
INTERNAL MARKET

The Single Market Act: Is it Really What the Market Needs?

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The Single Market is, as is noted in the Commission Communication¹, not an end in itself, but it is instead a tool used to support policies in other areas. This observation may seem self-evident, but it is an often forgotten very important point. This is why it has always been wrong to speak about the Single Market as a final goal in the shape of a particular date. This applied in 1992 and still applies for 2012. The Single Market remains the most important tool to achieve the targets of the European Union (EU). It is, however, important not to disregard the dynamics and changeability of the process. If the Single Market is regarded as a completed project, progress will stagnate and there is a risk that the European integration process may slow down profoundly. In this light, the fact that the Single Market has been put into focus again in recent years is naturally welcome.

The aim of the SMA is to be a milestone in the development of the Single Market, in a similar way to the Delors White Paper of 1985. From this perspective however, the SMA (Single Market Act) is a disappointment. It is difficult to discern a coherent and overarching vision. The paper gives the impression more of a smorgasbord, where efforts have been made to scrape together 50 concrete proposed measures.

Bearing in mind the broad scope of the proposed Act, this paper will recommend a prioritisation of the measures that would appear to be the most urgent ones for the Single Market to function.

“First things first”

In its Communication, the Commission includes 50 proposed measures; some of which are old issues that remain important, for instance the EU patent, while others are newer, like the “Ecological Footprint of Products”. There is no reason to criticise the innovativeness of the

1. European Commission, Communication, “Towards a Single Market Act – For a highly competitive social market economy, 50 proposals for improving our work, business and exchanges with one another”, COM(2010) 608 final, 27 October 2010, p.4

Act, but measures should primarily focus on current areas that do not function properly. As former Commissioner Mario Monti points out in the report that forms the basis of the SMA, the problem is hardly a lack of rules. Monti claims:

- In many areas, the Single Market exists in the books, but, in practice, multiple barriers and regulatory obstacles fragment intra-EU trade and hamper economic initiative and innovation.
- In others, the potential for greater economic gains is frustrated by lack of physical and legal infrastructure or by absence of dialogue between administrative systems.²

Thus the situation is diametrically different to the year 1985 when the Delors White Paper was presented. At that time there was a great need for rules. Today, the Single Market's bulk of legislation is instead generally considered as too heavy. According to Monti, there are currently 1521 Directives and 976 regulations in the area.³ In other words, what is required is not a new wave of legislative initiatives to realise the Single Market. Focus should instead be placed on trimming and improving the current legislation.

Improved partnership between the Commission and Member States

One aspect, which is very important in developing the Single Market and has been observed by the Commission, is that much can be gained by achieving improvements in the partnership between the Commission and the Member States. The Single Market legislation – and thus the prerequisites and conditions for its growth potential – are handled by a myriad of national authorities in the now 27 Member States or to be more correct in the current 30 European Economic Area (EEA) states. In this complex multicultural landscape, there is significant uncertainty about how central Single Market principles, for example the principle of mutual recognition and proportionality, are to be applied in practice. As long as this is the case, the advantages of the Single Market will not be realised or as Monti expresses it, the Single Market exists only in books.⁴ The realisation of the Single Market should therefore not only take place at the European level, but autonomous national measures, which aim to improve domestic conditions, are just as important. An improved partnership and dialog is vital in this respect and is required to achieve an effective and similar implementation of the Single Market rules in all Member States.

One issue that is not raised in the SMA is that it is important that Member States ensure and strengthen a Single Market coordination function, to promote efficient coordination within and between authorities responsible for Single Market issues at national, regional and local level. This was pointed out in the Commission Recommendation of 29 June 2009 on

measures to improve the functioning of the Single Market.⁵ Member States should actually go further and establish Single Market authorities, which could help to ensure that the Single Market rules – in particular the horizontal provisions – are implemented correctly and lead to the anticipated impact in each Member State. These authorities should also be responsible for information *vis-à-vis* other authorities, companies and people affected. The establishment of Single Market authorities would facilitate cooperation between the Commission and Member States (the partnership), and would contribute to a better implementation and application of Single Market rules.

In this context, a warning flag needs to be raised against the increased use of regulations at the cost of Directives. The SMA does not raise this issue specifically, but Monti does and an increased use of regulations is also mentioned as a proposal in the Europe 2020 Strategy. Such an important development should not take place without a great deal of reflection. Regulations do not provide Member States with as much room for manoeuvre to ensure that the rules really are applied in an effective way as a Directive. The provisions in a regulation are worded in such a way that they can work in 27 different legal environments. Applying the provisions in a national context makes huge demands of the applying party. There is a distinct risk concerning uncertainty on the correct implementation of the rules. The efficiency gains, which the Commission often perceives in the use of regulations, which come into force in all Member States rapidly and do not need any national transposition legislation, must thus be weighed against more long-term efficiency losses that are due to the provisions being poorly adapted to the national conditions and not being applied correctly by Member States.

Administrative cooperation and surveillance

Several EU legal instruments are aimed at facilitating administrative cooperation between Member States and their competent authorities. Several specific networks of collaborating bodies have been created to that aim. The aim is that the networks will help to increase faith in the market and thus facilitate cross-border activities. The vital thing is to compensate for the problems that may arise when Member States are not allowed to impose the same requirements on businesses as was permissible in the past, for example appointing a competent representative or fulfilling requirements of registration in the host country. However, what all such requirements have in common is that they aim to ensure some kind of control in the interest of the state, for example as regards taxation or to protect consumers and workers.

As the Single Market has developed, these requirements have increasingly become impermissible. The basic principle is that service providers shall only be controlled by the state in which they are established. This means that national authorities are only able to fully

2. Mario Monti, "A New Strategy for the Single Market: At the services of Europe's Economy and Society", 9 May 2010, p. 37. Available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

3. *Ibid.*, p. 93.

4. *Ibid.*, p. 37.

5. European Commission, Recommendation, "Measures to improve the functioning of the Single Market", 2009/524/EC, OJ L 176, s. 17, 29 June 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:176:0017:0026:en:PDF>

control the operations of a company when the company has decided to establish itself in the country in question. As regards companies that are already established in other EU countries, it should instead be possible for host country authorities to retrieve information and receive other assistance from the home country's authorities when the need arises. What is of particular importance in this context is the Service Directive's⁶ system of points of single contact. This is the most ambitious form of administrative cooperation in the EU today.

The development of mutual trust would appear to be one of the most important issues at the moment. It is only through close cross border cooperation between the competent authorities of the Member States that an increase in trust can be achieved. This was specifically noted in the above-mentioned Commission Recommendation of 29 June 2009, on measures to improve the functioning of the Single Market.⁷ According to this Recommendation, Member States should take the suitable and necessary measures to ensure the management of existing cross border networks or electronic information systems.

It is evident that administrative cooperation can only be efficient if it is used. Here, Member States can seize the opportunity to regain some control, if that is needed to fulfil legitimate aims. Administrative networks should therefore be further developed and analysed and this should be prioritised. One weakness with the current system is that it can be difficult to identify foreign traders who operate in a country. The Commission takes a very negative attitude towards an obligation to register or any similar system, making it possible to identify these traders since this entails obligations on companies. However, this negative attitude must be balanced against the interest of obtaining better functioning administrative cooperation. It is only in this case that enhanced mutual trust can be created between national authorities in the market, which is a precondition for a better functioning Single Market.

A final point is that in a system that is based on cooperation between authorities in 27 states (or 30 if one takes into account the whole of the EEA), the effectiveness of the system is dependent on its weakest link, in other words the authorities with the least resources or the areas with the least surveillance activities. It is reasonable to claim that a precondition for this mutual trust is that the whole chain of surveillance authorities functions properly. In this light, it is not unreasonable that the EU makes demands on surveillance, which has in fact been the case as regards market surveillance relating to the marketing of products,⁸ even if this has traditionally been a national matter. Nor is it at the end of the day unreasonable that the EU co-finances the establishment of an efficient market surveillance system in order

to guarantee a safer market for consumers. No market can function and lead to the desired growth without the faith of consumers.

Mutual evaluation

The Service Directive has not entailed any extensive changes to the basic rules that used to apply to the free movement of services, but it entails two fundamental changes. Firstly, the legal situation has been specified and fine-tuned, which has rendered the conditions on the market more predictable. Secondly, unusually far-reaching demands were made with regard to adaptation during the transposition period of the Directive. Compared to a sectoral Directive, the implementation of the Services Directive has therefore led to an unprecedented removal of impermissible provisions in national legislation. National requirements, which were found to be incompatible with EU rules on the freedom of establishment and the free movement of services, were eliminated even before the Directive entered into force, and Member States were obliged to notify the Commission and other States of the requirements that remained.

These remaining requirements are thereafter subject to mutual evaluation. Only requirements that are legitimate from the EU legal standpoint may be kept, and the Commission may bring infringement cases on Member States that continue to uphold unjustified requirements in their legislation. The system of mutual evaluation is therefore a very efficient method of getting the Single Market to function better in a short period of time. It also leads to increased dialogue between the Commission and Member States, and generates new knowledge in the ministries and authorities concerned. The proposal to extend this method to areas outside the Services Directive is therefore very welcome.

However, more publicity with regard to the system of mutual evaluation should be considered. It is reasonable that those affected by obstacles to free movement (in particular the European businesses) also have the possibility of identifying them and adapting their operations in that regard. If mutual evaluation is used correctly, the method may in the end reduce the need for harmonisation measures in certain areas, since the degree of predictability required by the market can be achieved in another way.

Dispute resolution mechanisms

Already established systems for alternative dispute resolution (SOLVIT, for example) can have a far greater reach than trying to solve each individual case at hand. These disputes may generate information about areas that do not function well and can hopefully lead to important changes. Expanding dispute resolution mechanisms and making these better known is therefore an important measure for the Single Market. The outcome of the dispute resolution should also be given greater publicity, both at the national and the European level.

6. European Parliament and Council, Directive, "Services in the internal market", 2006/123/EC, OJ L 376, 12 December 2006, p. 36. Available at: <http://www.deti.ie/trade/marketaccess/singlemarket/07serv005.pdf>

7. Op. Cit., European Commission, 2009/524/EC, p. 17

8. See European Parliament and Council, Regulation, "Setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation", (EEC) No. 339/93", (EC) No 765/2008, 9 July 2008, p. 30. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:en:PDF>

Conclusion

The Single Market obviously needs to be improved and the SMA is a step in that direction. However, there is a risk that the SMA's very broad scope and lack of coherent strategy turn it into a failure. It is therefore highly recommended that the Trio Presidency works out an agenda based on the SMA that specifies the most imperative measures to be taken. The Single Market is a never-ending story where the importance of quality outweighs quantity in the long run. It is submitted that much more emphasis should be added to already existing, but not fully functioning areas. In this article, it has been argued that such areas include an improved partnership between the Commission and the Member States, administrative cooperation between national authorities, mutual evaluation of national legislation and the need for dispute resolution mechanisms. Of paramount importance is the building of stronger mutual confidence in the market. No market can function and lead to desired growth without the faith of consumers.