TACKLING BARRIERS TO TRADE 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 have elicited few commentaries despite being the cornerstone of EU economic integration (Pelkmans 2010; Egan, 2012; 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 its strengthening in response to the changing economic and political environment (Pelkmans, 2010; Egan 2012; Howarth and Sadeh, 2010a). Seizing the opportunity of the twentieth anniversary of the "1992" program, European policy makers have placed renewed focus on the untapped growth potential of the single market. 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 promote innovation and growth and reconcile market integration with social concerns and commitments through a series of proposals to deepen the single market (Monti, 2010, European Parliament, 2010, 2014).[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in which the single market now operates has fundamentally changed, as economies of scale and mass production have been replaced by a knowledge and service economy based on product differentiation. Though the new proposals focus heavily on opening up the single market in energy, digital, consumer and transport sectors, greater attention

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

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. 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 single market instruments are not fully effective as various barriers continue to impede market integration. At face value, the national scorecards and transposition records suggest high rates of compliance with European laws. Generally, it is assumed that the expansion and integration of national markets has 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; Egan and Guimarães, 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 operating in the single market due to continued persistence of regulatory barriers to trade, despite being considered one of the most integrated and successful areas of market integration. We use a unique data set on infringements to the free

movement of goods to assess the types of barriers that firms encounter, their impact and variation across states and sectors, and their resolution method - through Court decisions or the pre-litigation, administrative means available within the infringement proceedings mechanism to restore compliance. We also resort to the Solvit dataset provided to the authors by the Commission to analyse some features and the effectiveness of this informal mechanism in dealing with discriminatory domestic trade and regulatory practices.

We examine four key questions: What are the most problematic policy areas in terms of barriers to trade that undermine the single market? What different dispute resolution mechanisms are utilized to address trade barriers and thus improve the functioning of the single market? Under what conditions are different enforcement mechanisms and strategies more likely to be used to resolve barriers for businesses operating in the single market? How important and effective are the more informal strategies in improving market access? In doing so, our goal is to link the research on trade barriers to that of implementation and compliance to assess the diverse strategies undertaken to reduce regulatory barriers to trade.

This is important in the context of other regional trade efforts as the emergence of mega-regional trade agreements has focused on a deep integration agenda that includes liberalization of specific goods and services, as well as addressing divergent regulations and standards. The complexity of regulatory barriers and their entrenched nature makes overcoming differences difficult. Despite the existence of a highly legalized framework, the European Union, like other international organizations, finds that it continually needs to address lack of compliance with the goals and objectives of its institutional commitments through a variety of internal trade remedies that serve to address cross-border restrictions. The European experience has often been touted as a model to emulate without focusing on the different approaches to regulatory convergence, as

well as the legal frameworks, enforcement and compliance mechanisms that underpin the continued European efforts to address barriers to cross-border trade. In practice, Europe seeks to facilitate cross-border trade using a mixture of formal measures such as directives and regulations, treaties and bilateral measures, as well as soft law, principles, guidelines and codes of conduct, dialogue and exchange of information, recognition and incorporation of international standards. Regional integration efforts that cover an increasing range of goods and services provide governments with a chance to experiment with various ruling making and market opening initiatives that allow us to learn from different comparative lessons and rule-making dynamics (Sauvé and Mattoo, 2004, p. 4).

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 documents the extent to which barriers to trade exist in the single market. Section 4 outlines and discusses the different strategies and instruments to address the persistence of barriers to trade and to facilitate market access. Section 5 concludes.

2. Single Market Governance

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). Studies that focus on compliance problems have offered explanations about the continued problems facing business and consumers by differentiating between voluntary versus

non voluntary violations of European legislation. These explanations have highlighted problems stemming from a lack of government capacity that results in the incorrect transposition of European laws into the domestic arena, the slow pace of legislative amendment to existing national rules, the raising of domestic standards or laws through 'gold plating' that causes the rules to be more onerous for business than justified by European law, or domestic opposition contesting the implementation and compliance of specific European laws (Börzel et al., 2010) For many scholars this issue represents a management deficit (Metcalfe, 1996) where administrative capacity and coordinating mechanisms cause implementation and enforcement problems in the single market (Sutherland, 1992). 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 the differential application of EU law in some policy domains (Hanf, 2008) creates additional costs for business in meeting multiple rules and market entry conditions. Few if any, have linked these findings to the varying efforts that the EU has pursued to promote single market governance through administrative and regulatory reform.

While discriminatory regulations create some rents for domestic incumbents, the EU has in fact pursued a range of options to address market distortions, focusing heavily on improving regulatory quality and governance to enhance the functioning of the single market (Radaelli, 1998). 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 does highlight the growing emphasis on monitoring single market compliance (Radaelli, 1998; Pelkmans and Brito, 2012). Other evidence based tools such as the Single Market Review and Market Monitoring Tool were applied to specific sectors to assess the performance of different markets. Yet often such monitoring tools focus on how well the EU and EFTA states comply with their obligations in terms of implementation of EU legislation in a timely manner, so that the transposition of European legislation into domestic laws does not give us a sense of the actual working of single market in practice.

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). Not only does Monti conclude that the EU need to address the remaining gaps in the single market, equally important is delivering a functioning single market through assessment of the state of implementation of market rules (Monti, 2010, p. 94). The European Commission has built on this through its Annual growth surveys in which it stresses the importance of the regulatory performance of the single market, while the European Council proposed to strengthen the governance of the single market so that it

can effectively deliver growth. The *Bureau of Policy Advisors* also commissioned a report on the costs of non-Europe. This focused on the untapped potential of the single market, focusing on the business environment in terms of regulations, productivity and industry dynamics, to demonstrate continued market fragmentation across specific sectors and industries (BEPA, 2013). *Europe Economics* performed a similar assessment for the British government about the performance of the single market in light of the discussions about competence review, although the report did not focus on what were the most effective tools for monitoring and evaluation of the functioning of the single market (European Economics, 2014). More recently, the European Parliament adopted a single market governance procedure in order to promote economic convergence between member states within and outside the euro area, while also focusing on the quality of implementation of single market laws within member states (European Parliament, 2014a). Systematic sector and industry monitoring which would help identify and address specific obstacles that firms face in the single market is scarce, according to Holmes and Rollo (2010). This may be due either underreporting of trade barriers or simply foregoing access to specific markets due to continued trade impediments.

Complaints from business indicate that barriers continue to impede their operations, suggesting that the law on the ground is very different from the legal framework of the treaties (Egan and Guimarães, 2012). Oscillating perceptions from European business provide some important insights about how market fragmentation impacts their business strategies. While a large business survey conducted by the European Commission in 1998 indicated more than 82% participate in the single market, this positive picture has changed over time, as the anticipated benefits of market consolidation have given way to increased concern over the cost of compliance with European regulations. Among the largest resource 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, 2011). 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. 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; Egan and Guimarães, 2012). British firms have also noted that their participation in the Single Market is marred by regulations and red tape, although there remains strong support for the single market across different sectors (IOD, 2014).

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; Egan and Guimarães, 2012). 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).

Scholars assume that compliance with judicial decisions consistently occurs – but do not unpack the different types of legal remedies available to address barriers to trade.[2] The burgeoning literature on compliance has begun to assess the impact of litigation on different policy areas within the European Union, but only a small subset of this work examines the range of options available

to address non-tariff barriers, and their effectiveness in tackling barriers to trade. Compliance is however, a relational concept in which there is an interaction between courts and states and firms that are impacted by the decisions, given that their reactions are a key component in measuring the effectiveness of legal remedies (Kapiszewski and Taylor, 2013). The main theories tend to focus on either management or enforcement approaches to highlight the policy tools available to handle implementation problems, which involves either a problem-solving approach based on improving administrative capacity or a more coercive approach based on monitoring and sanctions (Tallberg, 2002). With this in mind, our goal is to outline the extent to which barriers to trade hinder the functioning of the single market, and then map out the strategies utilized to tackle barriers to trade before providing some statistical data on their effectiveness. Our goal is to first highlight the barriers to trade within single market, then the trade remedies available to address them, and conclude with some analysis and observations of how these trade remedies actually work in practice.

3. Trade barriers hindering the single market

International trade is hampered by a variety of non-tariff barriers emerging out of national regulations. The fact that these regulations often differ by market, means that the fixed costs of complying with regulations are sunk costs and impact the choice about whether to produce different products and services due to regulatory heterogeneity. There are several different categories of barriers that impede market access. These may include quantitative-restrictive barriers such as restrictions on foreign ownership, discriminatory or preferential access to specific services or activities, or specific local content restrictions. Other barriers may also be price related such as specific price controls or charges for services, and fees that apply to foreign operators such

as transfer pricing, double taxation and user fees. A common form of market distortion can occur through domestic regulations derived from technical regulations and standards, licensing and qualification requirements. Countries can and do impose qualification and licensing requirements on foreign providers that may be more burdensome than necessary to satisfy otherwise legitimate public policy objectives. These licenses, qualification and certification requirements may also have operational or regulatory restrictions for foreign providers of goods or services. If the regulation is applied to domestic and foreign producers equally, then it may not in itself, be a regulatory barrier as it does not violate the principle of non-discrimination. However, the trade hampering effects can occur if there are additional compliance costs to enter the market or if the principle of mutual equivalence of regulatory norms and standards is not effectively implemented on the ground by administrative authorities or customs officials.

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.

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

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 indicate 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 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 and administrative barriers (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. Government restrictive practices and policies relating to intellectual property rights, monopolies and subsidies account for 16% of all barriers and mainly used in the health industry. Barriers related to mutual recognition represent 18% of all barriers,

[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).

affecting primarily the equipment industry. Technical and administrative barriers are the primary type of obstacle in all sectors (except equipment) reaching 72% in the 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. Remedies to address barriers to trade: evaluating hard and soft law mechanisms

While 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 reliance on member states to ensure compliance, it has shifted the transaction costs from market integration to the implementation stage (Schmidt, 2009, p.8). The major issue 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).

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 cross border trade 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 governance (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 and informal efforts at negotiated solutions to compliance problems (Börzel et al., 2010; Mastenbroek, 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).

4.1 Infringement proceedings

Although enforcement of European law is the responsibility of the European Commission and the member states, the Commission has the right to bring legal action against member states that it believes have not met their legal obligations. Opening infringement proceedings was the key governance mechanism to tackle barriers to trade, until the Commission chose to settle single market disputes through more informal mechanisms in the early 2000s. These infringement 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).

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 also lengthens 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). Also, member states with good transposition, implementation, and compliance rates may have the lowest rates of litigation and judicial sanctions. The likelihood of choosing to settle through formal judicial litigation or pre litigation administrative to address trade barriers remains understudied. In what conditions are trade barriers solved in Court or in the pre-litigation phase of the infringement proceeding?

Based on the infringement proceedings dataset and 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 in Court, or whether specific trade barriers are more likely to be subject to judicial proceedings. Recognizing that litigating incurs costs and potential sanctions, 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 and administrative

barriers, government restrictive practices (public procurement, intellectual property protection), mutual recognition, and other barriers[5]; (3) implementation instruments (policy tools used to apply the barriers), namely legislative acts, administrative practices, and other less conventional instruments.

Though the vast majority of cases are settled in the early stages of infringement proceedings (see Menindrou, 1996), we assume that member states have different preferences on whether or not to refer an infringement to the EU Court. Recognizing that using the EU Court involves costs we expect that small states with fewer resources to be more likely to use the pre-litigation mechanisms as they are less able to bear the cost of judicial actions and potential sanctions. We also expect that small states may prefer these mechanisms to settle disputed barriers due to fear of retaliation or for reputational reasons associated with the publicity that a EU Court decision on a violation of EU internal market law may entail (see also Panke, 2012). The cost of such negative publicity is higher for smaller than for larger countries, and 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.

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 practices 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.

[5] The taxonomy was based and adapted from UNCTAD (Bora et al., 2000).

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 and of government restrictive practices for example, 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; hence these types of barriers tend to be resolved in Court.

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 1.

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 in the informal pre-Court phases. 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 more informal mechanisms of compliance is not confirmed, as size seems not to explain the use of informal methods. Instead the use of these methods seems to be associated with the southern Europe enlargement countries, 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 referrals 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%).[6] Finally, the estimates of the implementation instruments 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 1. Elimination of trade barriers in EU Court

	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	

[6] Due to collinearity the variable "government restrictive practices" was dropped out.

	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

4.2 The post 2002 strategy: soft modes of compliance

In line with the member states' preference for solving infringement cases out of Court, the European Commission has been promoting more informal problem solving capacities instead of opting for formal infringement mechanisms to solve perceived violations of EU law. This is particularly true since 2002, when the Commission established the Solvit network designed to address barriers created by the misapplication of single market rules through informal coordination among member states, to avoid legal proceedings. 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.[7]

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

[7] However, sometimes overcoming the barriers requires a change in national legislation, in administrative practices, guidelines and other formal implementation provisions that Solvit cannot resolve.

impediments to cross border trade through negotiation, learning and deliberation. These are part of a larger set of instruments and mechanisms that the Commission has put in place to reinforce informal governance methods of the single market. Table 2 shows the diversity of presently existing informal mechanisms to improve compliance and a better functioning of the single market.

Table 2. Informal mechanisms to address single market non-compliance issues

	Preventive iniciative	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 Assessmemt	**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**

These include 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 still tries to use up its pre-litigation administrative initiatives before referring the case to the Court.

Surprisingly, existing approaches to noncompliance with European laws do not emphasize the efficacy of compliance solutions (Eberlein and Radaelli, 2010). However, these informal methods and preventive initiatives provide opportunities to improve market access and enhance competition in the Single Market and indeed, they can contribute to "EU growth through enforcement" (Jervelund et al., 2012, p.58). 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, 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.

4.3. Solvit in practice: features and effectiveness

Using a data set made available to the authors by the European Commission with the cases handled by Solvit services since its inception in 2002 until mid-2013, we analyze how this network has been allowing for the identification and removal of barriers in EU cross-border trade, improving market access and competition in the Single Market. Between 2002 and mid-2013, Solvit services alone registered 407 complaints of breaches of law the free movement of goods in the Single Market, representing 29% of all business complaints. The evolution in the number of cases handled by Solvit services since 2002 (Figure 1) contrasts with the decrease in the number of formal infringement proceedings handled by the Commission (about 80 in 2004 to 15 in 2010)

and in the number of new cases opened after this informal mechanism was introduced (from 30 to 5), as shown in Figure 2.

Figure 1. Number of cases handled by Solvit services (2002-2013)

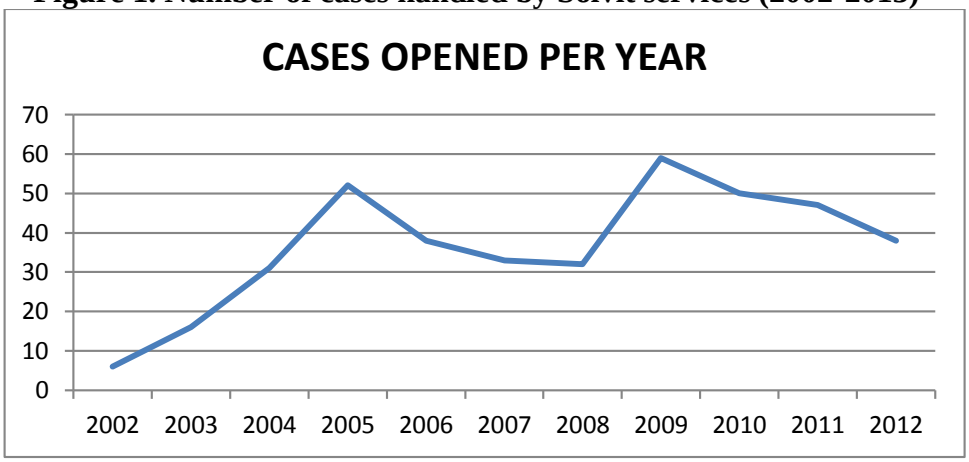
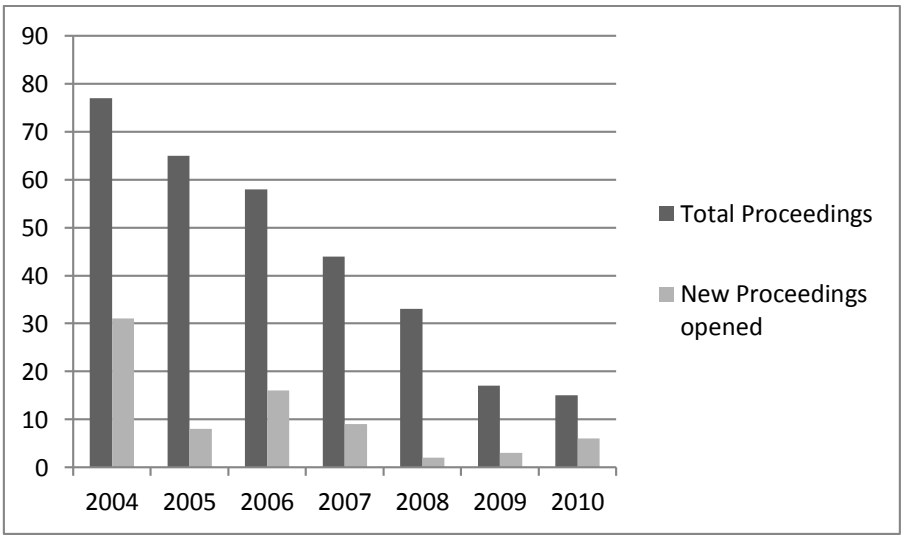


Figure 2. Decrease in the number of formal infringement proceedings

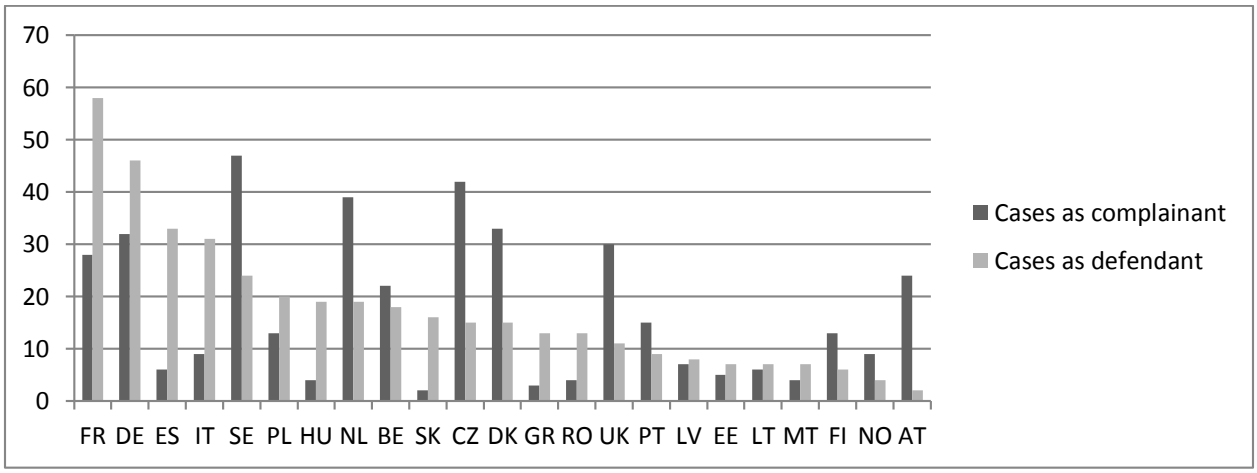


Source: Data compiled from the *Annual Reports on Monitoring the Application of EU Law.* European Commission (2005-2011).

The countries that place more cases in the Solvit network are mostly Sweden, Czech Republic, The Netherlands, Denmark, Germany and the United Kingdom, mostly northern and central Europe member states, which are the leading countries in trying to open EU markets to cross border trade using these soft methods. The main defendant member states in the Solvit

network are France, Germany, Spain and Italy, large EU countries, which were also countries with more formal infringement proceedings opened by the Commission. Countries where more barriers are encountered (defendants) are not the same countries that make more complaints about barriers in other member states. This seems to suggest that there is not a bilateral retaliatory dynamics in making complaints about barriers to trade; indeed, the difference between the number of cases as complainant and as defendant is quite large for some member states, such as Austria, Czech Republic and UK (see Figure 3).

Figure 3. Solvit cases by country (as complainant and as defendant)



Solvit average resolution rate is 84%, though in cases involving the free movement of goods it is 74%. An analysis of resolution rates by member state shows that Solvit resolution rate, i.e. its effectiveness in opening markets, varies from country to country; with few exceptions, if its resolution rate is above (below) the average, it will be above (below) the average despite the country acts as complainant or as defendant. The exceptions are Germany, France, Latvia, and Slovakia, in which Solvit resolution rate is below average when these countries are complainants and above average when they act as defendants, suggesting they are less open to informal problem solving when they detect barriers abroad than when barriers are spotted in their own national markets by other EU countries. On the contrary, when Spain, Poland, Romania and Finland act as

complainants, Solvit resolution rate is above the average, but below average if they act as defendants, suggesting they may be resisting a negotiated solution when alleged problems are found in their own markets

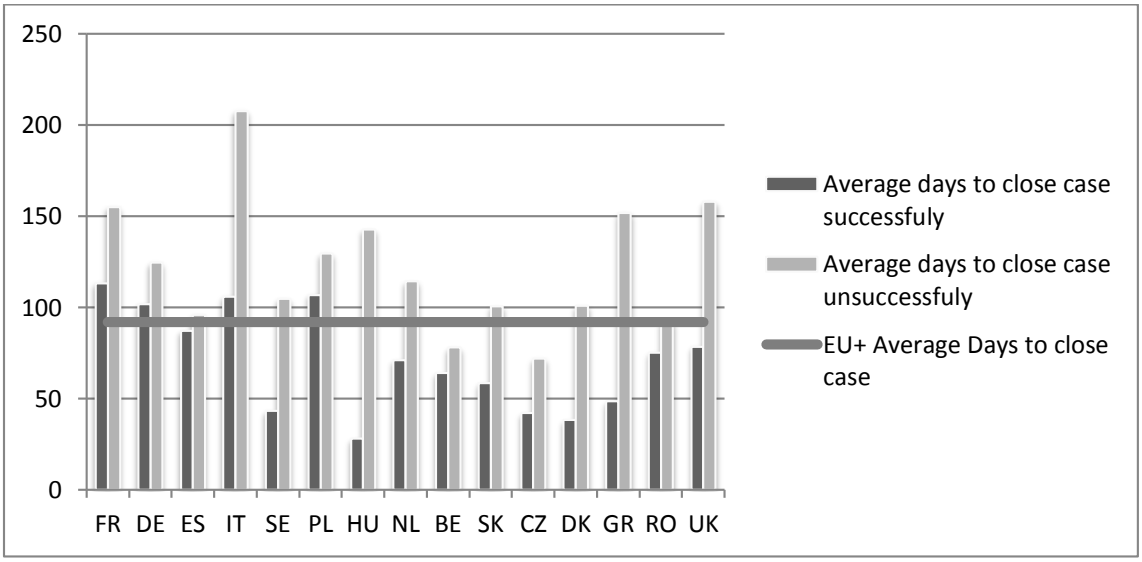
When trying to identify the main pairs of countries involved in Solvit negotiated solutions we find that large countries tend to target large countries, and neighbors also tend to target each other. The United Kingdom targets more often France (12 cases), The Netherlands target more frequently both Belgium and France (12 cases each), France makes more complaints regarding Italy (9), and the Czech Republic regarding Slovakia (9). Germany and Belgium both target more frequently France (8 cases).

The geographical dispersion of the number of cases varies across member states: of the 30 countries in the dataset that may resort to Solvit (27 EU member states plus Norway, Iceland and Liechtenstein), Sweden used this dispute resolution mechanism to target 16 countries, Denmark regarding 15 countries, Austria claiming barriers in 13 countries, and The Netherlands, Germany and Czech Republic in 10. This elucidates which countries are making a geographically more diversified effort to open EU markets. While countries with more Solvit cases may target more countries, there are cases like Portugal with fewer Solvit cases (15) that target many countries (11); on the contrary, France has the largest number of cases (58) but concentrates its efforts for increased market openness in merely 9 trading partners.

Time length is one of the main reasons why a judicial solution to Single Market disputes is often avoided (Siegel, 2011). One of the purposes of Solvit, as an informal alternative to other more formal problem-solving mechanisms, is to find solutions within 70 days since the case is taken by the Solvit center in the country where the problem occurred. While for all areas of EU Single Market law the average time elapsed is 81 days, cases in the free movement of goods take

an average 92 days, suggesting that even using voluntary negotiated solutions removing trade is more time consuming than eliminating frictions in other areas of the Single market. Our data also shows that there is variation across member states in Solvit resolution time, ranging from an average of 208 days for cases involving Italy and 46 days for Finland (both as defendant countries), suggesting different resistance postures to change behavior when barriers in their markets are reported to Solvit (Figure 4). As could be expected, cases in which a solution is found tend to take less time than average to close, and also each member state takes less time to close cases for which a solution is found than for unresolved cases. These may be the instances in which member states may have to resort to formal complaints to the Commission or use other formal mechanisms such as national court procedures.

Figure 4. Average days to close cases



Note: The figure only includes countries with at least 10 cases

5. Conclusion

Twenty years of liberalization have produced a deeply integrated, but still incomplete single market. Building on the Monti Report in 2010, and legislative proposals subsequently

enshrined in two Single Market Acts in 2011 and 2012, the efforts to address the remaining cross-border barriers in key areas highlight the need to focus on issues of enforcement and compliance with European rules especially in the wake of the financial crisis. The Single European Market suggests that substantive regulatory harmonization or coordination can be achieved among developed economies. Yet in many instances there are negative trade effects as business faces additional constraints in operating in a single market as member states fail to properly apply existing laws, mutual recognition is incorrectly applied or firms face continued barriers to trade due to the inability to achieve some degree of regulatory coordination. This takes sustained effort to ensure a regular and predictable business environment, so compliance with European law is a critical factor to ensure that trade and investment barriers are addressed.

Understanding what strategies are used and how effectively they can address barriers to trade is a key component in understanding how to address the myriad of different national regulations that often create trade frictions. A more sustained focus on explaining the different variety and usage of 'internal' trade remedies within the EU can highlight a range of tools that other regions can employ to address regulatory divergences that can hinder trade and growth in a regional market and to foster regulatory cooperation. However, negotiating new rules on areas such as data privacy, rail transport liberalization, and liberal professions, has not been easy and substantial differences in the negotiating positions of member states suggests that market access commitments can be difficult to deliver. Europe is also confronted by a difficult issue of whether some minimal exclusion will be tolerated to give domestic governments the necessary flexibility to appease domestic pressures, and what impact such differential market integration plays in fostering regional cooperation.

Our empirical analysis shows that in the EU single market there is preference for informal mechanisms and negotiated solutions to foster market integration and to address reported barriers to trade, though there is variation depending on the country, type of barrier and industry; secondly, it shows that Solvit effectiveness to overcome barriers to trade by voluntary cooperation is high, although the resolution rate of trade issues is slightly smaller than in other Solvit legal areas, and it takes the network longer to close these cases; this seems to suggest that efforts to open goods markets by improving compliance through voluntary cooperation is, nonetheless a laborious task. In providing an assessment of the most effective regulatory measures to address barriers to trade, there are some concerns that soft law mechanisms are not valuable in addressing regulatory barriers to trade. The conclusion we draw from this paper is that soft measures can generate satisfactory results provided that states were faced with a credible threat of legal intervention. As suggested by the 'shadow of hierarchy' thesis there needs to be options to litigate through infringement procedures if barriers are not resolved through informal soft law mechanisms. Although there is significant attention among scholars given to judicial recourse, such an approach neglects the other newer enforcement tools that can be used to reduce barriers to cross border mobility, market access and trade. We have shown that the pre-litigation measures are also important in promoting regulatory cooperation in the single market. At least as important for regulatory cooperation is the growth of informal cheaper strategies such as Solvit in the European context. These should be coupled with measures to prevent trade barriers from arising in the single market through the notification of pending national standards and regulations. We would argue that there is a tendency in the academic and policy literature to focus on ex post mechanisms, especially litigation efforts, rather than on measures to prevent new barriers to trade from emerging, which would suggest that more attention needs to be paid to issues of preemption, early warning mechanisms and notification

of pending legislation, especially as states are regulating new issues in both service and product markets.

Other similar "internal" trade remedies are being introduced in other regional contexts. While these have generated some criticism as being simply ‘window dressing’ in addressing barriers to trade, the experience of the European single market suggests that it can give policymakers a better sense of the reality of market access barriers on the ground. When firms are polled they often stress that a clear single set of rules provides legal certainty, enables them to invest in new products and technologies with more confidence and that such regulatory convergence attracts foreign direct investment. While non-EU trade is also increasing for some member states, particularly with emerging markets, this also suggests that being able to promote European rules in third country markets - the so-called 'market power' effect (Damro, 2011), is also more salient if there are common European rules and norms. However, this phenomenon is often touted rather than empirically demonstrated. This suggests that more attention needs to be paid to the external dimension of single market governance, the perception of business outside of Europe in terms of market access, and the formal and informal mechanisms and tools used by foreign companies to address perceived market entry barriers in the European context that are not simply de facto a WTO trade complaint. These issues are of increasing importance given global supply chains and product market integration, as well as the expansion of cross-regional FTA. The push for regulatory coherence to foster a transatlantic market is drawing on some of the same modalities and approaches that have been used in the single market. Hence, the importance of focusing not just on the negotiations but on implementation and compliance with such agreements based on an understanding of the range of “internal” trade remedies and enforcement mechanisms used within the European internal market. This may also raise issues of capacity building

depending on the regional context, as well as of domestic structural adjustments necessary in promoting cross-regional regulatory cooperation. Yet even as this comparison continues to hold, there are indications that the historical development of market integration in other contexts, notably ASEAN and NAFTA, is in fact, evolving in different ways, and that some of the governance issues in the European context have yet to be addressed (Pastor, 2011). In this regard, we need to focus on the dynamic institutional effects created by the deepening of market integration, as institutions are simultaneously *constraining,* in that they set the rules of the game, creating path dependent effects and *constructive*, in that they may generate institutional change elsewhere through their spillover effects, as evidenced by the shift from goods to services, and from product to process standards, for example. What Europe has learned over the past six decades can be of value to other regional trade blocs as they seek to tackle a variety of trade barriers, different regulatory practices, and different models of economic organization, governance and state-market relations. The question is not whether the European Union should be emulated, but how we can profit from understanding the tensions, contradictions, and differentiated integration that characterizes Europe, by giving a more accurate picture of its market integration experience and governance dilemmas.

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