Tackling Barriers to Trade in the Single Market

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Michelle Egan, American University and Helena Guimarães, University of Minho, EEG

i. 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 dominating the agenda in Europe, voters have reacted angrily to the effects of austerity measures and curtailing of public spending and social welfare measures. Despite the erosion of political and social support for market integration, European policymakers have placed renewed focus on the untapped growth potential of the single market as a necessary 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, but tempered by growing mistrust of market institutions, the 2010 Monti Report and subsequent Single Market Acts in 2011 and 2012 sought to promote innovation and growth while reconciling market integration with social concerns and commitments through a series of proposals to deepen the single market (Monti, 2010, European Parliament, 2010).

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in which the single market now operates has fundamentally changed, as economies of scale and mass production have been replaced by a knowledge and service economy based on product differentiation.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 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,

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1 An earlier version of this paper was presented at the ECPR Pan-European Conference on EU Politics, Hague, Netherlands 5-7 June 2014.
2 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).
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). While compliance with European legislation through the implementation and transposition of directives is viewed as critical in ensuring that international agreements are credible so that states adhere to treaty obligations, a number of studies highlight non-compliance as a result of either problems in administrative state capacity and governance, or national domestic preferences that diverge from specific mandates making them less willing or able to implement the negotiated agreement (Thomson et al., 2007; Börzel et al., 2010). Despite the quantitative evidence that compliance varies by member states and sectors, many consider the European Union as one of the most effective institutions in addressing barriers to trade. For some, the successful functioning of the single market is often attributed to the process of legalization that has created both public and private enforcement mechanisms to deal with trade disputes (Keleman, 2011). For others, soft law, principles, guidelines and codes of conduct, dialogue and exchange of information, recognition and incorporation of international standards can aid compliance with market rules and facilitate trade in the single market (Héritier and Rhodes, 2011). In spite of these different measures, several studies suggest that the reality for business may be very different as de facto trade integration lags far behind de jure integration (BIS, 2011; Lejour, 2010; Kox and Lejour, 2005).

In this article we investigate how well the single market functions in practice by examining barriers to trade in goods as this is considered one of the most successful areas of market integration. We want to see if states are backsliding in terms of their single market commitments by mapping the scope of trade impediments, and then evaluating how effectively they are resolved by different policy instruments. After more than twenty years of market consolidation, there is substantial evidence that the single market is far from complete. The costs of non-Europe have again been highlighted in a recent report – although the untapped potential of the single market focuses primarily on services not goods (BEPA, 2013).

Empirically we examine how problematic are barriers to trade in goods using an original dataset of specific trade complaints, recognizing that this captures only those barriers that have been formally reported. 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. We present the data to illustrate the effectiveness of enforcement mechanisms that are employed in the single market towards recalcitrant member states to see what instruments have been successful in promoting domestic institutional changes. In doing so, we are interested in the extent to which hard law and soft law measures are successful in addressing barriers to trade to generalize about the effects of public
enforcement litigation on member state compliance, and the role of alternative dispute resolution mechanisms as a credible option for single market governance. To date most of the literature emphasizes the formal, judicial enforcement mechanisms, and empirically focuses on infringement proceedings (Hobolth and Martinsen, 2013), despite the growing awareness that informal tools and channels are important and can be effective to address single market distortions. Can trade disputes be settled by alternative dispute resolution mechanisms or does the resolution of trade impediments require a credible threat of hierarchical intervention through legal action to ensure compliance with treaty commitments?

Scholars often assume that compliance with judicial decisions consistently occurs – but do not unpack the different types of legal remedies available to address barriers to trade. 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, Forthcoming: 4). While 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 rule interpretation, administrative capacity, and transparency or a more coercive approach based on monitoring and sanctions to ensure that member states meet their international obligations (Tallberg, 2002), the trade remedies that exist in the single market are, in fact, a mixture of public enforcement through persuasion, cooperation and negotiation as well as legally enforceable provisions exercised through litigation to meet single market obligations.

The rest of the article is structured as follows: Section 2 documents the extent to which barriers to trade exist in the single market drawing on data on business complaints. Section 3 is a brief overview of efforts at improving the governance of the single market over the past two decades. Section 4 outlines the different strategies and instruments to address barriers to trade and to facilitate market access, and tests the probability and success of using different mechanisms for resolution of trade impediments across states and industries. Section 5 concludes.

ii. Barriers to Trade in the Single Market

Although the European Commission provides annual public evaluations on the implementation of Single Market legislation, firms still face a variety of barriers arising out of discriminatory practices. To illustrate, for ten years, an Italian company Fra.bo engaged in a legal dispute about its dual use technology that faced commercial barriers due to lack of compliance with national
standards in other member states. The company brought action (case C 171/11) concerning the revoking of certification to sell its product in Germany, based on refusal to accept mutual equivalence of standards and certification.

Though there is a well-established case law, the fact that these regulations often differ across markets, 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. Barriers can encompass a variety of both deliberate measures as well as those that pertain to health and safety measures or other public policy objectives (Egan, 2001, Vogel, 2009). 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.

Such business complaints 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 as market fragmentation continues to impact business strategies (Egan and Guimarães, 2012). 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, 2013).
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 (TFEU) on goods, 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. 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.

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. 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 (Figure 1). The food industry is the most problematic (cf. Jervelund et al., 2012) in terms of overall notified cross border trade barriers (31%) (Figure 2). Four countries (Italy, France Germany, Greece) account for 64% of the barriers in the food industry. The automotive sector is the second most affected by barriers (18%), found mostly in France, Italy and Denmark (65% of the barriers in the industry).

Figure 1. Percentage of cases by member state

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4 Since then, the data set has not been updated; this may be due to the adoption of alternative conflict resolution mechanisms.
5 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). The data can be made available by the authors.
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% of total barriers) 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 are mainly used in the health industry. Barriers related to mutual recognition represent 18% of all barriers, affecting primarily the equipment industry. Technical barriers and administrative practices 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).

iii. Single Market Governance

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 (SLIM) and provide for regulatory impact assessment (RIA) 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.

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. 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, 2014).

Single Market governance is exercised in different ways through ex ante decisions in which there are rules and procedures that enable the European institutions to make decisions in the face of conflicts and shirking of commitments. In the case of fostering free trade, European governance has followed two different paths, namely that of informal negotiations through networked institutions made responsible for policymaking and implementation that functions in a ‘shadow of hierarchy’ (Scharpf, 1997) and more formal institutional paths that provide procedures for access to justice, and broad empowerment of private litigants (Keleman, 2011; Conant 2007). There are judicially enforceable regulations that pertain to the single market, and yet for all the discussion of new modes of governance, we have limited empirical assessment of whether states comply with persuasive informal efforts at addressing domestic barriers to trade, respond to legally enforceable rights and threats of litigation, or in fact are willing to experience adversarial legalism to protect domestic industries from increased competition (Keleman, 2011; Keelman, 2003). As market rights expand, whether in terms of product liability, copyright infringements or litigation against unfair commercial practices for example, (Weatherill, 2012), the pressure for compliance has led to a range of options in which states are seeking to determine what latitude they have within the confines of avoiding judicially enforceable actions, through less hierarchical cooperative modes of governance, or whether they opt for a more adversarial strategy through judicial action. While we analyze both options in relation to the single market for goods, the EU adopts detailed harmonized regulations as well as more flexible alternatives such as mutual recognition to facilitate trade. In addition, the EU also promotes self-regulation, co-regulation,
delegation to private bodies, and reliance on member states to ensure compliance, as it has shifted the transaction costs from market integration to the implementation stage (Schmidt, 2009, p.8).

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. Guzman argues that reputation can pull states towards compliance with international obligations (Guzman, 2002). Empirical studies of compliance provide evidence that enforcement, management and socialization approaches are 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; Mastenbrock, 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).

iv. Remedies to address barriers to trade: evaluating hard and soft law mechanisms

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). The likelihood of choosing to settle through formal judicial litigation or pre litigation administrative procedures remains understudied. Under 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; (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; Guzman, 2002). 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. Finally, we expect the member states with the best transposition and implementation rates to have the best rates of compliance and thus to have the lowest rates of litigation and judicial sanctions. In sum, the size of the economy along with the country’s

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6 The taxonomy was based and adapted from UNCTAD (Bora et al., 2000).
specific socio-legal traditions, namely of litigation avoidance, may concomitantly explain why some small EU countries are more likely to solve their cases outside the EU Court.

**H1 Smaller economies are less likely to pursue adversarial legalism and more costly legal contestation in court.**

As for differences between industries, we expect the use of the EU Court to be less likely in industries such as chemicals, health and automotive where the market is characterized by the existence of large companies with a presence in virtually all EU countries, and which want to avoid the reputational costs of having their business practices condemned by the EU Court, and the consequent negative impact on their market shares abroad. The food industry, which has one of the most nationally-specific markets and uses exemptions as a means to retain domestic health and safety regulations, is more likely to resist in Court domestic changes in laws, as a means to protect their domestic market from foreign competition.

**H2 Larger multinationals are more likely to avoid litigation given that they have a presence in several domestic markets and want to avoid confrontation with specific member states.**

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 than technical and administrative barriers, 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 cross-border market access. In the case of technical and administrative barriers or government restrictive practices, 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. In these more complex cases it is more challenging to prove that these measures, practices and policies are not used as means of arbitrary discrimination among member states and as disguised barriers to trade; hence judicialization and litigation in the Court is more likely than informal solutions based on voluntary cooperation and dialogue.

**H3 National measures justified under treaty rules as legitimate public interest concerns that could be illegitimate market protection measures tend to result in litigation in the Court.**

In the same vein, we expect that the case is more likely to go to the EU Court if the barrier is implemented through an administrative practice, as these practices may be subject to different interpretations in terms of their appropriateness and legitimacy. A member state may try to get a favorable decision in the Court; as Versluis (2007) argues ‘practical’ or ‘administrative’ implementation relates to specific socio-political interpretation. Legislative acts are assessed against the “law on the books”, and may more obviously be violating the free movement of goods, but 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 and administrative barriers, and legislative acts, which 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.

### Table 1 Probit Model Estimation Results

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*** \( p>0.001 \), ** \( p>0.01 \), * \( p>0.05 \)

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 no different than France. The results for 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 phase. Spain and
Portugal have the highest likelihood of solving the cases outside of court (17.5% and 17% respectively), followed by Greece (7%). The Netherlands, on the contrary, is 16% more likely to solve its cases in the Court. The 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 fully confirmed, as size seems not to explain the use of informal methods. Instead their use seems to be prevalent in the southern Europe enlargement countries, in line with Börzel’s (2000) conclusion that while Greece, Spain and Portugal have a lower number of infringement cases referred to the EU Court of Justice, Italy shows a significantly larger number of referrals to the Court. Explaining the variation in judicial action has tended to focus on the role of resources which may impact the ability of firms or societal groups to seek legal redress for enforcement of European law (Conant, 2002), or changes in socio-legal culture in which political incentives and functional pressures in countries such as the Netherlands and Italy have made litigation more rewarding and less difficult (Keleman, 2011).

When we control for the industrial sectors, the automotive, chemical, equipment and health industries, with a market structure characterized by high industry concentration and large companies with global supply chains and cross-border investment, are more likely to have cases solved outside the EU Court, to avoid confrontation, retaliation and reputation costs in case of an unfavorable Court decision. The prevalence of infringements referred to the ECJ related to food industry may be associated with the fact that the agricultural sector has more national based companies interested in protecting their market shares and in controlling competition from foreign companies; often these national companies operate in protected highly subsidized markets, as divergent food standards have historically been a trade barrier (Vogel, 2009). Given issues of consumer protection and public opinion making food safety highly salient, divergent domestic standards can require costly local conformity requirements which may explain why in food sector infringement cases are less likely to be settled in the initial, non-judicial stages of the proceedings, and instead end up litigated in Court.

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 a variety of Other barriers (less 19%). Finally, the estimates for the implementation instruments are statistically significant, indicating that barriers resulting from administrative practices are 27% more likely to go to Court than barriers contained in national legislation. This confirms our initial hypothesis that violations resulting from administrative requirements and red tape allow for more discretion and arbitrary discrimination, and may easily be used as disguised protectionism, which calls for litigation in the Court rather than for informal negotiated solutions reflecting lack of mutual trust or misunderstanding of legal commitments.

### 4.2 The post 2002 strategy: soft modes of compliance

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7 Due to collinearity the variable “behind the border barriers” was dropped out.
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, creating a set of different soft dispute resolution schemes to solve complaints of perceived violations of EU law. These alternative dispute resolution mechanisms include preventive initiatives of market surveillance (as for example the Technical Regulations Information System), channels to address requests of information and advice (such as Europe Direct), and channels to actually report barriers (such as Solvit or EU Pilot) and can be seen as a longer pre-litigation phase of the infringement proceedings.

For some, these informal methods and preventive initiatives provide opportunities to improve market access and enhance competition in the Single Market and indeed, 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.

As part of the large set of instruments and mechanisms that the EU has put in place to reinforce informal governance of the single market, the Commission established in 2002 the Solvit network. The network is designed to address barriers created by the misapplication of single market rules through informal coordination among member states’ administrations, and to try to avoid legal proceedings. Companies can seek within the network 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. We now 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 registered 407 complaints on regulatory trade barriers, representing 29% of all business complaints to Solvit. The large number of cases handled by Solvit services and its increase since 2002 contrast with the lower number of new infringement proceedings handled by the Commission (123) and with the limited the number of new Court cases (120), as well as with their decrease overtime (Figure 3).

![Figure 3]
New Infringement proceedings, new ECJ cases and Solvit cases (2002-2012)

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

9 Data on new infringement proceedings for 2012 not yet published.
The countries that bring more cases into the Solvit network to open EU markets to cross border trade (complainants) are mostly northern and central European member states (Sweden, Czech Republic, The Netherlands, Denmark, Germany and the United Kingdom). The main defendant member states in the Solvit network are France, Germany, Spain and Italy, large EU countries, which also had the largest number of formal infringement proceedings. Countries with more barriers reported to Solvit are not the same as those that place significant number of complaints. This seems to suggest that there is not bilateral retaliatory dynamics in the use of Solvit; indeed, for some member states the difference between the number of complaints they place and the cases they are involved as defendants is quite large, as for example in the cases of Austria, Czech Republic and UK (cf. Figure 4).
When trying to identify the main pairs of countries involved in Solvit’s negotiated solutions we find that large countries tend to target large countries, and neighbors also tend to target each other. The data also shows that some countries tend to concentrate their complaints against a small set of specific trade partners, while others diversify their efforts to open EU markets across a larger number of member states. The average resolution rate of Solvit is 84%, and in cases involving the free movement of goods is 74%, and has been consistent overtime (Figure 5), pointing to a good overall performance of the network.

Figure 5. Solvit resolution rate in free movement of goods cases

![Solvit resolution rate in free movement of goods cases](image)

Duration of case resolution is one of the main reasons why a judicial solution to single market disputes is often avoided (Siegel, 2011). The duration to resolve Single Market infringement cases is presently 27.9 months (Single Market Scoreboard, 2014), while the purpose of Solvit, as an informal alternative to other more formal problem-solving mechanisms, is to find solutions within 70 days. The average time that actually elapses for all Solvit policy areas is 81 days, while cases pertaining specifically to the free movement of goods take an average of 92 days. Though the resolution of trade frictions is traditionally time consuming (in infringement proceedings it is the policy area where more time is needed to resolve disputes, after the common agricultural policy (Hofmann, 2014), Solvit has consistently been performing quite well in finding rapid voluntary negotiated solutions since its inception (cf. Figure 6).

Figure 6. Average days to solve free movement of goods cases in Solvit
Overall, as a mechanism to tackle trade barriers, Solvit has generated a substantial caseload in comparison to formal enforcement mechanisms (new infringements and new Court cases). Solvit has a significant level of effectiveness (measured by its resolution rates) and efficacy (by addressing timely trade distortions detected by European businesses). However, conventional formal infringement proceedings and referrals to the Court were not displaced by the Solvit network, despite its good performance. This suggests that non-adversarial solutions for trade barriers coexist alongside with the traditional formal modes of enforcement in line with the “shadow of hierarchy” argument. Indeed, as trade frictions resulting from regulatory barriers are difficult to overcome – given that it is often difficult to gauge their protectionist intent – judicialization as the last-resort option remains necessary to improve compliance with single market rules on the movement of goods.

v. Conclusion and analysis

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. More than twenty years after the single market, there is still much to be done to improve the functioning of the single market as trade impediments continue to elicit complaints from some businesses as governments shield specific domestic industries from increased competition for a host of specified reasons. While 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 which undermines the uniformity of the single market (Hanf, 2008; Howarth and Sadeh, 2010(a) (b); Dyson and Sepos, 2010), more attention needs to be given to how effective are the formal and informal trade remedies to achieve policy objectives, and thus enhance the functioning of the single market in a climate in which there are increased pressures for protectionism.

Complying with single market rules is not a “straightforward act” since it often involves states engaging in multiple, sequential actions, so that the options to address domestic restrictions can also be impacted by the target, setting and instruments used to address specific barriers, and thus
what emerges in a specific policy sector may also depend on competing interests that influence the policy process (Weaver, 2014). Our analysis suggests that compliance and enforcement regimes can differ in their effect. While non-coercive instruments have been used with increasing frequency, the default option is still adversarial legalism, if the policy choice does not achieve its desired goals. This conclusion fits with the shadow of hierarchy approach in which hierarchical control – in this case litigation – is either a last resort, if informal negotiations do not resolve the problem, or a first resort, if firms seek legal resolution of their complaint and this leads to infringement proceedings. Though adjudication of trade barriers has been supplemented by soft laws, providing for flexibility and adaptability in European governance, legalization has been an important element in the management of the single market. The concomitant supply of informal institutions and procedures that help to deal with conflict out of court is not surprising, as the "infrastructure of avoidance" is slowly taking hold in terms of single market activities. Since the EU now provides alternatives to litigation, it creates different incentives for invoking or avoiding the courts. Since litigation is just like a market, the parties involved make strategic choices about the costs and benefits of adversarial action, whether it is the threat of judicial action and possible sanctions, loss of reputation for violating European law, or impact on market share and market access.

Though many consider the European Union one of the most effective institutions in addressing barriers to trade, state-centric theories often focus on distortions stemming from implementation, whether due to deliberate actions or unintended consequences. The success of addressing barriers to trade, not just in goods, but other sectors as well, depends significantly on firms notifying states of barriers encountered, on bringing domestic regulations into line with European commitments, and the legitimacy and effectiveness of market surveillance and resolution mechanisms. 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 require more attention to issues of preemption, early warning mechanisms and notification of pending national regulations and standards, especially as states are regulating new issues in both service and product markets. 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 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, 2012) is also more salient if there are common European rules and norms. Yet the credibility of market power is dependent on member states by and large implementing European laws, the effectiveness of alternative dispute resolution instruments in resolving pragmatic every-day problems, and the corresponding legal enforcement mechanisms that reflects the horizontal and vertical nature of single market governance (Lofgren, 2014).
REFERENCES


