

Extract from:
Jacques Pelkmans and Giacomo Luchetta,
"Enjoying a Single Market for Network Industries",
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FOREWORD

by Jonathan Faull¹

In its "Single Market Act II" communication issued on 3 October 2012, the European Commission emphasised the importance of developing "fully integrated networks", particularly in the transport and energy sectors.

Four key actions were identified:

1. Open domestic rail passenger services to operators from another member state to improve the quality and cost efficiency of rail passenger services.
2. Establish a true single market for maritime transport by no longer subjecting EU goods transported between EU seaports to administrative and customs formalities that apply to goods arriving from overseas ports.
3. Accelerate the implementation of the Single European Sky to improve safety, capacity, efficiency and the environmental impact of aviation.
4. Improve the implementation and enforcement of the third energy package and make cross-border markets that benefit consumers a reality.

The Commission stressed further in its "Annual Growth Survey" for 2013 issued on 28 November 2012 that "the performance of network industries across Europe (...) has a critical knock-on effect on the rest of the economy and can be significantly improved by (...) ensuring the full transposition and implementation of the third energy package, in particular unbundling networks, securing the independence and necessary powers of national regulators and phasing out gradually regulated energy prices, while protecting vulnerable consumers; accelerating the implementation of the Single European Sky by reducing the fragmentation of air traffic management and improving the organisation of airspace; opening up domestic rail passenger services to competition, in particular through equal access to infrastructure; integrating ports better into the logistic chain, by removing entry barriers to port services; removing

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remaining cabotage restrictions to improve the matching of supply and demand in international transport.”

It is therefore timely and welcome that *Notre Europe - Jacques Delors Institute* is publishing a Study on the single market for network industries. Two distinguished academics, Jacques Pelkmans and Giacomo Luchetta, look back on what has been achieved and forward to what still needs to be done. Their Study, rich in data and graphs, considers social and economic results and prospects, confirming some trends, dismissing a few myths and providing a firm foundation for future work.

The authors provide compelling evidence for the success of liberalisation of air transport and telecommunications, explaining the economic background, the legal techniques used and the policy imperatives pursued. Economic data are presented attractively in graphic form with accompanying commentary. The challenges of further progress and extension to other modes of transport and energy are explained with outlines of the political, economic, regulatory and legal contexts.

Pelkmans and Luchetta have made an important contribution to the debate on these issues by assembling data and arguments on the various network industries crucial to the European economy's future. They address the regulatory issues firmly, calling for an EU regulator to be set up. Recent events in a network industry not discussed by the authors, banking, show that euro area member states are willing to set up a single supervisory mechanism, but one in which the European Central Bank (ECB) supervises some banks directly, leaving others under national supervision in a system of shared responsibility in which the ECB can take over direct supervision if necessary.

Network industries require a complex system of governance involving regulators operating at various levels, themselves networked at European and sometimes global levels. In addition to the central concerns of market liberalisation and regulation, including enactment and enforcement of specific legislation and application of intellectual property, competition, social and consumer protection policies, the development of a genuine single market, giving inventors, investors, producers, distributors and consumers the continental scale they need to prosper, calls for attention to issues of data protection and security.

One particularly complex and controversial issue touched upon by the authors is the famous Meroni judgment² handed down by the European Court of Justice on 13 June 1958, an important legal legacy of the European Coal and Steel Community. This case created a much debated and often misunderstood constitutional doctrine.

Briefly, the Court held that the predecessor of the European Commission could not devolve discretionary powers to an equalisation fund for imported scrap metal. This may seem a long way from the challenge of 21st century governance in the EU comprising 27 countries, with a single currency shared by 17 of them and a single market which, for all its imperfections, has surpassed in size, scale and scope the hopes of the founders of the common market in the 1950s. Nevertheless, the judgment remains highly relevant because today's EU has dozens of agencies and authorities of various kinds involved in its systems of governance and administration. This is the case in the network industries discussed by the authors and in many other fields of EU activity. What tasks can EU legislation require such agencies to perform?

The “Meroni doctrine” may be summarised using the words of the Court itself as prohibiting the delegation of powers by an EU institution where that delegation involves “a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.”³

The ECJ now has an opportunity to fashion a “Meroni” doctrine for the 21st century in a case⁴ brought by the United Kingdom against the European Parliament and the Council of the European Union on 1 June 2012. The UK challenges as contrary to Meroni “intervention powers in exceptional circumstances” conferred by a Regulation of the European Parliament and the Council on the European Securities and Markets Authority (ESMA). Clarification of the precise scope of the doctrine would be very welcome.

2. Case 9/56, Meroni v. High Authority [1957 & 1958] ECR 133.

3. An update was provided in 1980 by the Court's judgment in Case C-98/80, Romano v. Institut national d'assurance maladie invalidité, [1981] ECR 1241. This case concerned the power of the Administrative Commission for the Social Security of Migrant Workers, an auxiliary body of the Commission, to lay down certain criteria of which national authorities had to take account. The duties of the Administrative Commission included comprehensive law-making competences, dealing inter alia with all questions of interpretation arising from a Community Regulation. The Court held that “a body such as the Administrative Commission may not be empowered by the Council to adopt acts having force of law.”

4. Case C-270/12, Official Journal of the European Union C273/3, 8 September 2012.