Showcasing Single Market problems

April 2023

Examples of Single Market barriers for businesses

European companies cherish the Single Market as the bedrock of the EU economy. 30 years is a significant milestone to celebrate, but it is also time for concrete actions for the benefit of citizens and businesses.

On 16 March, the European Commission published its Communication celebrating the 30th anniversary of the Single Market. BusinessEurope welcomes the Commission's acknowledgement of the urgent need to deepen the Single Market. But the proposed actions fall short of addressing barriers to the internal market. For example, 60% of current barriers to the provision of services are of the same type as 20 years and now also hamper the twin transition.

As underlined in a joint industry statement, BusinessEurope reiterates its call to remove all regulatory barriers to cross-border business operations and intra-EU investments, forming a fully-fledged Single Market for all economic activities. According to the European Commission's estimate, removing barriers to the Single Market for goods and services has the potential to unleash €713 billion by the end of 2029.

Tangible examples of barriers that businesses and citizens face in the Single Market are key to understand the remaining bottlenecks and facilitate informed decision-making. BusinessEurope continues building up the evidence and has updated its series of short papers showcasing practical issues on the ground, which can be used as a package or individually in policy discussions with different interlocutors, as they illustrate barriers across a wide range of different policy areas: from free movement of goods and services to public procurement, company law or transport. The papers supplement the work done by the European Commission in the Single Market Report of 2023, analysing the "root causes" of barriers and are structured around two categories:

- barriers emerging under existing EU legislation, due to its complexity, inconsistencies, uneven interpretation and application by Member States, etc.
- barriers emerging in the absence of EU legislation, where an additional harmonised framework might be necessary.

The examples linked to this introductory note are not an exhaustive list and would be supplemented by new cases in the future.

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Showcasing Single Market problems – in the absence of EU legislation

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Transport infrastructure and systems

This paper concerns inadequate or missing cross-border transport infrastructure and electronic systems. While (partial) frameworks exist, progress towards a complete and frictionless EU-wide transport infrastructure network remains slow.

CONTEXT

Europe's transport network lies at the heart of the EU Single Market as a key enabler for the free movement of people, goods, and services. The efficiency of transport services and the interconnection between all modes directly affects the impact on the environment, cross-border value chains, and the competitiveness of EU industry as a whole.

Nevertheless, businesses experience that Europe is not yet fully connected. In particular Europe's transport infrastructure network does not deliver. In many places, cross-border connections are inadequate (insufficient capacity) or completely missing, and often national digital systems or physical requirements are not compatible.

LEGAL FRAMEWORK

- **Trans-European Transport Network** (TEN-T) policy is set out by the TEN-T Guidelines, defining, *inter alia*, the setup of the network, the infrastructure requirements and its governance. At the end of 2021, the European Commission proposed revised guidelines to address the missing links and modernise the entire network in light of ongoing trends such as decarbonisation and digitalisation. The main funding instrument at EU level is the Connecting Europe Facility (CEF). Grants offered through CEF should continue to be the cornerstone of the EU investment policy for the transport sector, and it is therefore positive that the Commission has suggested an additional EUR 1.5 billion in the renewed MFF 2021-2027 to boost trans-European infrastructure through CEF.
- In the framework of the revision of TEN-T, the Commission has proposed the acceleration of the deployment of the **European Rail Traffic Management System** (ERTMS) to ensure all rail infrastructure on the TEN-T core network is equipped with ERTMS by 2030, and on the comprehensive network by 2040.
- The **Single European Sky** (SES) has been developed based on various legislative packages aiming to make EU airspace less fragmented and modernise Europe's air traffic management system in terms of operation, technology, control, and supervision. After negotiations in the Council stalled on the 2013 revision of the SES (SES 2+), the Commission published an amended proposal in 2020.

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- **Airport capacity** and infrastructure are essentially a Member State competence. EU action in this area seeks to find common solutions and support national efforts where appropriate. The EU Observatory on Airport Capacity and Quality serves as a forum bringing together stakeholders and Member States.

EXAMPLE

In 2017, the "Rastatt Incident" clearly demonstrated the fragility and static nature of the EU's transport network. A highly used section along the Rhine-Alpine rail freight corridor (connecting the Ports of Amsterdam/Antwerp/Hamburg with Italy/Switzerland) was closed for seven weeks after a tunnel collapsed. It caused severe disruption as alternative routes were inadequate. It has been estimated that the interruption resulted in approximately EUR 2 billion in damages: EUR 969 million for rail freight operators, EUR 771 million for manufacturing industries, and EUR 308 million for other industries such as infrastructure managers. The incident clearly demonstrated the importance of improving interoperability and capacity of the EU's overall transport network.

HOW TO ACHIEVE BETTER RESULTS

All modes of transport (air, rail, road, maritime) need to become increasingly interoperable as they can offer more efficient transport solutions in combination. Considering the expected increase in demand for transport services, progress is urgently needed on Europe's transport infrastructure network.

- The **TEN-T** must be completed on time[1], with a focus on infrastructure projects with the highest EU added value. Moreover, better alignment is needed with other policy objectives in the sector, such as decarbonisation and the digital transformation.
- The ambitions for and availability of **safe and secure parking areas** for trucks needs to be improved to ensure that transport operators can comply with binding provisions on resting times under Mobility Package 1. Today, around 100.000 parking areas are still lacking for heavy duty vehicles.[2]
- The **ERTMS** deployment must be accelerated. Only 10% of TEN-T core network corridors that must be equipped with ERTMS by 2030 have been put into operation.
- The **Single European Sky** needs to be completed as a priority and effectively implemented. Modernisation and interoperability will increase connectivity, allow for more efficient air transport and lower CO_2 emissions in the sector.
- **Airport capacity** is set to become a major challenge for air transport in the coming years, with a predicted 8% capacity gap in 2040[3]. Obstacles such as planning issues and inefficient airport processes must be addressed.

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[1] The TEN-T core network must be completed by 2030, the extended core network by 2040, and the comprehensive network by 2050.
[2] European Commission (2019), *Study on Safe and Secure Parking Places for Trucks*.
[3] Eurocontrol (2018), *European Aviation in 2040 - Challenges of Growth.*

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April 2023

Administrative requirements for posting of workers

This paper highlights difficulties faced by businesses in the European Single Market in the context of posting of workers.

CONTEXT

The freedom to provide services constitutes one of the fundamental principles of our single market and the possibility for companies to do business across Member States including postings is an essential part of this. Having clear rules in place which can be effectively implemented by national administrations and companies is important for business, governments and workers, in order to create a level playing field and to ensure that the single market functions well, enabling higher levels of worker mobility.

To date, all Member States have transposed the Revised Posting of Workers Directive (Directive 2018/957) and have already an over a year-long experience in applying it while posting workers across the EU. Nevertheless, companies continue facing an increasing number of barriers when posting workers in the EU, due to different practices, transposition, and systems at national level. In this challenging context, there is a welcomed growing focus at EU level on achieving greater digitalisation within the processes of social security coordination and positing of workers.

LEGAL FRAMEWORK

Directive 2014/67/EU on the Enforcement of the Posting of Workers Directive ('Enforcement Directive') came into force in June 2016. The revision of the Posting of Workers Directive 96/71/EC was adopted in July 2018 and by this date, all Member States have transposed the Directive.

These two directives are the EU's effort to strike a balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers. Another key objective of both directives is to harmonise rules across the EU and foster genuine social convergence between Member States. Businesses have long challenged the complexity of the rules as well as the additional administrative burden for companies.

Regulation 883/04 on the coordination of social security is also subject to an ongoing revision and on which an agreement still needs to be found. The approach to exempting the need for prior notification for business trips and other activities of a short duration, including short-term postings, remains a key aspect of the discussions.

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EXAMPLE

The most common challenges faced by companies posting workers across the EU include:

- **Lack of a single EU digital notification procedure** and lack of possibility to notify multiple postings as one action: companies need to submit separate notification forms for multiple postings (a group of workers) to the same location. The same concerns multiple trips of a single posted worker: each trip requires separate notification procedure.
- **Diversity of national websites**: they are the primary source of information about the posting of workers in the absence of an EU dedicated website/service. Not all of them have an English version, and their logic and design are very different. This makes navigating them and extracting information difficult and time-consuming.
- **Lack of guidelines how to interpret rules**: it is not always easy to understand how to apply the rules stipulated by the Revised Directive, which makes complying with the Directive difficult, time-consuming and increases the risk of non-compliance.
- **Diverse remuneration calculation**: it is difficult and time-consuming to calculate the total remuneration for the posted workers and the total cost of posting for a company as workers are entitled to diverse in-work benefits in different Member States.

HOW TO ACHIEVE BETTER RESULTS

Removing obstacles to posting of workers is a key priority for a well-functioning internal market for services. The following solutions are instrumental to this objective:

- **European social security pass** (ESSPass): ESSPass has good potential to reduce companies' administrative burdens related to the issuance of A1 forms for their mobile workers. Interoperability is key. Building on the Electronic Exchange of Social Security Information (EESSI), a true European data network is needed to enable the registration, submission, exchange and validation of data completely digitally and in real time, taking into account the applicable data protection requirements.
- **EU eDeclaration for the notification of the posting of workers**: it should be a simple form allowing to safeguard the introduced data, modify them easily if needed, and use them for future postings The eDeclaration should enable to process group and multiple notifications for a single worker. Moreover, eDeclaration should be designed in a consistent way to minimise administrative burdens for posting companies, also taking into account the digital solutions (i.e., ESSPass) that are being considered for A1 form related requirements under Regulation 883/04.
- **Single National Website** (SNW): introducing the European universal template for SNW would be the best solution. The second best would be introducing the EU-logo to be "pinned" to those national websites offering the core functions (effectiveness, accessibility, accuracy and user-friendliness).

Showcasing Single Market problems – in the absence of EU legislation

- **Interpretation of rules**: setting up a European Help Desk and securing appropriate resources for its functioning. The European Help Desk, managed by the European Labour Authority, would be very useful to offer guidance on applicable rules and their implementation. National practical guides on posting would also be helpful in providing relevant information on applicable rules across the EU27 (country sheets).
- **EU/national remuneration calculator:** it would enable calculation of a due salary and it could be linked to national Single National Websites; EU database of national in-work benefits as well as easily accessible information on applicable collective agreements would be helpful.
- **Exempting short duration activities, such as postings (and business trips) from the need for prior notification:** would bring legal certainty for companies and greatly reduce the administrative burden that they face.

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Showcasing Single Market problems – under existing EU legislation

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Improving Waste Shipment Regulation to facilitate Circular Economy in EU

This paper concerns challenges posed by an outdated Waste Shipment Regulation where companies struggle with inconsistent rules and fragmented enforcement within EU Member States.

CONTEXT

Businesses across Europe are fully engaged in maximising the value of materials, transitioning to circular business models and achieving a circular economy. This can best be achieved through a functioning market for secondary raw materials (SRMs) and circular products. Several challenges and untapped opportunities remain and impede the creation of such a market.

One such challenge is the outdated Regulation (EC) No 1013/2006 on shipments of waste (WSR) that hinders the creation of a functioning market for SRMs by making the transport of waste across Member States difficult and expensive. It causes significant inefficiencies in the field of international waste management, including for products destined for remanufacturing and refurbishment, and poses challenges for smaller Member States for which national recycling facilities are expensive.

LEGAL FRAMEWORK

The WSR lays down procedures for shipments of waste for intra-EU trade and between EU member states and OECD countries to prevent issues with uncontrollable waste transport. It includes a ban on exports of hazardous waste to non-OECD countries as well as a ban on the export of waste for disposal. In 2021, the European Commission tabled a proposal to revise the rules on waste shipments as part of the new Circular Economy Action Plan. However, the revision is mainly focused on ensuring that the EU does not export its waste challenges to third countries, aiming to restrict waste exports which may have harmful environmental and health impacts, as well as illegal exports and illicit trafficking. These issues should indeed be addressed but should be complemented with the solutions outlined in this paper.

EXAMPLE[4]

Garment and furniture companies experience that it is too complex and too expensive to reprocess their secondary raw materials. During the production processes, these sectors create leftovers such as textiles fabrics, scraps, or other semi-finished products.

[4] For more examples, please visit www.circulary.eu

Showcasing Single Market problems – under existing EU legislation

The leftover percentage may change significantly between 3% up to 21% depending on the degree of efficiency applicable, the materials cost and other variables. Currently, these leftovers are treated as waste and disposed or used in other production, however the costs and process to treat leftovers severely limit the potential of their re-use. Secondary raw materials such as recycled fabric should be viewed as a resource and not waste to encourage Circular Economy.

HOW TO ACHIEVE BETTER RESULTS

A comprehensive revision of the WSR is necessary to ensure appropriate management of hazardous waste and avoid illegal routes, as well as improving access to non-hazardous waste for recycling and recovery. Within the ongoing revision of the WSR, it is crucial to minimise the administrative burden for **trading high-quality secondary raw materials** by:

- Improving the access to waste for reuse, recycling and recovery to facilitate the transition to a circular economy by **allowing the free movement of non-hazardous waste destined for recovery** and reducing unnecessary administrative requirements. For example, by **reducing time required to authorise shipments and exploring the opportunities of digitalisation** (e.g., switching from a paper- based system to an electronic one).
- **Minimising fragmented enforcement within EU Member States** and make sure that transportation of waste in the EU is regulated and handled in the same way. BusinessEurope encourages the **development of guidance** that clarifies the implementation in different countries and the links between the different types of legislation. Logistics of the companies should not be dependent on national borders.
- Making transportation of waste for reuse and recycling less burdensome, both economically and administratively. For example, by **clarifying and harmonising definitions and criteria on recycling, recyclability, reusability and closed loop at EU level** and aligning them with existing EU legislation to create a genuine Single Market in this area (and where possible with international standards). If these issues cannot be dealt with under the WSR, they should be taken care off as soon as possible because they have important effects on the WSR's workings.
- Keep high **quality and transparency in waste shipment. A regulatory framework should be set up to import secondary raw materials** from regions without ambitious recycling systems. These waste imports should have a clear purpose: to feed into the circular economy and be used as valuable raw material for European products.

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Showcasing Single Market problems – under existing EU legislation

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Harmonised standards

This paper concerns bottlenecks in harmonised standardisation, causing high compliance costs for companies and delays in market entry.

CONTEXT

Harmonised European standards (hENs) represent a consensus by stakeholders on how to meet market needs, while at the same time facilitating compliance with EU legislation and supporting the circulation of goods in the Single Market. Following case law from the CJEU, the Commission started to interpret their role in the system for harmonised standards in a more extensive manner. This has aggravated not only an existing backlog of the publication of harmonised standards, but also includes more prescriptive standardisation mandates. The result is a situation where standards are not available to the users, and manufacturers have to resort to alternative and often costly ways to demonstrate compliance with EU law. This prevents using the potential benefits of Single Market governance, as it unnecessarily complicates EU market access.

LEGAL FRAMEWORK

The problem is caused by a contested Commission interpretation of CJEU rulings. The legal framework for European standardisation laid down in the Standardisation Regulation leaves some leeway as to what the roles of the different actors are in practice (notably Article 10). In principle, the Commission provides the mandate based on which the European Standardisation Organisations (ESOs) develop harmonised standards with stakeholders. At the end of the process, the Commission publishes a reference to the hEN in the OJEU, which is necessary for the presumption of conformity to take effect. However, following the CJEU case *James Elliot* on construction products, the Commission strengthened its oversight on this process by providing more prescriptive mandates and stricter controls before the publication of all hENs. The interpretation of the Commission's responsibilities, and in particular extending the implications of this case to all harmonised standards, remains contested.

EXAMPLE

The current situation causes severe challenges for company compliance processes relating to the EU market. Much of the additional burden and legal uncertainty will stay invisible for the external beholder, as they are distributed inside each company.

- **Absence of harmonised standards**. In the absence of a hEN, companies need to demonstrate compliance by creating a technical dossier with risk analyses that essentially repeat, for every individual product design, what standards already

prescribe as due risk coverage. This is costly and time consuming and will often involve engagement of a notified body. But even after involvement of a third party in the conformity assessment, the manufacturer is faced with legal uncertainty about acceptance of this evidence by market surveillance authorities in the EU. In the majority of cases (except where products are subject to pre-market approval), the product may easily be taken from the market which causes enormous turnover loss, reputation damage and recall costs. Modifying a well- established compliance process is in itself a substantial burden as well.

- **Link with international standards**. Delays in the harmonisation process mean that the EU adopted version of the standard will run behind the international state-of-the-art standard, which is nowadays the case for more than two or three years. This causes a duplication of demonstrating compliance, and often the need for an EU specific version of the product, or a change to the design and/or manufacturing processes resulting in different product lines for different markets. Where mandates for harmonisation do not offer sufficient possibilities to include market-relevant elements linked to international standards, technical differences between EU requirements and those of most other markets even get a permanent character.

While companies will ultimately strive to overcome these challenges, the lack of harmonisation brings additional costs and decreases safety, as there are no detailed uniform requirements for new technologies anchored in standardisation. It also enhances the risk of diverging technical content between EU and international standards, thereby decreasing European competitiveness.

HOW TO ACHIEVE BETTER RESULTS

BusinessEurope recommends the Commission to refrain from assuming additional responsibilities in the harmonisation of standards where those affect the roles of other key players in this system, as also reflected in our joint industry recommendations for effective harmonised standardisation:

1. Harmonised European standards should be put back in the hands of self-regulating stakeholders, with public authorities at EU and national level in a guiding and guarding role rather than the driving seat.
2. There should be **no bureaucratic interference with planning and execution** of standardisation work by the Commission, and **no excessive setting of requirements for standards** that are incompatible with the nature of standardisation. It is key that there is sufficient **flexibility for stakeholders in the process** as to how achieve ends.
3. The backlog in the citation of harmonised European standards in the Official Journal should be eliminated, and **a swift citation modus should be guaranteed** in the future, allowing their use for the presumption of compliance by industry.

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Showcasing Single Market problems – under existing EU legislation

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Points of Single Contact in the Single Market

This paper concerns shortcomings in terms of access to information on Single Market rules and procedures, as multiple information sources and different contact points exist across EU legislation.

CONTEXT

Companies intending to export goods and services often face difficulties trying to obtain information about which rules to comply with at national and EU level, which procedures to follow and which public authorities to contact in those Member States they wish to export to.

It is important to ensure a transparent and clear legal base for European companies. A too complex regulatory environment risks that SMEs will refrain from exporting and instead remain in their national markets where they are familiar with the respective rules. The existing complexity can be illustrated in all the different contact points that have been established in various EU regulations. They do not cover all business-related aspects nor information about the entire range of requirements that a company must comply with.

LEGAL FRAMEWORK

Companies that export goods or services to other Member States must comply with all requirements on the market in question. According to existing Single Market legislation, Member States must make information available to companies through Points of Single Contact. The information obligations are imposed in at least eight different regulations[5]. Some non-exhaustive examples of rules and requirements that companies must comply with when accessing other markets are:

- Requirements regarding technical approval
- Requirements regarding registration of the company
- Documentation of the company's eligibility
- Requirements for permits, licences, authorisations
- Registration of posted workers and various documentation requirements concerning the posted workers/staff (qualifications, skills, health, etc.)
- Requirements on local safety certificates and other work environment issues
- Various VAT and tax issues, including registration of staff at local authorities.

[5] Services Directive (2006/123/EC), Mutual Recognition Regulation (764/2008), Recognition of Professional Qualifications Directive (2005/36/EC), Directive on the enforcement of Directive 96/71/EC concerning the posting of workers (2014/67/EU), Marketing of Construction Products Regulation (305/2011), Guidelines for trans-European Energy Infrastructure Regulation (347/2013), Directive on Electronic Commerce (2000/31/EC) and Regulation on a Framework for the free flow of non-personal data in the EU (COM(2017)495).

Showcasing Single Market problems – under existing EU legislation

In 2018, the European Parliament and Council adopted a Regulation establishing a Single Digital Gateway (SDG). The SDG serves as the online access point for EU citizens and business in need of information to become active in another EU country. The SDG will also facilitate access to procedures and assistance services such as Points of Single Contact (PSCs), which were established to improve cross-border service provision. Although the SDG will increase online access, multiple points of single contact will continue to exist depending on different EU legislation and procedures will remain not fully digitised. Insufficient implementation at national level and lack of coherence between the different points of single contact further pose obstacles to cross-border activities of business and citizens. Moreover, it remains to be seen which online procedures will be available under SDG by the end of 2023[6].

EXAMPLE

A manufacturing company and service provider is experiencing increased complexity in the procedures, registration and documentation requirements concerning posting of workers in some Member States. The company operates across the EU providing maintenance services on production equipment it has manufactured.

In some Member States, the company must consult several websites – at times only available in the local language or lacking a user-friendly application by using overly legal or technical language - to obtain an overview of the relevant requirements, such as posting of workers or relevant permits. Still, due to the fragmented information, the company does not feel certain that it has everything in order. Nonetheless, it has to fulfil its contractual obligation to provide the services. Considering that some Member States issue excessive fines for non-compliance, the lack of transparency puts this company in a very uncomfortable situation when fulfilling its service contracts.

HOW TO ACHIEVE BETTER RESULTS

The best way to improve information access is to provide business with all procedures and necessary information in **one "Single Market access point"** accessible also through the SDG. The following actions are needed:

1. **Availability of comprehensive information and e-procedures**, regardless of whether the request originates from a national or foreign business.
2. Provision of **one single, coordinated answer** from a contact point in the Member State concerned, whenever an inquiry is submitted by a business.
3. Provision of information and **relevant documents in English** as default, on top of the official national languages and any other languages chosen by the Member State concerned, and in a **clear and user-centric way**.

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[6] In its 2023 Annual Single Market Report, the Commission announced to make available 21 online procedures in all EU countries by the end of 2023.

Showcasing Single Market problems – under existing EU legislation

April 2023

Placing Single-Use Plastics on the market

This paper highlights the risk of market fragmentation posed by the Single-Use Plastics Directive, resulting from the narrow interpretation of the definition of 'placing on the market'.

CONTEXT

According to the EU Blue Guide on the implementation of EU product rules, a product is considered as placed on the market when it is made available for the first time on the EU market, i.e., when it is first supplied for distribution, consumption or use on the market during a commercial activity, whether in return for payment or free of charge.

This provision is based on the principle of mutual recognition, according to which products lawfully manufactured or marketed in one Member State should move freely throughout the Union where such products meet equivalent levels of protection to those imposed by the Member State of destination.

LEGAL FRAMEWORK

Directive (EU) 2019/904 on single-use plastics (SUP Directive) provides for a harmonised framework to tackle plastic marine littering and pollution by, inter alia, phasing out single-use plastics, introducing economic incentives to reduce consumption and transition to reusable systems, and establishing high collection rates and extended producer responsibility schemes (EPR). All EU Member States had to transpose and implement the SUP Directive into their national legislation by mid-2021, therefore prohibiting the placing on the market of all single-use plastics covered.

In the current form of the SUP Directive, the 'placing on the market' of certain products would be restricted to the territory of a Member State, rather than the Union Market, impeding the principles and definitions established by the New Legislative Framework (NLF) and the Commission's Blue Guide. This narrow definition creates pre-conditions for market fragmentation and further harms the Single Market.

EXAMPLE

According to the narrow interpretation of the definitions of 'placing on the market' and 'making available on the market', which are set out in Article 3 of the SUP Directive, existing stocks without the relevant marking would only be compliant if the products remain in the same Member State where they were already placed on the market prior to 3 July 2021. This would result in a prohibition of making available those products for final distribution to another Member State after that date.

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Any decision to move away from 'placing on the (Union) market' as the single decisive moment to apply the harmonised markings would be clearly inconsistent with the Single Market principles and would result in both negative economic and environmental impact.

Further limiting the time available for economic operators to utilise the existing stocks transition options, by forcing a very narrow interpretation of the meaning of 'placing on the market', will have a significant impact on industry and on the distribution value chain.

It should be noted in this regard that the option of affixing the marking by means of stickers is for industry a resource intensive last resort. Finally, it makes the legislation potentially discriminatory towards distributors active in smaller Member States as products without the marking placed on their territory would not be allowed for final distribution in other Member States. However, its transposition could result in serious market fragmentation due to insufficiently defined provisions, narrow interpretation of established concepts such as 'placing on the market' and sever delays with the adoption of guidelines and implementing measures.

HOW TO ACHIEVE BETTER RESULTS

The European Commission, as the guardian of the treaty, should not introduce pre-conditions for market fragmentation in legislative proposals that are aimed at harmonising the single market. Single Market legislation should consistently reflect the market integration ambition through reduction of barriers and be future proof.

Further **opening and integration of the markets in the EU need to be based on optimally harmonized rules** so that citizens and businesses can easily see they would be treated equally across the EU and can benefit from greater competition across EU countries. Where full harmonisation is not necessary, the **mutual recognition principle** should be respected and solutions for its practical enforcement found, including in the area of services. This approach should also work to ensure smooth pan-European trade flows with our closest European trading partners.

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Showcasing Single Market problems – under existing EU legislation

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Unlocking the full potential of the European Public Procurement Market

This paper outlines existing barriers in the EU's public procurement market, in particular related to the accessibility and openness of national public procurement markets.

CONTEXT

Accounting for about 14% of the EU GDP, public procurement is an important economic lever for growth and investment. At a time of strained public finances, a transparent, open and competitive system of public procurement in the Single Market can not only streamline public finances and raise investment opportunities for business, but also provide high quality goods, works and services for citizens.

However, the European public procurement market still offers untapped potential to achieve economic growth. Companies continue experiencing difficulties when competing for public tenders, which limits the benefits of the Single Market for business and citizens and results in less efficient spending of public money.

LEGAL FRAMEWORK

The EU legal framework on public procurement[7] sets out minimum harmonised public procurement rules, aiming to establish a level playing field for businesses across the EU and promote the free movement of goods and services, while at the same offering flexibility to contracting authorities. Rather than establishing a *common* regulatory regime, the 2014 Public Procurement Package permits Member States to maintain or adopt substantive and procedural rules at national level and covers only contracts affecting cross-border trade[8]. The Directives aim to increase access to procurement markets, improve transparency and equal treatment, and promote digitalisation.

In practice, however, companies continue facing barriers when participating in public tenders. Poor enforcement of public procurement rules at national level, ineffective administration, and practices narrowing cross-border procurement opportunities and favouring national suppliers are prevailing in the EU's public procurement market, limiting the benefits of the Single Market for business and delivering less advantageous solutions for citizens.

[7] Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector, Directive 2014/23/EU on the award of concession contracts

[8] Tenders falling within the scope of the Directives are those whose monetary value exceeds a certain threshold, and which are presumed to be of cross-border interest. National rules apply for tenders of lower value.

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EXAMPLE

In some Member States, such as in Belgium, tendering processes for construction contracts are based on a classification system for suppliers and contractors. To be able to compete in a public tender, a construction company must inform itself about the functioning of the system and then qualify for a certain class. Information about the classification and required steps to qualify are however difficult to find or only available in the local language. Thus, not only divergences in the functioning of national tendering systems, but also the lack of information about the structure of a national procurement market, projects available or complain systems impede the access to public procurement, making it difficult for companies from other Member States to participate in a tendering process.

In the healthcare sector, suppliers often cooperate with contracting authorities to deliver healthcare solutions and services. However, companies who offer such services across the Single Market are often confronted with difficulties when competing with domestic companies in public tenders due to contracting authorities' usage of overly prescriptive qualification tender requirements, thereby favouring national or regional suppliers. For example, healthcare service suppliers must in some Member States comply with specifications requiring the operational presence of trained staff, inventory and infrastructure in the market of interest or submission of regional or local certifications as a prerequisite to compete in tenders. Such prohibited discriminatory conditions may block new suppliers from entering markets and participating in public tenders, thus failing to respect the principles of market openness and non-discrimination, and limiting the potential of delivering innovative goods, works and services for citizens.

Moreover, under the existing regulatory framework, competent authorities may require a specific label either to draw up technical specifications and award criteria, or as a means of proof of compliance. It is often experienced that labels used in public procurement procedures conflict with one another, making it difficult for contracting authorities to compare labels and for suppliers to comply with specifications of the tender, resulting in uncertainty and increased bureaucracy.

SMEs in particular face another obstacle when attempting to participate in public procurement. In some Member States, for example in Germany, the Netherlands and Austria, national contracting authorities only divide a limited number of public contracts into lots, which may be awarded and performed by different economic operators, and instead predominantly offer single contracts.[9] This approach makes it easier for large companies to make an offer, discouraging SMEs to bid for public contracts and restricting new entrants to the market.

HOW TO ACHIEVE BETTER RESULTS

To fully unlock the potential of the EU's public procurement market and remove barriers for companies participating in cross-border public tenders, the focus must be on safeguarding the full, correct and consistent implementation of the existing Directives across the Single Market, rather than revising the current legal framework. As poor enforcement and incorrect or ineffective application of the rules at national level, often

[9] See e.g. European Commission (2023), *Single Market Scoreboard*, Access to public procurement

reinforced by a lack of training amongst contracting authorities, are among the causes of barriers to cross-border trade, a revision of the rules would do little to remove these obstacles.

Instead, the focus must be on the following priorities:

- **Harmonisation of public procurement processes** at national level is needed to improve access to Member States' public procurement markets and enable companies from other Member States to participate in tenders. Therefore, it is necessary to strengthen cooperation and increase the exchange of best practices between Member States, for example through cooperation of national competence centres, or the creation of a Public Procurement Portal providing access to information on national procurement markets, publication platforms, complaint systems and availability of projects.
- **Qualification and performance criteria and the use of labels should not be overly prescriptive**, especially where it would result in impeding participation opportunities for cross-border suppliers and narrowing the public procurement procedure to include only localised suppliers or restrict potential solutions.
- **Professionalisation of public buyers** is key. As public procurement concerns the area between the public and the private sector, it is essential that professionalisation should be organised in such a way that experts from the industry side are involved in the training for public purchasers to ensure the application of attainable and feasible requirements. Moreover, exchange of information and practices between Member States regarding recruitment, skills assessment and professional development of staff should be strengthened and promoted.
- **Compliance with the existing legal framework must be guaranteed**. Infringements of public procurement rules should be rigorously enforced in a national and EU context, in particular those relating to transparency and non-discrimination.

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Showcasing Single Market problems – under existing EU legislation

April 2023

Corporate Sustainability Due Diligence: Ensuring a level playing within the EU

This paper highlights the Single Market challenges posed by the proposed Directive on Corporate Sustainability Due Diligence in terms of legal fragmentation and lack of harmonisation between Member States.

CONTEXT

Over the past years, the EU enacted a number of laws laying down supply chain due diligence requirements for certain sectors, such as batteries, minerals and deforestation. At the same time, several Member States have introduced national laws on corporate due diligence, requiring companies to act against human rights violations and environmental destruction and exploitations in their entire supply chains.

Companies across the EU recognise the advantages and need of a harmonised EU framework on due diligence to prevent fragmentation of the internal market, ensure legal certainty as regards due diligence requirements and guarantee fair competition among companies operating in the Single Market.

LEGAL FRAMEWORK

In February 2022, the European Commission proposed a Directive on Corporate Sustainability Due Diligence (CS3D), aiming to promote sustainable corporate behaviour along global value chains, increase transparency for investors and consumers and establish a level playing field for businesses, both within the EU and vis-à-vis companies from third countries. The CS3D proposal introduces a set of binding legal requirements on human rights and environmental protection for all sectors and establishes new due diligence obligations for European and non-EU companies and company directors above a certain threshold of employees and turnover. In case of non-compliance, the Directive would provide for various measures and sanctions, such as financial penalties, suspension, or deprivation of public support, and introduce civil liability provisions.

While in theory aiming at creating a level playing field for businesses within the EU and preventing fragmentation resulting from unilateral actions by Member States, in practice, the current proposal fails to provide provisions that limit the ability of a Member State to legislate beyond the provisions of the proposal. As a minimum (standards) harmonisation directive, the CS3D proposal allows Member States discretion in the implementation of the Directive, thus contradicting one of its main justifications, namely, to fight legal fragmentation to guarantee one of the EU fundamental freedoms (right of establishment), ensure fair competition and ultimately stimulate sustainable investment.

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EXAMPLE

A European manufacturer of textiles operating and supplying goods across the Single Market and having cross-border value chains could be subject to different requirements depending on the Member State where its subsidiaries are based in, and on the authority or judge who will be in charge of interpreting the rules. One Member State might determine that the company should automatically cancel its relationship with a "risky" supplier whilst another national framework might determine that the company should try to work with such a supplier to solve the situation on the ground. Moreover, while the company might be required to control all its supply chain in one Member State, it might have to monitor only a portion of suppliers in another Member State. Because most value chains have a cross-border nature, companies would be subject to patchworks of rules with multiple interpretations, rendering business impracticable in certain areas.

In addition, if a Member State decides to introduce more stringent provisions at national level than those provided for by the CS3D, a company located in that Member State might be subject to damages and fines due to non-compliance with requirements and harm caused in its value chain, while a company with the same value chain but operating in another Member State with less stringent rules would not be concerned. Besides leading to unequal competition as companies are subject to different requirements based on the location of their activities, this could also result in a forum shopping situation.

Disparities in national corporate due diligence requirements and thus burdensome and complex comparisons of different legal frameworks would make it more complicated and costly for the company to carry out economic activities in another Member State, creating risks and financial burdens whenever the company intends to scale up and establish companies across the EU. Thus, in a nutshell, if adopted as a minimum harmonisation directive, as currently drafted, the CS3D would potentially lead to 27 different corporate due diligence frameworks across the EU, resulting in distortions of competition and fragmentation of the internal market, legal uncertainty and additional costs and complexity for businesses operating in the Single Market.

HOW TO ACHIEVE BETTER RESULTS

To limit this harmful fragmentation, **targeted full harmonisation on essential elements** must be ensured ad minimum to avoid discrepancies to emerge between Member States' transposition laws and guarantee a level playing field for European business. One technique could be to replicate what it is done in EU consumer law directives which include an "internal market or full harmonisation clause"[10]. In accordance with this clause, Member States "shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions, unless otherwise provided for in the Directive". As the proposal for the Directive is based on Article 114 of the Treaty on the Functioning of the European Union, BusinessEurope would see no legal obstacles for this legal tool to be implemented.

[10] See, as example Directive 2019/771 on sale of goods: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0771

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The need for full harmonisation does however not apply to the corporate governance elements of the CS3D. Legislation on corporate governance at EU level is generally more likely to do harm than good. It would interfere with national company law systems and could lead to redefining corporate interest in a way that is incompatible with our economic market model. Also, legislating on corporate governance is unnecessary for the purposes of creating a level playing field on due diligence[11]. Therefore, the **deletion of the provisions on corporate governance in the CS3D** will not have a negative impact on the Single Market but is rather necessary to safeguard the global competitiveness of European companies.

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[11] See e.g. European Commission (2011), *Report of the Reflection Group On the Future of EU Company Law*: "The different corporate governance systems of the Union should not be viewed as an obstacle to free enterprise within a single market, but as a treasure trove of different solutions to a wide variety of challenges that has been experienced and overcome." (p.11).

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Showcasing Single Market problems – under existing EU legislation

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Divergent weight and dimension requirements in road freight transport

This paper highlights the diverging weight and dimension requirements for vehicles and vehicle combinations in freight transport.

CONTEXT

Transport is a key pillar of the Single Market, allowing for the free movement of goods in the EU. The cost and efficiency of transport services directly affect trade flows, mobility, and the competitiveness of European companies. The COVID-19 pandemic has further demonstrated the importance to keep freight moving freely and efficiently across the EU, due to supply chain disruptions that resulted from unilateral measures imposed by Member States.

The EU, from a geographic and logistic perspective, is a fragmented market with different conditions and requirements on transportation at national level, depending on Member States' national geography, international location within the EU and industry pattern. Flexibility in freight transport, rather than a "one-size-fits-all"-approach, regarding permissible weights and dimensions for vehicles provided for in EU legislation has offered increased opportunities for companies to develop innovative and efficient vehicle concepts and transport solutions, bearing potential for increased sustainability, improved road safety and limited congestion and capacity shortage.

Yet, at the same time, due to fragmentation and a patchwork of legislation at national level, companies in the freight transport face the risk of being confronted with significant regulatory barriers, hampering business opportunities, fair competition and ultimately efficiency, sustainable development, growth and job creation. Divergences at national level both regarding the possibility and permissibility of cross-border freight traffic with different weights and dimensions for vehicles and vehicle combinations, as well as the interpretation and transposition of the respective EU legislation have rendered road transport less efficient and hindered the functioning of the Single Market.

LEGAL FRAMEWORK

Directive 96/53/EC regulates the permissible dimensions and weights for vehicles and vehicle combinations in international traffic. Currently, the maximum length of vehicles for cross-border use in the EU is limited to 16,5 meters for articulated vehicles and 18,75 meters for combination of vehicles and weighing up to 40 tonnes. Moreover, in accordance with Article 4, the current EU rules allow for deviating standards in national transport, provided that international competition in the transport sector is not affected. The overarching principle of the Directive was to create correct conditions to further open the market, without creating distortions of competition. In practice, however, views on the

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permissibility and interpretation of vehicles' dimensions and weights have diverged within the EU, particularly regarding cross-border transport. These divergences jeopardise the free movement of goods and the Single Market for road transport services. As part of the Sustainable and Smart Mobility Strategy, and with the aim to align the current EU rules with the EU's objectives to ensure the smooth functioning of the Single Market and reduce greenhouse gas emissions from transport, the European Commission is evaluating the Directive's application with a view to publish a revised Directive in the second quarter of 2023 as part of the Greening Transport Package.

EXAMPLE

Practices in several Member States show that higher weights and dimensions[12] in road freight transport allow for a reduction in CO_2 emissions, as well as traffic and capacity relief. However, the current basic limitation of cross-border traffic to 40 tonnes and 18.75 meters has led to distortive situations all over the EU, given that several Member States have adopted different maximum tonnages levels and allowed diverging limits on dimensions at national levels. The fragmentation among Member States has forced companies operating in international road freight transport in Europe to comply with divergent rules regarding the maximum length and weights of vehicles and vehicle combinations for cross-border use, sometimes obliging operators to partly unload their vehicles between two Member States when they both accept higher capacities at national level. This leads to unwanted additional operations and additional vehicle moves and miles for shorted distances, which results in unnecessary CO_2 emissions, contradicting the EU's ambitious climate goals as laid down in the EU Green Deal, and adds further pressure on driver shortages and challenges in terms of capacity in the market.

HOW TO ACHIEVE BETTER RESULTS

Since many years, businesses representing shippers, freight forwarders, OEMs and transporters have been confronted with a fragmented market in international road freight transport in Europe. In view of the upcoming revision of the Directive, taking into account existing practices and agreements between and within Member States and in full respect of the principle of subsidiarity, we propose the following solutions to be considered to protect the Single Market, enhance the efficiency of road transport, and promote the EU Green Deal objectives:

- When revising the permissible weight and authorised dimensions for road freight transport across the EU, an assessment must be carried out, examining the impact on:
    I. The EU freight transport market, including rail freight transport and inland waterway transport
    II. The road transport infrastructure and related maintenance and upgrading requirements
    III. Intermodal transport (e.g., permissible total weight in combined transport) and equipment
    IV. Energy efficiency and CO_2 reduction in the transport sector

[12] Some Member States increasingly promote the use of Longer Heavier Vehicles (LHV), reaching lengths of up to 25.25m or 34m, while at the same time allowing a higher maximum permissible weight of up to 74 tonnes.

- Member States can *differentiate upwards* on their national territory (which would be supported by their national infrastructure system).
- *Exceptions downwards* can only be clearly and scientifically motivated for specific fragile parts of the infrastructure.
- Higher weights and dimensions should be allowed for *cross-border* transport between like-minded states, taking into account, however not requiring, existing practices and agreements between Member States.
- Member States would not be allowed to apply a maximum limit for international road freight transport that is lower than the national maximum limit.
- Deviations in weights and dimensions should not be conditioned upon the use or deployment of any specific technology or the use of the vehicle for specific purposes.
- Member States must avoid applying measures leading to a competitive disadvantage for eco-friendly vehicles. Exceptions to the maximum weights and dimensions of vehicles equipped with features and/or equipment designed to increase energy efficiency and/or reduce greenhouse gas emissions should therefore be allowed.

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Showcasing Single Market problems – under existing EU legislation

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Striving for greater harmonisation of packaging legislation to prevent market barriers

This paper highlights the diverging packaging and labelling requirements in the EU, and the need to achieve greater harmonisation across Member States.

CONTEXT

The packaging value chains are increasingly facing market barriers resulting from divergent national provisions. Unilateral national packaging, labelling and information requirements are being introduced by Member States alongside unilateral bans on packaging formats. Additionally, the lack of harmonised EU measures or their delayed adoption is eroding the integrity of the single market.

These market barriers lead to additional operational and administrative costs for European companies. Moreover, they risk undermining the EU's sustainability goals by undercutting economies of scale and investments in innovation because of the increased market fragmentation. A well-functioning internal market is key to protect the free circulation of packaging and packaged goods across the EU and enable the circular economy.

LEGAL FRAMEWORK

The European Commission's proposal for a Regulation on packaging and packaging waste (PPWR), repealing the current Directive, aims to improve the environmental sustainability of packaging and ensure the free movement of packaging in the internal market. According to the PPWR, packaging can only be put in free circulation on the internal market if it complies with sustainability requirements on *inter alia* recyclability, recycled content, reusability, and packaging minimisation as well as labelling and information requirements.

To deliver on its sustainability objectives and strengthen the internal market, it is crucial that the PPWR provides greater harmonisation of requirements on e.g., labelling and packaging design across Member States. The Commission's proposal to transform the outgoing Directive into a Regulation and the choice to maintain an internal market legal basis (Article 114 TFEU) is welcome since it will contribute to increased harmonisation of such measures. Thereby, it has the potential to enhance the competitiveness of European companies, considering the high costs of complying with divergent requirements, and contribute to the development of a circular economy.

However, several provisions in the PPWR proposal allow Member States to maintain or introduce additional national sustainability and information requirements or introduce

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further measures to reduce the generation of packaging waste and the environmental impact of packaging. Such articles include Articles 4(4), 4(5), 45(2)(c) and 38. Provisions that risk causing market fragmentation and thereby also hindering the development of a circular economy are concerning.

EXAMPLE

Diverging labelling and packaging requirements force companies to create several iterations of their packaging to comply therewith, or to use stickers to add or cover certain markings. In addition to costs and operational impacts on production lines, these national measures have a negative impact on the size of packaging and its recyclability (e.g., when stickers are required) and can confuse consumers. Using the same packaging for a product for several markets increases the flexibility of manufacturers to react to demand, maximize efficiency and reduce environmental impacts.

Furthermore, national interpretations and transpositions of such requirements differ, and, in some cases, Member States have established additional requirements. For example:

- Green Dot: The use of the “Green Dot” symbol is penalised in some Member States, while being mandatory in others. This leads to situations where manufacturers would need to develop national-specific packaging or use stickers to cover the “Green Dot”.
- Triman Logo: The indication of a sorting logo is mandatory in some Member States and possibly prohibited in others. Such conflicting requirements hinder the use of the same packaging for a product for the entire European market.

HOW TO ACHIEVE BETTER RESULTS

A **functioning single market for packaging and packaged goods** must be a key deliverable of the negotiations on the PPWR. To reach this objective, the focus should be on creating strong **harmonisation of legislative measures on packaging**, such as labelling and packaging design requirements.

To ensure that the PPWR prevents further market distortions and barriers to the free movement of packaging and packaged goods across the EU, the following is key:

- Maintaining the Commission’s choice of legal instrument, i.e. a Regulation.
- Maintaining an internal market legal basis (Article 114 TFEU).
- To ensure optimal environmental and economic outcomes, Member States should be prevented from introducing divergent or additional national requirements that risks fragmenting the internal market. In this aspect, articles such as 4(4), 4(5), 45(2) and 38 are of concern as they could lead to such diverging requirements on e.g., packaging design and labelling.
- While requirements for companies should be harmonised, provisions in the Regulation should not undermine efficient waste management systems already in place in Member States.

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