Protectionism in Central and Eastern Europe and the EU Internal Market: the case of retail

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1 Introduction

Populism and protectionism are not only phenomena in the media, in which trust has diminished,[1] but they are also affecting our daily lives and the EU Internal Market. Businesses operating cross-border suffer from new national rules and practices that restrict their freedom to conduct their business. A survey among EuroCommerce members showed that, for the coming years, the main challenges, apart from the digital transformation of the economy, are protectionism and trade barriers.[2] The economic evidence in literature demonstrating how protectionism hampers economic growth and jobs is overwhelming. Nevertheless, policy-makers undermine competition in the market. This reduces consumer's choice, purchasing power, and confidence on the one hand, and legal certainty for businesses on the other. It also prevents the Internal Market from reaching its full potential to provide jobs and growth. Ultimately, it is the citizen, whether as a consumer or a jobseeker, who suffers the consequences of these policies.

By working with retailers in EuroCommerce,[3] the European umbrella organisation for retail and wholesale businesses, we have built up significant experience of dealing with these protectionist measures and trade restrictions in a number of countries, in particular in Central and Eastern Europe: how to identify and deal with

[1] Edelman (2018): In the yearly global Trust Barometer of Edelman, correspondents have been asked about their trust in four institutions: NGOs, business, government and media. This year correspondents have identified media as the least trusted institution.

[2] The EuroCommerce online membership survey was carried out in December 2017 and January 2018. The e-survey was sent to all member contacts of EuroCommerce and received 140 replies which represents a 15% response rate.

[3] www.eurocommerce.eu.

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them, but also how this impacts the Internal Market. We have seen over many years a diminution of respect for the rule of law and its institutions, and increasing fragmentation of the Internal Market.

After 60 years of European construction, we still do not have one Internal Market in Europe, free from unnecessary, unjustified and disproportionate restrictions. Yet everyone recognises that achieving this will bring benefits to society: increasing wealth, jobs, growth and choice for consumers. We believe that this increased welfare will give citizens more opportunities to live their lives the way they want, and that all of Europe's nations will be so economically and culturally intertwined that the costs of protectionism are unimaginably high, and that war becomes an archaic concept. The Single Market has already provided those enterprises with countless opportunities to expand their businesses and trade with other businesses and consumers all over Europe. The digital transformation is facilitating this further; with a few mouse clicks, customers have access to products and services anywhere. For years now, the growth rates of e-commerce sales (even during the financial crisis) have been in double digits.[4] We want to find a way to preserve our current EU achievements, and use and develop further the governance of the Internal Market to contain the wave of protectionist and populist policies in a more effective way.

In this paper, we discuss protectionist trends in the EU, our experience with dealing with protectionist and populist policies, the weaknesses in current Single Market governance, and possible ways of improving governance further.

2 The rise of protectionism and populism

Protectionism and populism have become growing global trends over the past decade. Obviously, protectionism and populism are not the same thing, but they often go hand in hand. In the EU (the focus of this paper), we see that almost all populists display protectionist tendencies. Protectionism often involves conscious government policies and practices aimed at giving a direct or indirect advantage to local businesses vis-à-vis foreign businesses. Populism is harder to define, however, and literature offers many definitions and ideas. Cas Mudde and Cristóbal Rovira Kaltwasser[5] offer an 'ideational approach' of populism, which combines different definitions found in the literature. They define populism as "a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps: the pure people versus the corrupt elite. They argue that politics should be an expression of the general will of the people. Most notably, political actors have combined populism with a variety of other thin- and thick-centred ideologies, including agrarianism, nationalism, neoliberalism, and socialism."[6]

[4] Eurostat (2017).

[5] Mudde and Rovira Kaltwasser (2017).

[6] Mudde and Rovira Kaltwasser (2017).

A recent study published by the Tony Blair Institute[7] shows that more and more people in Europe are voting for populist parties. In 2000, on average 8.5% of the votes went to populist parties. Today, that number almost tripled at 24.1%. While populist parties in Eastern Europe took an average of 9.2% of the national vote in 2000, their vote share has since then even more than tripled, reaching 31.6% in 2017.

Examples of growing populism among voters and in political leadership abound in Europe. For example, in Poland, the ruling PiS party continues to enjoy wide acceptance[8]; in Hungary, Prime Minister Orban's Fidesz party has secured its dominant position institutionally and electorally[9,10]; since last year Austria has a new coalition government including the far-right FPÖ[11]; in the Netherlands, the populist Geert Wilders gained more votes than ever in last year's parliamentary elections[12]; in France, Marine Le Pen won more votes than ever in the presidential elections, even though she ultimately lost out to Emmanuel Macron[13]; in Germany, the AfD's major gains in the last election made building a coalition of the centre unusually difficult[14]; in Italy, the Five Star Movement and Lega won together more than 50% of the votes in the 2018 elections.

According to an analysis by the Economist[15] more and more populist parties are being brought into coalitions,[16] co-opted and their policies copied. Even if populism is still not the dominant force in national politics, it is widespread. However, voters in general are not necessarily anti-EU. Last year has shown a steep increase of people throughout Europe having favourable views of the EU. But, while few citizens on the European continent are eager to see their own country depart the EU, many have expressed the wish to have their voice heard through their own referendum on EU membership.[17]

The above seems to imply that populism is far from dead, and it might even grow further if the trend revealed in the Tony Blair Institute study would continue.

Where does this populism come from and why are populist parties gaining so much ground? In a study, the World Bank sought to look into the socio-economic

[7] Tony Blair Institute (2017).

[8] Reuters (2017).

[9] New York Times (2018).

[10] Financial Times (2018).

[11] Guardian (2017).

[12] NRC (2017).

[13] Le Monde (2017), 10.6 million votes were cast for Marie Le Pen in the second round of the presidential elections in 2017, in the second round of 2015 Front National received in the regional elections 6.8 million votes.

[14] Spiegel (2017).

[15] Economist (2018).

[16] For example, FPÖ in Austrian government since 2017 and from 2000 to 2007, PVV supporting minority government in the Netherlands from 2010 to 2012, PS in Finland from 2015 to 2017 and its splinter Finns Party in the government coalition until today.

[17] Pew Research Center (2017).

aspects that drive populism. They concluded that perhaps one root case is the structural challenges and resulting social and political tensions in many countries. Mistrust in established institutions is increasing, and concern about job security is growing. Even though common economic indicators show that peoples' economic conditions have improved, they do not necessarily perceive it that way. This may reflect decreased optimism about the future, more jobs have become flexible or part-time, and a shift in demand for skills due to digital technology has made jobs not requiring those skills rarer or more precarious. More academic research is needed to investigate this further, the World Bank concluded.[18]

In The Toronto Globe and Mail, Darrel Bricker and John Ibbitson argue that populism is not mainly driven by economic insecurities but by fear of immigrants. They call this nativism "a fear of foreigners coming into your community and undermining your culture and way of life." They claim that for example that resentment towards immigrants caused people to vote for Brexit. "Today's populist rebellions are nothing more than the exploitation of gullible voters by politicians who are willing to stoke nativist resentment that other elites ignore and who couldn't care less about how badly they damage their societies in the process." Interestingly, they say that politicians and the media should "play down the grand theories about the advantages of immigration, globalization and economic diversification. It'll all be labelled fake news."[19]

Their views become more interesting if we take a look at an article on global demographic developments until 2050 from Jean-Michel Boussemart and Michel Godet, which was published by the Fondation Robert Schuman. While the population of Europe remains stable at about 500 million, in Africa the population is expected to more than double from 1186 million in 2015 to 2478 million in 2050. An increase of 1292 million people, of which a 130 million will be born in North Africa. "In other words, the migratory pressure on Europe will be greater than ever! (…) Yet nobody in Europe is talking about it, let alone preparing for it."[20] One could therefore conclude that, if fear of immigrants is one of the drivers of populism, it will certainly not disappear in the following decades. This makes it even more important to have a real debate about populism and protectionism, and about the role of our institutions to guard against those.

[18] World Bank Group (2016).

[19] The Globe and Mail (2018).

[20] Fondation Robert Schuman (2018).

3 Protectionism against Western retailers in Central and Eastern Europe

While the digital revolution is fundamentally changing the shape of retail, we still need brick & mortar stores, products still need to be produced somewhere and will still have to cross borders. In 2017 intra-EU trade was valued at EUR 3347 billion.[21] While many barriers to e-commerce are created by outdated rules or new rules designed for a non-digital economy, over the past ten years, international retailers from Western Europe have seen a strong rise in protectionism everywhere in Europe, and particularly in member states in Central and Eastern Europe.[22] The Czech Republic, Hungary, Poland and Slovakia have united in the Visegrad Group,[23] which has become more and more influential, often strengthening and reinforcing each other's position.[24] Business sectors that are considered strategic and where foreign players, mostly from Western Europe, dominate, like banking, telecom, media, energy, and food retail have been targeted. Control of the media is of particular interest to populist regimes, as we see in the Czech Republic,[25] Hungary or Poland.

In retail, we mainly see protectionist laws restricting Western food retailers. They face significant barriers to establish stores in another Member State and to operate their businesses in an open and fair way. They are often bluntly discriminated against in favour of local players and local product assortment.

Sometimes protectionism is indirect and difficult to detect, because one needs a thorough understanding of market mechanisms involved. However, often, it can also be very obvious, as in countries like in Poland[26] and Hungary[27] where the Rule of Law is clearly under threat. This undermines legal certainty for businesses and undermines trust for foreign investors. If we look in particular to the food retail sector, there are a number of ways in which regimes in Central and Eastern Europe usually try to regulate the sector:

1. **competition and (unfair) trading laws** that prohibit or restrict certain B2B trading practices, redefine concepts as 'dominant market position' or 'significant market power', oblige large foreign-owned players to publish market sensitive data, or impose disproportionate fines;
2. **food laws** that introduce new labelling and reporting obligations, disproportionate fines, sourcing obligations, or disproportionate inspection fees;

[21] Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/International_trade_in_goods, last visited 21 May 2018.

[22] Central and Eastern Europe covering in this paper Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia.

[23] http://www.visegradgroup.eu/.

[24] Visegrad Group (2018).

[25] The two leading newspapers *Lidové noviny* and *Mladá fronta DNES* are owned by the current Prime Minister Andrej Babiš.

[26] European Commission (2017a).

[27] European Parliament (2017a).

3. **tax laws** that introduce discriminatory and disproportionate retail taxes or 'fees';
4. **product laws** that make foreign products less attractive vis-à-vis local products;
5. **establishment laws** that restrict the market-entry or expansion of new or foreign-based players.

These mechanisms are used by governments to limit international food retailers' ability to compete in the market, which limits choice for consumers, raises costs and curbs investment and innovation. In Table 1, we present some examples of these laws. A more extensive but non-exhaustive overview of specific laws is available on the website of EuroCommerce.[28]

Many of these laws target the business model of Western European retailers. This usually differs substantially from local players or national chains: (1) they are usually centrally organised and have integrated businesses, while local players often operate under franchise or in a network of independent retailers; (2) international retailers have complex global supply chains and multifaceted agreements with a great number of local and large multinational suppliers, whilst local players have often less complex supply chains; (3) international retailers often operate with large stores, while local players often focus on smaller stores; (4) international retailers need to achieve economies of scale in a new market to make their investment profitable. Because of these differences between international and local players, it is often easy for policy-makers to design laws in such a way to undermine the business model of international retailers or benefit the business model of local players.

We also see a pattern emerging of Member States mimicking each other's laws: examples include the introduction or consideration of a staggered retail tax (Poland, Hungary, Romania, Slovakia), a reporting obligation on the origin of foods (Czech Republic and Slovakia), the prohibition of certain listing fees (Croatia, Czech Republic, Romania, Slovakia), and the redefinition of market power (Czech Republic and Hungary). This makes it more important to have a Single Market in which the rules are clear and well enforced. If one Member State gets away with a specific measure, others are likely to follow.

In addition to business-unfriendly legislation, EuroCommerce members also suffer discrimination in enforcement. Very intense and more frequent inspections (e.g. food, taxation, compliance) are used to find minor violations and punish retailers. With every successive violation, fines may increase exponentially. It also happens that, under the threat of fines, local authorities make illegal suggestions on how these fines can be avoided, e.g. by selling more (of a specific) local product(s). These discriminatory or disproportionate practices by public authorities are difficult to document, and the retailer cannot reveal the practice without revealing its own identity and risk retaliation. In some Member States, we see that public opinion is very hostile towards foreign-owned retailers.[29] The media regularly reports on

[28] www.eurocommerce.eu, search for 'Single Market Barriers Overview' under the tab resources. The overview is regularly updated.

[29] Budapest Business Journal (2016).

Table 1 Examples of protectionist laws

Czech Significant Market Power Act (Act No. 395/2009 on Significant Market Power in the sale of agricultural and food products and the abuse thereof) Among others, retailers that have a turnover higher than CZK 5 billion (≅€200 million) are deemed to have significant market power. No additional assessment of economical dependencies between retailers and suppliers is necessary, or the actual impact on competitiveness. Businesses can be fined up to 10% of turnover. Suppliers' payments are limited to 3% of the value of the delivered food products. There is a list of prohibited activities such as commonly used listing fees. Retailers have to publish their payment conditions. Publication of payment terms undermines competition. Many of the practices that are prohibited are common commercial practices which are legitimate in other EU Member States. The prohibitions undermine the business model of modern retail.
Slovak Food Act (152/1995 Coll) The law foresees a very steep fine system for violations of the law, including minor violations that have limited or no risks for consumer health e.g. expiry of the best before date, spots on fruit and vegetables. The first fine is between €1000 and €500,000, the second fine is double the first fine i.e. €2000 and €1,000,000, the third fine is €1,000,000 to €5,000,000. These high fines create high legal uncertainty for all retail businesses, especially when stores already have two fines. They are also disproportionate to the violation, as these are usually minor. There is no indication that food sold in Slovak supermarkets is less safe or safer than elsewhere in the EU. So far, mainly foreign-owned retailers have been fined and only those have received €1 million fines.
Romanian Food Act (Act 150/2016 of 18 July 2015 on Food Trade) Among others, the law requires large retailers to source 51% of merchandise volumes in core product categories via the (still undefined) short supply. There is an obligation to display and promote Romanian products in stores. There is a total prohibition of listing fees. These are fees charged by retailers to suppliers for services provided e.g. logistics, promotion campaigns, etc.
Polish Act on the Retail Sales Tax of 6 July 2016 (Published in the Polish Official Gazette on 1 August 2016) The tax would only have applied to retailers. Franchisees and online sales were exempt. The tax would have been charged based on a: • monthly turnover of less than 17M Zloty would be exempt from the tax • monthly turnover of 17M to 170M Zloty would be subject to a 0.8% tax • monthly turnover exceeding 170M Zloty would be subject to a 1.4% tax The largest portion of the tax would have been paid by foreign-owned retailers. In average, many of them have a higher turnover than local players, not least because they operate less frequently via a franchise system.
Hungarian Food Supply Chain Fee (2014 amendment to the Food Chain Act) The law would have introduced a tax based on the total turnover of retail businesses. Franchise chains (only local) would have been taxed based on the turnover of individual franchisees. The staggered rate was as follows: • the first 500 million HUF turnover exempt • between 500 million HUF and 50 billion HUF 0.1% • between 50 billion and 100 billion HUF 1% • between 100 billion and 150 billion HUF 2% • between 150 billion and 200 billion HUF 3% • between 200 billion and 250 billion HUF 4% • between 250 billion and 300 billion HUF 5% • above 300 billion HUF 6% The tax was justified by the need to finance food controls. The revenue was estimated at €100 million, almost all to be paid by foreign-owned retailers.

(continued)

Table 1 (continued)

Czech Reporting Obligation (Act 110/1997 on foodstuff and tobacco products and on amendments to certain related acts—Amendment 139/2014) Retailers with a turnover greater than CZK 5 billion were obliged to disclose a list of the five countries of which the highest percentage of food products is sold in the Czech Republic, including the percentage, at the entrance of the store, and report to the government. The intention of the law was to influence consumer behaviour, in the hope they would shop at stores that reported high percentages of local (Czech) products.
Ban World Heritage Sites (Act CXII of 2014 on Modification of Act CLXIV of 2005 on Trade in connection with operation of undertakings in the interest of fair market practice) The ban entered into force on 1 January 2015, and prohibits to establish or operate discounters, large supermarkets or hypermarkets in urban living areas of World Heritage Sites and their buffer zones, i.e. an area of 967 hectares in the inner districts of Budapest. After a three year's transition period from 1 January 2018, it is prohibited to establish and operate discount stores (400 m^2 and above), supermarkets (2500–5000 m^2) or hypermarkets (5000 m^2 and above) on places belonging to the World Heritage defined by a separate law. The only existing stores covered by the law were of foreign-owned retailers.

allegations by producers, farmers and politicians against foreign-owned retailers of bad behaviour, often demanding government intervention and regulation. In this environment, retailers operate under constant threat of arbitrary action. In some countries, foreign-owned retailers are refused access to key policy-makers, or policy-makers fear that being seen to support retailers may damage their reputation. Speaking up in public or going to court where a retailer believes it is mistreated or subjected to protectionist measures may have consequences in future dealing with national authorities and make them cautious about doing so.

4 Economic impact of protectionism

How can we assess if the Single Market is functioning, or if there is a Single Market at all?[30] Could we measure this by the level of harmonisation within the EU? Or the number of national rules deviating from the four freedoms based on overriding reasons of public interest? Is it possible to measure the additional economic growth since the Single Market project has started or how much we still have to gain, or the welfare loss due to non-integration? This goes beyond the scope of this paper. In this chapter, we will instead try to identify some key issues relating to how protectionist policies undermine the functioning of the Single Market.

The European Parliamentary Research Services has published several studies on the "Cost of Non-Europe".[31] The fourth edition estimates an annual cost (in terms of

[30] Erixon and Georgieva (2016) is an interesting read, as it discusses if the Single Market delivered anything at all and if current harmonisation policies are creating barriers instead of removing them.

[31] European Parliament (2017b).

lost opportunities) of some €1751 billion, 12% of EU-28 GDP (2016). €615 billion could be gained by completing the Single Market for consumers and citizens, and €415 billion by completing the digital Single Market. The €615 billion cover completion of the Single Market for goods, which would gain €183 billion, and completion of the Single Market for services, worth an extra €338 billion. Both are key for retail and wholesale businesses. Especially for services the potential is high. It is widely recognised that the Services Directive has not brought the benefits people expected from it. In 2016 the European Court of Auditors (ECA) published its assessment of the implementation of the Services Directive,[32] in which it concludes that among others the Commission has not applied the announced zero-tolerance policy against Member States infringing the Services Directive, the number of infringement cases is extremely low, the Commission has not created a systematic strategy to strengthen the Single Market in services, overall the Commission has only been partially effective in ensuring the implementation of the Directive. The ECA makes one interesting recommendation (number 5), namely strengthening the notification procedure with a standstill period. This procedure is a preventive tool that may be an effective way of tackling protectionism, as we will explain in chapter 6. To conclude, the ECA report seems to indicate the Commission seriously underperformed here. But it seems unfair to put all the blame on the Commission, it were in the end the Member States that did not implement the Services Directive properly and continued to protect local interests instead.

The Organisation for Economic Co-operation and Development (OECD) took another angle to look at the performance of the Single Market. It compared the EU with the United States in a 2016 report on completing the Single Market.[33] In the EU intra-EU trade in manufactured goods was in 2012 21% of GPD, in comparison with 35% of GDP with interstate trade in the United States. A staggering gap that seems to indicate that cross-border trade in the EU could easily double when barriers are removed.

While these are impressive figures, it is unclear how far they stem from protectionist policies connected with populist regimes. However, we can say something more concrete about the impact of restricting retail operations on the overall competitiveness of the market. A very recent communication by the Commission concludes that the retail is a heavily regulated sector, and that overregulation may lead to less competition in the local retail markets. "[T]he productivity of the EU retail sector has been lagging behind other sectors and is less dynamic than in other comparable economies." Main points of attention are barriers to retail establishment, operational restrictions and compliance costs.[34] One of the conclusions of an underpinning study of the communication on retail establishment that was commissioned by the Commission on the legal framework for retail establishment in the 28 Member States was that "the regulatory framework in the Member States regarding the establishment of retail outlets tends to be (very) complex… [P]rocedure(s) to be

[32] European Court of Auditors (2016).

[33] OECD (2016).

[34] European Commission (2018a).

followed (are) usually quite burdensome." In the accompanying economic analysis the researchers found that the level of restrictiveness was negatively correlated with the opening or expansion of stores. It also concluded that the most concentrated markets have the lowest level of opening new stores. This might be indirectly linked with the level of regulation.[35]

A study published in 2014 commissioned by DG COMP tried to measure the impact of modern retail on choice and innovation in the EU food sector.[36] This and other studies found evidence that new shop openings led to more competition, and that there is a link between the level of restrictive regulation of retail and innovation, and competition in the retail market. Although scientific evidence is still limited, one could conclude that protectionist policies that undermine competition in the retail market undermine the free movement of goods and services, and thereby the working of the Single Market. In more general terms, the OECD Services Trade Restrictiveness Index (STRI) shows that consumers and firms pay the cost of trade restrictions: entry barriers allow incumbent firms to gain market power, limit competition, and delay innovation. The costs of a policy environment that reduces competition from new entrants, whether domestic or foreign, is ultimately borne by consumers and downstream business customers, who pay higher prices and enjoy less choice than they would in more competitive markets. The resulting price increases for domestic users of services can be quantified as a sales tax equivalent on their purchases, imposing substantial additional costs on manufacturing enterprises and eventually on final customers.[37]

To give a better idea of the practical implications we have listed in Table 2 the known impact of some protectionist laws or the possible impact these would have had.

While these effects might look limited in themselves, over time the missed potential accumulates and consumers will experience less choice, higher prices and less jobs.

5 Filing cases for infringements against EU law

In this challenging context, EuroCommerce has supported its members in addressing various sometimes blatant infringements against the freedoms laid down in the EU Treaties.

If a national protectionist measure breaches EU law, there are two main forms of remedies one may consider: invoking the breach of EU law in proceedings before the national courts or lodging a complaint with the European Commission for

[35] HVG (2016).

[36] European Commission (2014a).

[37] OECD (2018).

Table 2 Economic impact of some protectionist laws in retail

Hungarian crisis tax for the retail sector	A total amount of €300 million paid over 2010, 2011 and 2012. (Estimated amount mainly paid by foreign-owned retailers based on public sources)
Hungarian Supplier Act[a]	Between 2013 and 2014, the quantity of imported UHT milk in Hungary decreased from about 75% to 50% in favour of locally produced milk.
Polish Act on the Retail Sales Tax	€350 million annually (Estimated amount that should have been paid by foreign-owned retailers out of total tax revenue of €450 million annually based on public resources)
Hungarian Food Supply Chain Fee	€100 million annually (Estimated amount that should have been paid by foreign-owned retailers based on public sources)

[a]The law prescribes that the profit margin on local and foreign agricultural products should be the same. In practice it is mainly applied to imported UHT milk, which has led to a steep decline of imported UHT milk. Showing it clearly affects the free movement of goods within the EU

infringement of EU law. We discuss both approaches and our experience in dealing with both approaches below.

5.1 National procedures

Businesses should pursue national appeal procedures and an EU complaint at the same time. A national procedure is not always opportune, as stated earlier, as it may lead to retaliation and attacks in the media. However, if the national procedure raises questions of EU Law, the national court could decide to refer the case to the Court of Justice of the European Union for guidance. In the absence of an infringement procedure by the European Commission, such a referral may resolve the case but only if the right questions are referred to the ECJ. It is also possible to run a national case and an EU infringement procedure in parallel. From experience, we know that this may delay a decision by the Commission on an infringement procedure. However, such a referral order to the ECJ could take quite some time before being concluded. During an infringement procedure, the European Commission usually enters into a dialogue with the accused Member State to change its policies and bring them in line with EU law before the case is referred to the ECJ by the Commission. In certain cases, this can be a faster and more permanent solution than a preliminary ruling of the Court.

Having a national case next to lodging a complaint against a Member States with the European Commission is relevant for a number of other reasons. The European Commission might decide not to pursue the case at all. In 2016, the European Commission handled 3458 complaints; of those, 3026 were closed for different reasons: no EU laws were breached (2253), no power to act (86), the

correspondence did not qualify as a complaint (667), and 20 cases were withdrawn.[38] This means that only 1 out of 8 complaints led to a real case against a Member State that year.

In some cases, the decision by the European Commission for not pursuing a complaint further may be driven by a reluctance to enter into action it may not win, or as a result of lack of resources. For example there is little case law about disproportionate fines, and EU law gives the Member States a lot of room for manoeuvre.

Another reason that plays a role is the Commission's ambition to be 'bigger and more ambitious on big things, and smaller and more modest on small things'.[39] Basically, meaning the European Commission is no longer the guardian of the Treaties if it is an infringement with a limited impact. We have had several complaints that were not pursued due to their limited impact.

In addition, the European Parliament and Member States are looking for opportunities that serve their interest. The Commission may not want to pursue an infringement case that may work against gaining the Member State's political support in, for example, a new piece of legislation. For instance, the opening of infringement cases is frequently delayed during the months before national elections. Although this delay might be understandable, in the meantime businesses have to abide the infringing national law and change the way they operate.

Simply waiting for the Commission to take immediate action is an uncertain strategy, and even when the Commission opens a case this may not lead to swift solutions. Therefore, it is worthwhile for businesses to pursue a national solution, next to lodging a complaint with the Commission.

5.2 Lodging complaints for infringements against EU law

Below we discuss some lessons learned from lodging complaints and infringement cases. In principle, lodging a complaint should be a last resort. It means all other options at national and EU level have failed and the only way to resolve the matter is by lodging a complaint against a Member State with the Commission.

The Commission has tried to act fast and took our complaints seriously. In most cases, the complaint led to the opening of an EU pilot[40] or a formal infringement procedure. However, we see a number of issues that prevent or delay the opening of a procedure, or slow down its progress. All these make this Single Market governance tool less effective in fighting Member States breaching EU law in general, and protectionism in particular.

[38] European Commission (2017b).

[39] European Commission (2017c).

[40] The so-called "EU pilot" procedure used to be a procedure preceding the formal infringement investigation.

In general, the most effective policy tool the Commission has is in Competition Law. The Directorate General for Competition can open an in-depth investigation about possible unlawful State aid and issue a suspension injunction on the implementation of the alleged unlawful State aid. Even in cases where the implementation of the state aid is not suspended, if the Commission concludes, at the end of the State aid investigation, that the State aid is unlawful, the Member State has to recover the State aid. A suspension provides businesses with immediate redress, while an infringement procedure against legislation will only conclude that a law breaches EU law and has to be adjusted accordingly. It is up to businesses and citizens to seek redress in a national court. However, in our experience, only a limited number of cases qualify for the State aid case criteria. Yet, the Commission has strong powers when unlawful State aid is given, but this contrasts with cases where Internal Market law is breached.

If we look at how the Commission handles infringement cases, a number of things stand out. Even if one has a strong case, this does not mean the Commission will immediately act. Complaints are not only assessed from a legal perspective, but also from a 'political urgency' perspective. Getting support further up the Commission's hierarchy accelerates the handling of a complaint, but it can be difficult to pinpoint why a decision is sometimes delayed by many months or even years.

When an infringement procedure is finally opened, a cat-and-mouse game may begin between the Commission and Member State. Although on paper the Commission and Member States are bound by deadlines to reply to each other's correspondence, there are no penalties for taking more time. What we have experienced in certain cases is that Member States reply just before or after the deadline to maximise the duration of a procedure. Member States provide the Commission with insufficient or even false information, they propose superficial solutions, or even push the national parliament to initiate a never-ending and confusing discussion of amending the contested law. This creates the impression that the contested law might be amended for the better soon, but no clarity over how the amended law will look. We also see that in some cases, the wording of the law is changed, but the impact remains the same. All these tactics are difficult for the Commission to handle. It feels forced to play by the rules, even though it knows it is being played with.

Another effective delaying tactic is a Member State announcing that it will change the law in line with the Commission's instructions, and then only doing so with considerable delay. Even though, legally speaking, a business is no longer obliged to apply the law, in practice a business will do so, because it may lead to repercussions by local authorities e.g. more inspections, fines and create legal uncertainty.

To conclude, we see that Single Market governance in theory is very clear. The Commission is the guardian of the Treaties, and it can initiate infringement procedures against Member States. Business can exercise their Single Market rights and go to court or file a complaint with the Commission. In reality, we see that the Commission can be held back by various factors from policing the Single Market, businesses may fear retaliation when complaining in public, and certain Member

States may be very inventive in preventing or delaying infringement procedures. In a time where populism and protectionism seem to go hand in hand and can act to undermine the EU and the Single Market, this is of major concern. We would like to see more resources and proactive policing of the Single Market, effective governance and institutions able to protect the rights of citizens and business. In Sects. 6.1 and 6.2 below, we look at ways of aiding the process by allowing early action before national measure are adopted.

5.3 Respect for the rule of law

The threat to the functioning of our institutions is not imaginary: the European Commission felt it necessary to adopt 'A new EU Framework to strengthen the Rule of Law' in 2014.[41] The Communication starts by saying: 'The rule of law is the backbone of any modern constitutional democracy. (…) respect for the rule of law is a precondition for EU membership'. This is a strong and clear statement aimed at Member States. The Communication sets out a procedure for a dialogue between the Commission and a Member State adopting questionable practices, before activating the mechanism in Article 7 TEU, under which the European Council could ultimately suspend the voting powers of, and the financial support to the accused Member State. This would require unanimity by the Council, of course with the exception of the Member State involved. This new EU framework is currently being put to the test with regard to Poland and Hungary. The European Commission asked the Council by the end of 2017 to activate Article 7(1) against Poland[42] and in September 2018 the European Parliament adopted a resolution regarding Hungary[43]; at the time of writing the Council had not yet decided to support the Commission's Decision or Parliament's Resolution. On 1 March 2018, the European Parliament backed the Commission's decision on Poland.[44] Whether Poland or Hungary will ever suffer the ultimate sanction foreseen in Article 7 is questionable. Hungary and Poland both expressed their intentions to vote against imposing sanctions under the Article 7 procedure against each other. In Hungary, this was confirmed by a vote in the Hungarian Parliament calling upon the Hungarian government to support Poland in its fight against the European Commission.[45] The Commission proposal for the 2021-27 Multi-annual Financial Framework suggests using "reverse qualified majority" voting to break this logjam.[46]

The European Commission and European Parliament do not stand alone in this debate. The Venice Commission of the Council of Europe has raised its concerns

[41] European Commission (2014b).

[42] European Commission (2017d).

[43] European Parliament (2018a).

[44] European Parliament (2018b).

[45] Politico (2018).

[46] European Commission (2018b).

multiple times. In its last opinion on several Polish draft laws amending the judicial system it concludes "that the Act and the Draft Acts, especially taken together and seen in the context of the 2016 Act on the Public Prosecutor's Office, enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law."[47]

To conclude, we see a strong political trend in Europe of populist forces that seem unlikely to change direction in the years to come. It is likely that the populist footprint will grow stronger. At the same time, we see that in countries like Hungary and Poland populist governments reform their institutions, which undermine the Rule of Law, infringe EU law and disrespect EU values. This undermines legal certainty for businesses, especially foreign businesses. This makes it clear that Single Market governance is becoming more and more important to protect the four freedoms and the rule of law. In the next chapter, we will suggest some ideas to improve Single Market governance.

6 Prevention is better than cure

We believe that the focus of the EU institutions should shift more to the prevention of infringements. Prevention of infringements is attractive from several points of view:

- no harm has occurred yet;
- it is politically and procedurally easier to adjust draft measures than measures already adopted by the national or local legislative bodies;
- infringement cases may drag on for years, and the result is uncertain. In the meantime, citizens and businesses are forced to change their behaviour and may suffer damages;
- stronger prevention could lead to better quality legislation that ensures better compliance with EU law and reduces the number of infringements;
- EU institutions would have more resources available to focus on other relevant EU files (e.g. in 2016, 3783 complaints were filed with the Commission. The number of new complaints in 2016 is the highest since 2011, at the end of 2016, 1657 infringement cases were open).[48]

Mechanisms should be set in place or better utilised to detect possible infringements at an early stage and solutions should be put forward before a national measure is adopted or enters into force. Some of these mechanisms are already there or are in the pipeline. Below we will discuss some of them.

[47] Council of Europe (2017).

[48] European Commission (2017b).

6.1 Single Market Transparency Directive (EU) 2015/1535

There is a notification procedure for national technical product legislation and information society services, which is set out in the Single Market Transparency Directive (EU) 2015/1535 (SMTD). This procedure is best known as 'TRIS': the Technical Regulation Information System.[49] Member States must notify draft measures at least three months before adoption (the so-called standstill period). The notifications are translated by the Commission in all official EU languages, are submitted to a public database,[50] are accessible to all stakeholders and one can easily submit a contribution via the website. Member States and the European Commission may submit an observation or a detailed opinion. In case of the latter, an additional three months standstill is introduced preventing the notifying Member State to adopt the measure after the initial standstill period expired. In principle, the notifying Member State has to respond to the observations and detailed opinion and take them into account in the final draft put to vote in the national parliament. If the notifying Member State would ignore the Commission's detailed opinion or not amend the draft measure sufficiently, the Commission may open an infringement procedure (the burden of proof is on the Commission). According to case law,[51] when a Member State has not notified a measure, it renders it null and void. This procedure provides a strong incentive for Member States to fulfil their obligations under the SMTD.

The notification helps stakeholders to be aware at an early stage of national technical product legislation. Member States do notify most of the relevant measures (about 700 notifications per year) and the procedure enables a dialogue with the notifying Member States. Regularly, the initial standstill period is extended, and other Member States and the Commission submit observations or a detailed opinion. It leads to debate and changes in the final measures[52] and sometimes Member States even abstain from its adoption.[53]

Most stakeholders and the EU institutions agree this procedure works quite well. However, transparency could be increased by making the observations and detailed opinions public. It is unclear whether the Commission's detailed opinion takes account of all arguments put forward by stakeholders. The Commission's opinion could also be relevant in the national debate. Now governments cannot be held accountable for the accurate application of the Commission's opinion. It might also be worthwhile to extend the notifications to general product rules. For example, generic provisions that apply to all products do not fall within the scope of the notification procedure, but in some cases one would appreciate a review of such a measure to assess the compatibly with EU law.

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[49] http://ec.europa.eu/growth/tools-databases/tris/en/.

[50] http://ec.europa.eu/growth/tools-databases/tris/en/search/.

[51] Beca Engineering, Case C-285/15, EU:C:2016:295, paragraph 37, Ince, Case C-336/14, EU:C:2016:72, paragraphs 67–68.

[52] For example TRIS notification 2016/318/BG.

[53] For example TRIS notification 2017/199/HU.

6.2 More effective notification procedure for services

The Services Directive[54] also has a notification procedure for legislative changes affecting the freedom of establishment in Article 15(7). Draft national measures or newly adopted measures falling within the scope of the Services Directive should be notified. The Commission theoretically has the opportunity to take a decision within three months of notification, and to request the notifying Member State to either withdraw the draft measure or abolish the adopted measure if it infringes the Services Directive. Unfortunately, this legislation is at present ignored by most Member States. Between 2009 and 2015, the Commission received 1639 notifications, five Member States never notified anything and the majority of notifications was from only seven Member States.[55] Some reasons brought forward by Member States for not fulfilling their obligations were a lack of awareness of the obligations, absence of standard practice, and a lack of any clear consequences in case of non-notification. EuroCommerce advocated a review of the procedure in 2015.[56] The Commission issued a proposal on 10 January 2017 for a new Directive further clarifying and strengthening the procedure.[57] The proposal would strengthen the obligation for Member States to notify a draft measure three months prior to adoption; the notification would be published on a public website; the Commission, other Member States and stakeholders would have the possibility to provide comments; in case of concerns, the Commission could issue an alert which would require the notifying Member State to refrain from adoption another three months. Not fulfilling obligations as a Member State would constitute a procedural defect of a serious nature. In such a case, the Court of Justice of the European Union could be expected to rule that a not notified measure is null and void. The proposal aims at a structured and transparent procedure for dialogue between the notifying Member States, the Commission and other Member States, with the aim of preventing infringing laws of being adopted. The Council has now agreed a general approach[58] and the Internal Market and Consumer Protection Committee of the European Parliament adopted its report on the proposal.[59] Both have tried to water down the Commission proposal, but kept intact the obligation on all Member States to notify draft measures three months prior to adoption and the ability of the Commission to issue a decision (burden of proof on Member State) or recommendation (burden of proof on Commission) requesting (instead of requiring) a Member State to refrain from adopting or abolishing the measure. At the moment of writing, the EU institutions are in trilogue to find an agreement.

[54] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the Internal Market.

[55] European Commission (2017e).

[56] EuroCommerce (2015).

[57] European Commission (2017f).

[58] Council of the European Union (2017).

[59] European Parliament (2017c).

We are convinced that a strong procedure that enables the Commission to assess draft laws on their proportionality and compatibility with EU law is an effective way to prevent infringements. Giving stakeholders the opportunity to provide timely comments will be of great value as well. In the case of EuroCommerce, members regularly report on regulatory developments in their countries. Members have an in-depth understanding of their own regulatory decision-making process and how new regulation may impact the market. Because of this, they can provide the Commission with important information that enables it to make a better assessment of draft measures.

Obviously, such a notification system needs to be proportionate and should not prevent Member States from regulating their markets appropriately.

6.3 Extend the power of suspensive injunction to Internal Market law

Article 13(1) of Council Regulation (EU) 2015/1589 on State aid gives the European Commission the power to "adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the Internal Market": the so-called *suspension injunction*. This is a powerful tool for a number of reasons. First, the Commission may issue such a suspension injunction before any harm has occurred. It also sends a strong signal to Member States that the Commission has the power to act immediately in case it considers a measure constituting unlawful State aid. This contrasts with the standard infringement procedure where the process of opening a procedure may take many months and the procedure itself years. If ultimately no resolution is found, the Commission has to resort to the Court of Justice to establish that the Member State is infringing EU law. During the infringement procedure, businesses and citizens may suffer damage, may be deprived of their rights under EU Law, and be subject to sanctions. If the Court does rule that a Member State has infringed EU law, no compensation is provided for businesses and citizens. They have to go to court separately to seek redress.

It is remarkable that, today, in case of a clear breach of Internal Market law the Commission first has to open an infringement procedure with the possibility that a Member State will use all the tricks in the book to delay the procedure. We see a great added value in introducing the right of a suspension injunction under Internal Market law if there is a clear breach. This should always be followed by an in-depth investigation, similar to State aid law. We believe this would lead to better quality law-making by Member States, would solve the problem of short-term infringements that last shorter than completing an infringement procedure and improve compliance by Member States.

6.4 *Link EU funding with upholding the rule of law*

In the recent discussion at EU level, the idea has been raised to establish a stronger link between EU funding and upholding the Rule of Law by Member States. This has now been taken up in the recent Commission proposal for a multiannual financial framework 2021–2027.[60] Even though crude, such a mechanism could work. As mentioned earlier, it is now difficult for the Commission to penalise a Member State via the earlier mentioned Article 7 procedure. A number of Member States are heavily dependent on the EU structural and cohesion funds. For CEE Member States, the money flowing in from the EU represents literally percentages of their GDP.[61] Cutting off all or some of the funding would lead to immediate economic problems. The question remains of course if one would ever want to bring a Member State's government on its knees like this, it would be mostly a deterrent instrument and when used it could backfire in the sense that the 'EU'[62] is imposing its dictates on the Member States. Nevertheless, it makes sense to cut off Member States from EU funding if they do not uphold the Rule of Law and EU values anymore. In this case, it should be best used as a preventive tool, to withhold Member States to infringe EU law in a very grave manner.

6.5 *Make infringement procedures more automatic and transparent*

We described earlier that the European Commission may have a number of reasons to abstain from or delay an infringement procedure. Our impression is that this is not likely to change in the near future. At a certain moment, Member States may start expecting the Commission to take into account local sensitivities by default. If the Commission would then ignore those and go ahead with enforcement actions, Member States may object, leading the Commission to be even more hesitant next time.

At the same time, the Commission and the Member States are not always transparent about infringement procedures. Almost all correspondence and argumentation during most of the enforcement steps is kept confidential, with even complainants only having very limited access to information.

The lack of transparency and the lack of a more automatic infringement procedure undermine legal certainty. Member States can get away with infringements for

[60] European Commission (2018b).

[61] http://ec.europa.eu/budget/figures/interactive/index_en.cfm, webpage visited on 21 May 2018.

[62] Even though people often refer to the EU or 'Brussels' as acting entities, both are nothing of the sort. It is among others the institutional dynamic between the Council, Commission and European Parliament that leads to EU actions. In that sense, all policies seen as adverse by the Member States are approved by at least a qualified majority or by unanimity by those same Member States in one way or the other.

a long time and different Member States may end up receiving different treatments.

Therefore, we believe infringement procedures should be made more automatic, by setting clear criteria taking a next step, and decisions based on these conditions should not be influenced by external factors. This would make infringement procedures more predictable and diminish the impact of extraneous political considerations. The Commission could also set out in more detail why it is pursuing or closing an infringement procedure. Providing greater clarity of the Commission's considerations in specific cases could act as a deterrent to Member States infringing EU law, and reduce the scope to exert political pressure on Commission decisions. With much more predictable and automatic infringement procedures, Member States would have a strong incentive to assess the compatibility of new laws with EU law ahead of taking a decision to propose them, thus avoiding public reprimand.

7 Conclusion: The Single Market more important than before?

At the beginning of this paper we asked ourselves if Single Market governance could play a role in containing protectionist and populist policies and maintain our Single Market achievements. First, we looked at populism and protectionism as trends in Europe and concluded that they have become more dominant over the past decade and were likely to even increase further. Then we looked at our experience in dealing with protectionism and infringement procedures. We saw that State aid law as an instrument was fairly effective, but could only be used in a limited number of cases. The use of infringement procedures as a single market governance instrument has its limits. We see that in a number of cases it helped to abolish the infringement, but the Commission is sometimes held back from opening an infringement and taking fast and decisive next steps. Additionally, Member States can be very resourceful in preventing or delaying infringement procedures.

This leads to a situation where the ultimate tool of the European Commission to enforce Single Market rules has become less effective over time. We see that certain Member States are behaving in a more and more protectionist way to protect local interests. We also showed that the cost of this protectionism and the gaps in the Single Market are significant, involving hundreds of billions of euros in opportunity costs. We also saw that the cost impact of individual laws can easily be hundreds of millions of Euros. If we believe that increased welfare is beneficial for Europe's citizens, all European stakeholders and decision-makers have an interest to defend the integrity of the Single Market and fight protectionism.

The question remains of what the most successful strategy would be to contain or fight protectionist policies via Single Market governance. We believe that in the current timeframe, we should focus on prevention, rather than demand stronger

enforcement by the European Commission. Over the years, demands for stronger enforcement have not been very effective and it is questionable if Member States would allow it. This is why we put forward a number of concrete ideas that we believe could prevent infringements from happening by assessing more and better draft laws affecting the free movement of goods and services, introducing a deterrent power of suspension injunction in case of clear breaches of Internal Market law, linking EU funding with upholding the Rule of Law, making infringement procedures more automatic and less political, and improve transparency of notifications of draft laws and infringement procedures for all stakeholders.

We believe this will help preserve Europe's competitiveness and provide economic welfare gains for future generations. Populism may grow stronger, but a well-functioning Single Market will create economic benefits for all regardless their political preferences, and just possibly by stimulating growth and jobs, reduce some of the underlying reasons for illiberal political tendencies which threaten the very fabric of the European project.

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