Assessments of business perceptions towards the single market are far less common, although .privately conducted and government funded business surveys have focused on the business climate in Europe. Looking at business practices and attitudes towards the single market, it is clear more obstacles remain than are captured by EU compliance statistics, which highlight high degrees of transposition and implementation of EU laws, often in marked contrast to the practical on-the ground experience of firms engaged in cross-border activities (Pelkmans and Brito, 2012). Among the largest resources is the *European Business Test Panel* where the most recent survey indicates that diversity of national rules is the main obstacle to cross-border trade in the single market (EBTP, 2011a). Of those firms surveyed that conduct cross-border trade 56% encounter high levels of administrative barriers in another member state, 40% believe that public authorities discriminate between national and foreign businesses, and 17% do not engage in cross border trade due to the legal and tax requirements that constitute barriers to market entry.

Other surveys conducted of British, Swedish, and Finnish firms, found that a substantial minority of firms had faced legal or administrative barriers to trade,

including measures they felt represented protectionism by another member state². Smaller firms were most likely to find such measures prohibitive. The Federation of British Industries, for example, reported that 90% of small firms surveyed did not have the resources to treat the EU as their home market due to the red tape, and wanted more attention given to removing barriers to trade in goods and services in the EU (Child, May 9, 2011; UKTI, 2010).

Eurobarometer surveys found that large firms attach more importance to removing the remaining technical barriers to trade in goods than SMEs (2006, p.36), and that business generally wanted increased European-wide standardization (Eurobarometer, 2010, p.11). Overall 30% of businesses recognized the positive impact of European product standards on their business activities, but one in two claim that they have been unaffected by the changes in such product rules and specifications. (Eurobarometer, 2006, p.7). European businesses remain concerned about the enforcement of European rules regarding four freedoms and rights of establishment, with one out of five French and German businesses indicating that their export potential is hampered by prospective or perceived regulatory barriers (Eurobarometer, 2010; Guimarães and Egan, 2012). While businesses understand that some of these restrictions may be justified under European law, thus requiring adjustments in their cross-border strategies and operations (Pelkmans and Brito, 2012), almost 80% consider that one of the most important areas for future EU policy is establishing a common set of rules, rather than having separate rules in each individual member state which increase overall business costs.

3.2 Barriers to trade

² These surveys were conducted respectively by Open Europe (2006), Swedish National Board of Trade (2011), and Ministry of Foreign Affairs of Finland (2009).

To further assess the pervasiveness of cross-border trade impediments in the single market and the pattern of compliance with the free movement of goods, we draw on a large original dataset provided by the European Commission containing information on business complaints on violations of articles 28 and 30 of the EU Treaty, presently article 34 and 36 of the Treaty on the Functioning of the EU (TFEU), as well as on the subsequent efforts to address them. The data set contains 2319 infringement cases and covers the period from 1961 to 2002.³ It provides information on the EU15 member states but not on the post 2004 enlargement member states. Aggregation of the data was required to allow for statistical analysis. The data was categorized and coded along several dimensions, including a) member state; b) type of industry; c) category of barrier; d) national policy instrument that implements the barrier; and e) enforcement mechanism used to address the violations.

To better understand firm level impacts, we conducted bivariate analysis of the relationship between member states and types of barriers, and types of barriers and industries, and the results show that there are significant relationships between them.⁴ The data indicates that firms encounter more obstacles to cross border trade in France, Germany and Italy, which account for over 50% of the notified restrictions in the single market in goods. The food sector is the most problematic in terms of overall notified trade barriers (31%) followed by the automotive sector, (18%), equipment (13%), health (11%) and chemicals (8%). Companies have complained about restrictions in exporting foodstuffs in thirteen of the EU 15 states, targeting Greece as the most restrictive state (46%) with Germany, Ireland, Italy, Luxembourg, and the Netherlands all registering more than 30% of overall reported barriers in this sector, making it the most

³ Since then, the data set has not been updated; this may be due to the adoption of alternative conflict resolution mechanisms.

⁴ The chi-square statistic is significant at the 0.000 level for member states and types of barriers (2197 observations); and significant at 0.000 level for types of barriers and industrial sectors (1680 observations).

problematic in terms of obstacles to cross border trade (c.f. Jervelund et al., 2012). The food sector is the most affected by barriers in France and Italy (18% each), followed by Germany (16%) and Greece (12%). Health industries face more barriers in Germany (28%), followed by France (12%). The automotive industry experiences significant barriers in France (30%), while in the chemical industry there are more barriers to entry in Germany and France (19% each) and the equipment sector is mainly affected by barriers in France (21%).

In terms of the relationship between types of barriers and industries, the results show that technical barriers and administrative practices (comprising product requirements, labeling and packaging) are the most frequent barriers in the single market (56%) and are mainly used in the food (35%) and automotive (26%) industries. In the health sector, government restrictive practices and general policies relating to intellectual property rights, monopolies and subsidies account for more than 25% of business complaints. Barriers related to mutual recognition affect primarily business in the equipment industry (31%). The primary type of barrier existing across all industrial sectors involve technical barriers and administrative practices, ranging from as much as 35% in the equipment industry up to 72% in food sector. The pervasiveness of barriers in some sectors seems to be associated with rent seeking behavior which keeps the EU single market fragmented and limits the capacity of member states economies to fully reap the benefits of the single market. Non-tariff or institutional barriers are thus a crucial impediment for firms cross-border trade "as they may function as a fixed export cost that firms have to overcome" before they are able to successfully operate in multiple markets (Smeets, 2010).

4. Strategies of enforcement: Evaluating Hard and Soft Law Mechanisms

Though the single market imposes formal obligations that supposedly restrict protectionist pressures and promote market access through removing trade barriers, it is difficult for states to promote market liberalization when domestic conditions worsen (see Egan, 2012; Pelkmans et al., 2008). Compliance with international commitments becomes increasingly important to ensure that violations of treaty obligations are costly so that governments follow through on their trade commitments. How credible are different strategies that the EU uses to 'tie the hands' of member states and ensure that protectionist pressures do not undermine export oriented businesses abroad by retaining restrictive rules and administrative barriers? Börzel et al. (2010) explain that the European Union must carefully balance the trade-offs between a judicial enforcement approach and a more flexible approach which relies on persuasion, learning and socialization as a means of altering member states behavior and strategic calculations, so that they comply with European rules and norms. Empirical studies of compliance provide evidence that enforcement, management and socialization approaches are each supported and relevant in improving European regulatory (Mbaye, 2001; Tallberg, 2002; Börzel et al., 2010). More recent studies also highlight variation across policy areas and legislative tools, due in part to differences in monitoring capacity at the national level, growing complexity of legislative acts, and the salience of administrative discretion that has fostered more non-judicial formal and informal efforts at negotiated solutions to compliance problems (Börzel et al, 2010; Maestenbrock, 2005).

Keleman (2006) in his work on adversarial legalism contests this view, arguing that the systemic judicialization of the single market is high, as the European Union has created new mechanisms for rule-making and monitoring compliance. By contrast, new modes of governance have attracted significant attention as soft law, voluntary agreements and self-regulation are seen as offering more flexible means of compliance,

and an alternative to the judicialization of policymaking (Trubek and Mosher, 2003; Radaelli, 1998). While this enhances our understanding of the politics of compliance, questions about the strategic impact on firms, the likelihood of choosing to settle through formal judicial or more informal mechanisms, and the preferred mechanisms to address trade barriers remain understudied. Although there are several studies on how the EU circumvents institutional gridlock (eg. Héritier, 1999), these accounts of organizational dynamics focus on the institutions themselves rather than the preferences, choices and actions of firms in choosing such mechanisms. Existing approaches to noncompliance with European laws focus on the preferences and strategic choices of states or the institutional constraints that affect outcomes rather than on the efficacy of compliance solutions for firms (Eberlein and Radaelli, 2010). Building on this extensive literature on compliance we suggest two hypothesis about the relationship between trade barriers and their possible resolution: (1) small states are more likely to use soft law mechanisms as they are less able to bear the cost of judicial actions, and so are more likely to settle disputed barriers prior to litigation and potential sanctions; (2) more persistent barriers exist where states seek special exemptions, and promote integration through mutual trust and reciprocity rather than harmonized laws, as this allows more discretion, and thus greater probability for protectionist practices.

4.1 Infringements

Although enforcement of European law is the responsibility of the Commission and the member states, the European Commission has the right to bring legal action against member states that it believes have not met their legal obligations. These proceedings begin with administrative notification by the Commission and the possibility of voluntary member state compliance, followed by a formal Commission opinion

requiring Member State reply, and ultimately referral of the case to the European Court of Justice (ECJ). If the member state does not follow the ruling of the ECJ (article 258 TFEU), a second infringement procedure can be initiated and financial sanctions can be imposed (article 260 TFEU).

Although infringement proceedings do not provide absolute levels of non-compliance, Börzel notes that they do allow comparison of non-compliance cases across member states and across time (Börzel et al., 2010; Börzel, 2001). Börzel finds that the application of compliance instruments, and especially judicial proceedings and sanctions, can alter the cost benefit calculations of states as they face legal costs and reputational losses for non-compliance (Panke,, 2012; Börzel et al., 2010). The jurisdictional control by the Court can however lengthen the dispute resolution process, as infringement proceedings may have been the result of highly politicized opposition domestically. This is particularly true if the costs are concentrated or if the perceived costs of compliance are high in terms of the rate of return so that there is pressure to maintain the status quo (see also Siegel, 2011).

4.2 Soft Modes of Compliance

The single market relies heavily on different modes of governance to achieve regulatory coordination (Schmidt, 2009). Because the EU adopts detailed harmonized regulations as well as more flexible alternatives such as mutual recognition, while also promoting self-regulation, co-regulation, delegation to private bodies, and relying on member states to ensure compliance, it has shifted the transaction costs from market integration to the implementation stage (Schmidt, 2009, p.8). For firms, the major criteria is whether the regulatory regime works in practice and if there are mechanisms in place to address the conflicts that emerge from non-compliance (see Smith, 2010;

Pelkmans, et al., 2008; Schmidt, 2009). Instead of opting for formal infringement mechanisms, the European Commission has also promoted more informal problem solving capacities that firms can utilize prior to the infringement process. Interactivity, information sharing, voluntary cooperation and negotiated resolution of non-compliance (Woll et al., 2007) legitimize informal governance and may promote “internalization” of European rules by firms, dissuade non-compliance and persuade more adherence to single market rules. This "facilitated coordination" differs from the more formal implementation process in focusing on deliberation between public and private actors, and at different levels of government.

For example, the Solvit network created in 2002 is designed to address barriers created by the misapplication of single market rules, through informal coordination among member states without resorting to legal proceedings, to solve perceived violations of EU law. Companies can seek pragmatic and rapid solutions to barriers to trade, and the Commission may also refer complaints to Solvit if there is a good chance that the barriers can be removed without legal action. Sometimes overcoming the barriers requires a change in national legislation, administrative practices, guidelines and other formal implementation provisions that Solvit cannot resolve. However, business is not widely using the Solvit mechanisms to resolve cross-border trade barriers. According to Jervelund et al. (2012), as of 2011 less than 25% of the cases presented to Solvit centers originated from businesses, compared to the larger use by citizens. Moreover, in 2009 80% of the businesses in the survey had never heard of Solvit and of those who had only 1 in 7 used its services to overcome trade barriers caused by the incorrect application of EU law (EBTP, 2009). By 2011, 45% had still not heard of Solvit though 83% would have used this option if they had known of it, suggesting that there is still untapped potential for conflict management mechanisms in

the single market (EBTP, 2011a). Perhaps more illustrative of business concerns, 30% of business indicated that they would accept the national requirements of another member state even if they were not in compliance with European law (EBTP, 2010). This sheds a different light on compliance problems in the single market, as firms themselves opt for non-opposition to the status quo. The costs of filing a complaint with the Commission, or even of resorting to more soft mechanisms of compliance through Solvit, are perceived as higher than the production costs involved in adapting to different national regulations. With 11% opting out of cross-border trading opportunities due to the problems encountered by the incorrect application of European laws by another member state, these lost business opportunities are not captured by much of the current literature on the single market.

Increased reliance on informal mechanisms has translated into two additional initiatives - the EU Pilot and Enterprise European Network schemes - both created in 2008 to address impediments to cross border trade through negotiation, learning and deliberation. Table 1 shows the diversity of presently existing informal mechanisms to improve compliance and a better functioning of the single market. These include

Table 1. Informal mechanisms to address single market non-compliance issues

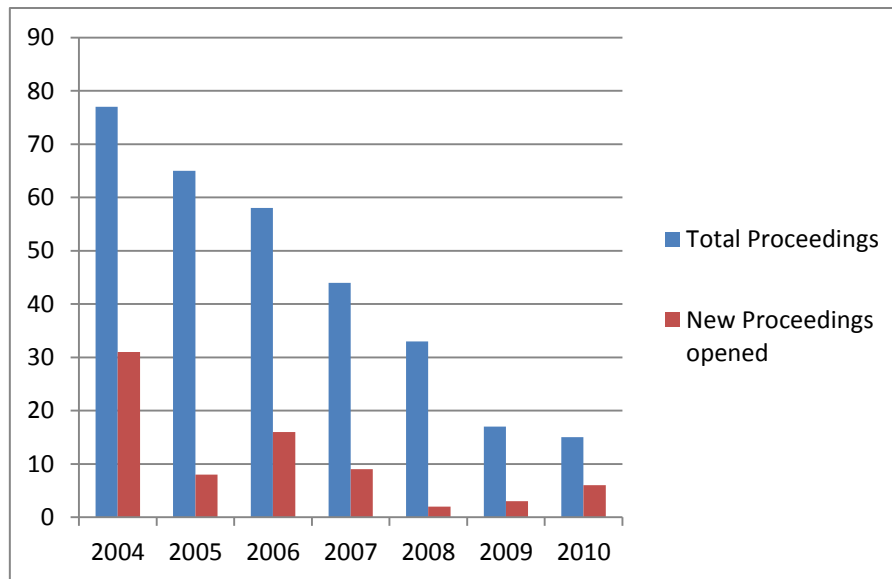
	Preventive initiative	Channel for request of information and advice	Channel to report barriers	Soft dispute resolution scheme	Pre litigation administrative initiative
TRIS - Technical Regulations Information System	X				
IMI - Internal Market Information System	X				
RIA - Regulatory Impact Assessment	X				
RAPEX - Rapid Alert System for Non-Food Consumer Products	X				
RASFF - Rapid Alert System for Food and Feed	X				
Internal Market Scoreboards	X				

Your Europe		X			
Europe Direct		X			
ECC-NET - European Consumer Centers Network		X			
EEN - Enterprise Europe Network		X			
EU Pilot		X	X	X	
Solvit				X	
Ad hoc contacts				X	
Package Meetings				X	
Networks of civil servants				X	
FIN-Net				X	
European Small Claims Procedure				X	
Letter of formal notice					X
Reasoned Opinion					X

preventive initiatives of market surveillance and channels to address requests of information and advice, and channels to actually report barriers; a set of different soft dispute resolution schemes to solve complaints were created, and in case an actual proceeding is opened by the Commission, it tries to use up its pre-litigation administrative initiatives before referring the case to the Court. Since 2002 until mid-2013, Solvit services alone registered 530 complaints from European firms related to the free movements of goods in the Single Market, representing 36% of all business complaints.⁵ Consequently, there has been a decrease in the total number of formal infringements proceedings handled by the Commission as well in the number of new cases opened after these informal mechanisms were introduced, as shown in Figure 1.

Figure 1. Decrease in the number of formal infringement proceedings

⁵ The data was made available to the authors by the European Commission Solvit services in July 2013.



Source: Data compiled from the *Annual Reports on Monitoring the Application of EU Law*. European Commission (2005-2011).

Although these informal methods are supposed to encourage more firms to voice concerns about the single market, through business organizations from both EU and non EU countries, the most recent EBTP (2011) survey showed that EU businesses have mixed opinions regarding the European business support networks. Though 41% say they would contact them, about 25% say they would not, and another 25% don't know whether or not they would. Indeed, of the respondents surveyed only 6% have actually contacted these networks. This evidence suggests that opportunities to further exploit these informal and preventive initiatives and procedures exist; indeed, they can contribute to "EU growth through enforcement" (Jervelund et al. 2012, p. 58) as pre-infringement approaches can reduce transaction costs for firms, improve market access and enhance competition in the Single Market.

4.3 Enforcement Mechanisms in Single Market: an application of the probit model

Surprisingly few studies have assessed whether states would be more likely to use hard or soft law mechanisms to solve business complaints about barriers in the single market. Using probit analysis, we are able to assess whether strategies of compliance vary by country, whether barriers in specific sectors are more likely to be resolved by legal infringements, or whether specific trade barriers are more likely to be subject to judicial proceedings. Recognizing that litigating incurs costs, we measure the determinants of having a case solved in the EU court by conducting multiple probit estimates. For each of the EU 15 member states, we include several explanatory variables: (1) the industrial sectors aggregated into the following categories – automotive, food, equipment, chemical, and other industries; (2) the types of barriers, classified as technical barriers and administrative practices, government restrictive practices such as public procurement and intellectual property protection, mutual recognition, and other barriers⁶; (3) implementation instruments, relating to the policy tools used to apply the barriers, namely legislative acts, administrative practices and other less conventional instruments.

Based on our review above, we assume that member states have different preferences on whether or not to refer an infringement to the EU Court. Though the vast majority of cases are settled in the early stages of infringement proceedings (see Menindrou, 1996), the application of judicial sanctions and enforcement mechanisms can alter the cost benefit calculation of states (Panke, forthcoming). Recognizing that using the EU Court involves costs we expect that small states with fewer resources to be more likely to use soft law mechanisms. We also expect that small states may prefer soft law mechanisms due to fear of retaliation or due to reputational reasons associated with the publicity that a EU Court decision on the existence of a violation of EU

⁶ The taxonomy was based and adapted from UNCTAD (2000).

internal market law may entail (see also Panke, forthcoming). The business cost of such negative publicity is higher for smaller than for larger countries. Finally, we expect the countries with the best transposition and implementation rates to have the best rates of compliance and thus to have the lowest rates of litigation and judicial sanctions. As a result these countries are less likely to go to court and more likely to resolve problems quickly to maintain their reputation and credibility in the face of peer pressure. We also assume that the industrial sector where the infringement occurs, the type of barrier and the instrument that implements the barrier can also influence the decision whether or not to resort to the EU court to solve an infringement.

As for differences between industries, we expect the use of the EU Court to be less likely in industries such as chemicals and automotive where the market is characterized by the existence of large companies that want to avoid the reputational costs of having their business practice condemn by the EU Court. We expect the food and health industries which can use specific exemptions as a means to retain domestic health and safety regulations to be most likely to resist domestic changes in laws and continue to restrict foreign products on their markets through various administrative and regulatory barriers.

We also expect the coefficients for the types of barriers to be different. Barriers resulting from non-implementation of mutual recognition may be more likely to be solved outside the EU Court as a result of strong business criticism in the 1990s of the legal tradition of “basing everything on case law” (Pelkmans, 2010a) which was directly impacting on cross-border market access. . In the case of technical barriers and administrative practices s and government restrictive practices and other policies barriers, on the contrary it is harder to separate potential protectionist intents from legitimate public interest goals, such as protection of health and life of humans or

protection of industrial and commercial property and to prove that restrictive practices and policies are not used as means of arbitrary discrimination and as disguised barriers to trade among member states.

Regarding the policy instruments that implement the barriers, we expect that the case is more likely to go to the EU Court if the barrier is applied through an administrative practice, as this may be subject to different interpretations and the member state may try to get favorable decision in the Court; as Versluis (2007) argues 'practical' or 'administrative' implementation relates to socio-political interpretation. Legislative acts are assessed against the "law on the books", and may more bluntly be violating the free movement of goods, thus the chances of winning a case in the Court are smaller and informal modes of enforcement are preferred over adversarial strategies.

Our dependent variable is the solution of the case where $Y=1$ if the case is solved in Court and $Y=0$ if the case has an out of Court solution. We controlled for country of origin of the infringement, for the industrial sector where the infringement occurred, for the type of barrier and for the instrument used to implement the barrier. The reference group includes the cases with the following characteristics, France, food industry, technical barriers and administrative practices and legislative acts, which all had the highest frequencies. The expected rate of a case going to court for the reference group is 18,27%. The results of the probit estimation are shown in Table 2.

If we control for country of origin, the coefficients for Germany, Italy, Luxembourg, United Kingdom, Ireland, Belgium, Denmark, Finland, Sweden and Austria are not significant, therefore the probability of their infringements going to court is not different from France. The results for three countries (Spain, Portugal and Greece) are statistically significant and have negative signs, showing that these countries are more likely to solve infringements through soft law mechanisms. Spain

and Portugal have the highest likelihood of solving the cases outside of court (17,5% and 17% smaller probability respectively, relative to France), followed by Greece (7%). The results for The Netherlands, on the contrary, have a positive sign and are statistically significant; the Netherlands is in fact 16% more likely to solve its cases in court than France. These results suggest that the hypothesis put forward in the compliance literature that small states are more likely to use soft law mechanisms is not confirmed, as size seems not to explain the use of informal methods. Instead the use of soft mechanisms seems to be associated with the southern Europe enlargement countries. Our results are in line with Börzel's (2000) conclusion that Greece, Spain and Portugal have a lower number of infringement cases referred to the EU Court of Justice, whereas Italy, on the contrary, is on top of the list of countries with references to the Court.

When we control for the industrial sectors, the automotive, chemical, equipment and health industries, all are more likely to have cases solved outside the EU Court than the Food industry, in particular the infringements on the Chemical sector, which are 14% less likely to go to Court. The prevalence of infringements referred to the ECJ related to food industry may be associated with the fact that often national industries operate under different strong regulatory barriers and domestic standards, and in some EU countries in the absence of relevant legislation in some EU countries, which associated with costly conformity requirements, may explain why infringement cases are less likely to be settled in the initial, non-judicial stages of the proceedings.

Controlling for the types of barriers, two are less likely to go to Court as both display negative signs and are significant - mutual recognition obstacles (less 22%) and Other barriers (less 19%).⁷ Finally, the estimates of the implementation instruments

⁷ Due to collinearity the variable "behind the border barriers" was dropped out.

control variables are statistically significant, though administrative practices have a positive sign and other less conventional instruments a negative sign. This indicates that barriers resulting from administrative instruments are 27% more likely to go to Court than barriers contained in specific national legislative acts, which confirms our initial hypothesis. Violations of the free movement of goods resulting from administrative practices related to paper work requirements and red tape for example, are thus more likely to be sent to Court than barriers contained in legislative acts that were not amended by timely transposition, for example; the former allow for more discretion and may easily be used as disguised protectionist measures calling for litigation in the court rather than mutual trust and informal mechanisms.

Table 2. Resolution of trade barriers by formal means

	Variables	dy/dx	P>z	
Countries	Germany	-0.0415842	0.133	
	Italy	0.0109542	0.725	
	Luxembourg	0.0647446	0.458	
	Portugal	-0.1707338	0.000	***
	United Kingdom	-0.0080468	0.838	
	Spain	-0.1750898	0.000	***
	Ireland	0.1110551	0.153	
	Belgium	0.0840578	0.058	
	Greece	-0.0779679	0.006	**
	Netherlands	0.1661687	0.002	**
	Denmark	-0.0100438	0.869	
	Finland	-0.0722197	0.380	
	Sweden	-0.0616594	0.380	
Austria	-0.073695	0.129		
Industries	Automotive	-0.1253801	0.000	***
	Chemical	-0.1482136	0.000	***
	Equipment	-0.0739023	0.003	**
	Health	-0.0813493	0.000	***
	Other Industries	0.0056766	0.820	

Types of Barriers	Mutual Recognition	-0.2182201	0.000	***
	Other Barriers	-0.1929913	0.000	***
Implementation Instruments	Administ. Practices	0.2742367	0.000	***
	Other Instruments	-0.2046603	0.000	***

*** $p > 0.001$, ** $p > 0.01$, * $p > 0.05$

5. Conclusion: Is Single Market Working for Firms?

Recognizing that one of the most pervasive problems in the single market is the lack of compliance with European rules, European policymakers have been concerned that this is undermining the effectiveness and credibility of the single market. Although on paper EU level single market laws and regulations attest to substantial market liberalization in product markets, the reality on the ground is somewhat different. Business has complained of multiple problems resulting from administrative and regulatory barriers that member states have retained, despite the adoption of European-wide rules. Business surveys and statistical analysis of infringement cases based on documented complaints reveal a mixed pattern of compliance across Europe, which affects both intra-EU trade, as well as non-EU exporters. Remaining barriers to business in the single market indicate that despite more interdependent markets, some industries fare better than others in seeking export markets, that small and medium companies are discouraged from moving beyond their home market, and that rent seeking in some sectors is keeping the domestic economy partly sheltered from the full competitive effects of the single market (Monti, 2010, p. 15). The resulting market surveillance has generated both formal and informal mechanisms to remove such barriers to trade, with the threat of judicial proceedings and sanctions, if states do not comply.

Our results show that the probability of getting a resolution by non-judicial mechanisms is much higher in Southern member states of the EU of the 1980's

enlargement as they are more likely to seek informal means to address barriers to trade. The discretion used by states in many administrative practices causes significant problems for firms as many of these cases risk to end up being the subject of lengthy litigation efforts before the European Court. And finally, for firms, they can expect the most significant problems in the food sector where states are reluctant to change domestic regulations, so they are more likely to be engaged in long protracted litigation before getting resolution to their complaints.

In sum, barriers to a true single market remain plentiful. It is important in the current effort to relaunch the single market to distinguish between new legislative initiatives and the enforcement of existing rules. In the latter case, confronting member states may be difficult politically, but in some instances soft law mechanisms are likely to be more effective if they operate in the 'shadow of hierarchy' (Scharpf, 1997). These limited formal sanctioning powers are often preferred by most member states, even as these persuasive modes of governance are backed by the possibilities of judicial enforcement and financial sanctions. If states improve their compliance with the single market, in part by using recently created, informal mechanisms, then this will likely reduce uncertainty for business, foster new trade and export relationships, and harness the unexploited growth potential of the single market by lowering market entry costs.

Finally, while the untapped potential of the single market requires the adoption of new rules and policy initiatives in response to changing economic conditions, the enforcement of existing rules in goods is viewed as a successful model for application to other areas of the single market. Moreover, these efforts in goods markets may also have outward benefits for European firms. Negotiations for the elimination of NTBs and creation of transatlantic standards within the framework of the Trade and Investment Transatlantic Partnership are expected to expand business opportunities for European

firms, as NTBs and standards constitute the main obstacle for European exporters in gaining access to the U.S. market. Successful initiatives in the single market may be used as a model in current efforts to create a transatlantic market, particularly in sectors in which European producers have a large share of bilateral trade. Building, developing and improving governance in both markets may push more structural domestic reforms in EU member states.

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