1 The internal market

INTRODUCTION

The European Union (EU) was founded in 1957 as an economic organization, as is indicated by its original name – the European Economic Community (EEC). The creation of an internal market among the European countries has been its central endeavor, and remains so to this day. According to Article 26(2) of the Treaty on the Functioning of the European Union (TFEU), "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." Since the Union's inception, however, its economic objectives were considered to be part of a broader, political mission. In the Union's early days, this mission was to foster general rapprochement between the Western European countries and to enable reconciliation of Germany with its former enemies in the Second World War (as well as to ensure the long-term containment of Germany's re-emerging economic power).[1] While the political environment has changed in significant ways since then, the political ambition to promote increased openness of the European countries toward each other has remained unchanged. Article 1(2) TEU holds: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." The creation of such an ever-closer union among the European peoples appears as the EU's central project, which the internal market is intended to support. The internal market must therefore be understood within the context of the Union's broader, political goals. This is most clearly expressed in Article 3(3) TEU, which defines the tasks of the European Union:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion,

1 Alan Milward, *The European Rescue of the Nation State*, London: Routledge, 2000, p. 104.

and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

This provision expresses the expectation that the internal market can help achieve such diverse goals as balanced economic growth, social progress and an improvement of the quality of the environment. The internal market, as an economic instrument, is therefore designed to serve societal goals. At the same time, it is clear that the values espoused by Article 3(3) TEU are connected to very different political-economic programs: whereas issues such as "full employment," "social progress" and "social justice" appear to be connected to social-democratic or christian-democratic thinking, goals like "price stability" and the "highly competitive social market economy" tend to be of central importance for conservative, liberal and neoliberal thought. Finally, themes like "balanced economic growth" and the "protection . . . of the environment" may be seen as connected to green political and economic thinking. Internal market law therefore is placed within this context of different, partly conflicting socio-economic visions. This can lead to competing interpretations of the Treaty freedom provisions, none of which necessarily representing a single "correct" understanding.

The central doctrinal feature of internal market law in its current state is that the obligations the Treaty defines with regard to the internal market – to create an area without borders for goods, persons, services and capital – are interpreted as individual rights, i.e. as the right to move goods and capital freely across borders, to freely provide and receive services and to access employment or self-employment in another Member State. These rights can be invoked by persons against conflicting national law in national legal proceedings. This characteristic quality of internal market law has been developed by the Court of Justice of the European Communities ("the Court") in some of its most fundamental decisions, in particular in such cases as *Van Gend en Loos* (1963) and *Costa* v. *ENEL* (1964).[2] Since then, the individual-rights perspective has developed into the dominant analytical framework in European law scholarship. The present textbook largely follows this approach. It should be emphasized, however, that this analytical framework – like any analytical framework – provides only a partial perspective: it reveals some important aspects of its object, while leaving others obscure.

While the Union citizenship provisions are not as such part of internal market law proper, they share, as interpreted by the Court, a common doctrinal framework with the economic freedoms. Most notably, the Court interprets the Union citizenship provisions as individual rights comparable to the economic freedoms. It is for this reason that the Union citizenship provisions are analyzed in conjunction with internal market law in this book. We will refer to the rights established by the

2 Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR 3; Case 6/64, *Costa* v. *ENEL* [1964] ECR 1141.

Table 1.1 Overview of the Treaty freedom provisions

Treaty freedom	Provisions
Union citizenship	Arts. 18–25 TFEU
Free movement of goods	Arts. 28–37 TFEU
Free movement of workers	Arts. 45–48 TFEU
Freedom of establishment	Arts. 49–55 TFEU
Freedom to provide and receive services	Arts. 56–62 TFEU
Free movement of capital and payments	Arts. 63–66 TFEU

Union citizenship and the internal market law provisions under the common term "Treaty freedoms." Table 1.1 sets out an overview of the Treaty freedom provisions.

SHORT HISTORY OF THE INTERNAL MARKET

The EEC was created by the Treaty of Rome (1957), with the goal of establishing a "common" (now "internal") market. Early Treaty reforms of the 1960s and 1970s mainly altered the institutional setup and the budgetary system of the EEC. The central Treaty changes that shaped internal market law as we see it today were set in motion by the White Paper on the completion of the internal market (1985), a strategic plan drafted by the Commission upon request by the European Council.[3] The strategy mapped out by the White Paper was subsequently implemented by the Single European Act (SEA, 1986) and the Treaty of Maastricht (1992). In this section, we will look at some of the important historical developments that shaped the system of internal market law as it exists today. Table 1.2 sets out an overview of the major Treaty reforms.

The historical context of the Treaty of Rome

Trade liberalization had already been in full swing for a decade when the Treaty of Rome was signed, at both the European and the global level.[4] Immediately after the Second World War, the European countries had established numerous bilateral trade agreements.[5] The signing of the Convention for European

3 See European Commission, Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28–29 June 1985), COM(85) 310 final, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf (accessed February 18, 2014), p. 4.
4 The following section is based on Clemens Kaupa, "Dealing with Competing Socio-Economic Paradigms in Internal Market Law," dissertation, Vienna, 2013, pp. 139–142.
5 Jan Tumlir and Laura La Haye, "The Two Attempts at European Economic Reconstruction After 1945" (1981) 137 *Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics* 367, 382.

Table 1.2 Overview of the major Treaty reforms[a]

	Treaty	Important aspects from internal market perspective	Other important reform elements
	Treaty of Paris, establishing the European Coal and Steel Community (ECSC, 1951)	Establishes common market for coal and steel; free movement of workers in coal and steel industries	Establishes European institutional framework: High Authority (now Commission), Council, Assembly (now European Parliament) and Court
EEC Treaty	Rome Treaties establishing the European Economic Community (EEC, 1957) and EURATOM	Establishes customs union and common (now "internal") market	Introduces common agricultural policy, common transport policy and common rules on competition
	Treaty of Brussels ("Merger Treaty", 1965)		Institutions of the EEC, ECSC and EURATOM are merged
	Treaty amending Certain Financial Provisions (1975)		European Parliament can reject budget; European Court of Auditors created
	Single European Act (1986)	Expansion of majority voting in Council	European Parliament is involved in legislative process; new EEC competences, e.g. environment and research
EC Treaty	Treaty of Maastricht (1992, now "EC Treaty")	Alters provisions on free movement of capital; introduces Union citizenship provisions	Creation of EU: three pillar structure; creation of European Economic and Monetary Union; new competences (education, culture)
	Treaty of Amsterdam (1997)[b]		Expansion of European Parliament competences; incorporation of Schengen Agreement
	Treaty of Nice (2001)		Institutional reforms to enable Eastern enlargement; double majority requirement in Council
TFEU	Treaty of Lisbon (2007, now "Treaty on the Functioning of the European Union")	Charter of Fundamental Rights	Abolition of pillar structure; expansion of role of European Parliament

a Excluding Accession Treaties and the Treaty on Greenland (1984).
b See Philippe Manin, "The Treaty of Amsterdam" (1998) 4 *Columbia Journal of European Law* 1.

Economic Cooperation in April 1948, which founded the Organization for European Economic Co-operation (OEEC) (now the Organization for Economic Co-operation and Development, OECD), constituted the first postwar multilateral attempt to abolish restrictions on trade and payments in Europe. The liberalization process begun under the auspices of the OEEC was successful: in the years that followed, intra-European trade quickly expanded, surpassing even the optimistic projections of the OEEC secretariat.[6] At the same time, trade liberalization progressed with similar high speed at the global level. Although the Havana Charter for the envisaged International Trade Organization was aborted, having failed to pass the US Congress,[7] the General Agreement on Tariffs and Trade (GATT, 1947) nonetheless came into force in 1948, having been signed by twenty-three countries (which together already accounted for 80 percent of world trade).[8] By 1956, four (of the GATT's total of eight) multilateral trade negotiating rounds – Geneva, Annecy, Torquay and Geneva II – had been successfully concluded. It was in such general climate of European and global trade liberalization that the EEC was conceived.

The EEC was a continuation and intensification of this process of trade liberalization, but it was also a qualitatively new step. European policymakers, undeniably inspired by the United States, the most productive, technologically advanced and socially progressive economy in the world, concluded that the size and structure of the US market was among the crucial factors that made this success possible.[9] "The modern world is a world of continents, of markets and economies on the grand scale," Commission president Walter Hallstein remarked in a speech at Harvard University in May 1961. "Divided economies and divided markets mean small-scale efforts, which in turn mean waste and relative poverty."[10] The European Economic Community attempted to combine the expected benefits from trade liberalization with the dynamic effects they believed would follow the formation of a single, common market of Member States.

The Treaty of Rome

The Treaty of Rome, which established the European Economic Community (EEC), was signed in 1957 and came into effect on January 1, 1958. Its signatories were Belgium, the Netherlands and Luxembourg as well as France, Germany and Italy. The same six countries had already formed the European Coal and Steel Community (ECSC) in 1951, creating a common market for coal and steel. The central elements of the EEC were the establishment of a customs union and of an internal market (then termed the "common market"). The Member States committed to provide for the free movement of goods, services and persons by 1970, after a transitional period of twelve years.[11]

In both the ECSC and the EEC, "the six members chose economic means to reach political objectives," as political scientist Stanley Hoffmann put it.[12] Most notably,

6 *Ibid.*, 385.
7 Douglas Irwin, "The GATT in Historical Perspective" (1995) 85 *American Economic Review* 323, 325.
8 *Ibid.*, 325.
9 See e.g. Tibor Scitovsky, *Economic Theory and Western European Integration*, London: Allen & Unwin, 1958, p. 9.
10 Rudolf Ganz, "Hallstein Notes Political Goals of Common Market," *Harvard Crimson*, 23 May 1961, www.thecrimson.com/article/1961/5/23/hallstein-notes-political-goals-of-common (accessed February 9, 2013).
11 Art. 8(1) EEC.
12 Stanley Hoffmann, "The European Community and 1992" (1989) 68 *Foreign Affairs* 27, 32.

Table 1.3 Various preferences regarding European integration, according to Leon Lindberg

Preferred nature of European integration	Proponents
Integration as political unification	"This group consists of a relatively small number of strategically placed 'Europeans' in all walks of life and in all countries, mostly in Christian-Democratic parties, but some of them in Socialist parties, particularly in Belgium and the Netherlands; a majority of EPA [European Parliamentary Assembly] members; the Commission; [German chancellor Konrad] Adenauer, [French foreign minister Robert] Schuman, [Italian prime minister Giuseppe] Pella, [Belgian foreign minister Pierre] Wigny, [Dutch politician Carl] Romme, and [Belgian prime minister Paul Henri] Spaak; and [French politician Jean] Monnet and various 'federalists'."
Integration as economic unification	"This group is composed of Socialist and Christian-Democratic parties and trade unions in all countries; other groups which consider themselves in a marginal position at the national level, or which have come to the conclusion that comprehensive welfare or planning programs cannot be achieved at the national level; Belgian industry; and Dutch agriculture."
Integration as economic and political cooperation	"This head covers [French president Charles] de Gaulle and the UNR [Union pour la Nouvelle République [the Gaullist party]; center parties in France; agricultural groups in France, Belgium, Italy, and Luxembourg; and high-cost industry in all countries."
Integration as free trade	"Here we have free-trade-oriented parties; Liberals in Italy, Belgium, and the Netherlands; the [German liberal] FDP, the [German national-conservative] DP, and the Erhard wing of the [German Christian-Democratic] CDU; low-cost and highly efficient industry in all countries, especially in Germany and the Netherlands; and commerce in all countries."

economic integration served as a means to contain Germany's economic power; but it would also give the Member States greater voice on the international level. The motivations to support the foundation of the EEC of the various governments and the groups within the Member States varied, however: political scientist Leon Lindberg emphasized in 1963 that support for European integration in the various countries came from very different political parties and interest groups, and for very different reasons (see Table 1.3). In particular, he distinguished four broad viewpoints, which in turn all shaped the EEC.[13] Whereas some hoped that the EEC would mainly become a free trade project on the basis of a traditional, liberal model, others – among them the main social-democratic and christian-democratic parties – expected increased economic unification of the national economies. Other players, such as the De Gaulle government, believed that European integration would be a means to strengthen their respective nation-states, whereas the European-oriented political elites believed that the EEC could be a vehicle for eventual political integration.

13 Leon Lindberg, "The Political Dynamics of European Economic Integration" [1963] in Mette Eilstrup-Sangiovanni (ed.), *Debates on European Integration*, New York: Palgrave, 2006, p. 131.

The Treaty of Rome reflects the political compromise between the different governments and different groups within the Member States in various ways. A notable example is the Common Agricultural Policy, which created a special regime of trade and subsidies for the agricultural sector, where the general rules on the internal market applied only in part. The institutional setup of the EEC equally reflects the political compromise. The EEC was a mix between federalist (or "supranational") and intergovernmental characteristics: the relatively strong role of the Commission as an executive authority and the independence of the Court were outweighed by the strong influence of the Member States exercised through the Council. Historian Alan Milward described this compromise as follows:

> [T]he rejection of the extreme protectionism of the 1930s and the cautious moves towards trade liberalization in the pursuit of the economic goals of the post-war consensus inevitably also endangered the position of some elements of that consensus, and it was this which gave the commercial policies of the period their peculiar mixture of liberalism and protectionism. The transition was not, as so many commentators suggest, a transition from pre-war protectionism towards classical free trade, but towards a new form of neo-mercantilism appropriate to the changed political conditions.[14]

The historical context of the White Paper

The 1970s brought Europe's largest economic downturn since the Second World War, with a recession following both the 1973 and the 1979 oil crises.[15] These downturns were accompanied by growing unemployment and rising inflation, phenomena which proved unresponsive to the set of macroeconomic interventions that had been successful in managing business cycle downturns in previous decades. Today, many economists therefore argue that the crises – while sparked by rising energy prices – were in fact triggered by deeper, structural causes that exacerbated and prolonged the downturn.[16] Economist Barry Eichengreen, for example, argued that in the early 1970s a shift in the structure of economic development took place, evident in the declining productivity growth in Europe.[17] The period after the War was a period of "catch-up" growth: Europe had experienced an innovation gap during the war in comparison to the US. Europe could follow this development by mobilizing capital on a large scale to adopt technologies that had already been developed in the US. This period of "extensive growth" ended in the 1970s, when Europe had finally "caught up" technologically with the US. It was replaced by a phase of "intensive growth," which required innovation and increased flexibility to invest in new technologies.[18] This new growth phase, Eichengreen argued, required a different institutional structure: whereas the corporatist, big-industry approach was adequate for "catch-up"

14 Milward, *The European Rescue of the Nation State*, p. 113.
15 Barry Eichengreen, *The European Economy Since 1945: Coordinated Capitalism and Beyond*, Princeton University Press, 2007, p. 252; The following section is based on Kaupa, "Dealing with Competing Socio-Economic Paradigms," pp. 163–166.
16 See e.g. *ibid.*, 252 *et seq.* 17 *Ibid.*, 252. 18 *Ibid.*, 5–6.

growth, it failed to create an environment that sufficiently fostered innovation. The postwar economic boom had ended, and the old growth models no longer seemed to work.

Macroeconomic instability was exacerbated by the unraveling of the Bretton Woods system in the early 1970s. The Bretton Woods system was conceived in 1944 to establish a system of global macroeconomic governance, with the International Monetary Fund (IMF) and the World Bank as its main institutions. Within the system, currency exchange rates were fixed to the US dollar, which in turn was linked to gold, and thereby provided relative exchange-rate stability. When the system broke down, currencies floated freely against each other, which increased macroeconomic instability.

According to the Treaty of Rome, the main competences for instruments of macroeconomic regulation – monetary policy (including currency policy) and fiscal policy (including social policy and capital controls) – were to remain with the Member States. When the impact of the 1973 oil crisis on the European economies as well as the breakdown of the Bretton Woods system became clear, the Member States responded nationally, but increasingly turned to the European level as well. The phase between 1974 and 1985 was characterized by a period of "social activism" at the European level.[19] This included the first "Social Policy Action Programme" of 1974 and a number of Directives on labor-market-related issues. Moreover, in the 1970s the Member States attempted for the first time to coordinate their monetary policies on a European level (the so-called "European Monetary System"). And, finally, there was an increasing push toward a resumption of efforts to further integrate the European common market.

A central factor in this decision was Europe's global competition with the US, and even more so with Japan.[20] In the 1980s, the Japanese economy was on the rise, and seemed to disrupt the hitherto existing global economic balance. European policymakers and commentators were particularly concerned about Europe's growing lag in technological development, above all in the IT and telecommunication sectors.[21] The fragmented nature of the European market was believed to have had negative effects impacting adversely on the ability of companies to innovate. European businesses were, above all, interested in creating a home market large enough to sustain global corporations, which in turn could compete with the US and Japanese companies. An influential text titled *Europe 1990* that was published by the Philips corporation in the early 1980s held:

> There is really no choice . . . and the only option left for the Community is to achieve the goals laid down in the Treaty of Rome. Only in this way can industry compete globally, by exploiting

19 Hugh Mosley, "The Social Dimension of European Integration" (1990) 129 *International Labour Review* 147, 149.
20 See e.g. Wayne Sandholtz and John Zysman, "1992: Recasting the European Bargain" (1989) 42 *World Politics* 95, 95; Hoffmann, "The European Community and 1992," 29.
21 Eichengreen, *The European Economy Since 1945*, p. 335.

economies of scale, for what will then be the biggest home market in the world today: the European Community home market.[22]

And Fiat CEO Clemente Signoroni explained in 1989: “The final goal of the European ‘dream’ is to transform Europe into an integrated economic continent with its specific role, weight and responsibility on the international scenario *vis-à-vis* the US and Japan.”[23] It was in this political and economic context that the Commission developed its White Paper, which led to the adoption of the SEA and ultimately to the Treaty of Maastricht.

The White Paper and the Single European Act

Because of these global economic developments, the 1980s brought an increased push to reinvigorate the integration process at the very core of the Community, the internal market. The European Council called for steps to be taken “to complete the Internal Market,”[24] and the new Commission under its president Jacques Delors was mandated to draw up a strategy to this effect. The result was the White Paper “Completing the Internal Market” of June 1985.[25] It established a roadmap that should lead to the completion of the internal market by 1992. It aimed at three central goals: (1) the removal of physical barriers (i.e. customs posts at frontiers and corresponding formalities); (2) the removal of technical barriers (i.e. different regulatory product standards in the Member States); and (3) the removal of fiscal barriers (i.e. differences in indirect taxation, such as excise taxes). Moreover, the White Paper set out a timetable for the enactment of over 320 measures by 1992, ranging from a proposal for the abolition of “customs presentation charges” to a Directive “on eradication of classical swine fever.”[26]

The White Paper initiated major reforms, which were facilitated in particular by three changes in regulatory strategy. The first strategy was a rollback of the unanimity requirement for harmonizing measures, which was implemented by the Single European Act (1986). Under the voting system of the Treaty of Rome, secondary legislation had often required unanimity among the Member States in the Council. With the expansion of qualified majority voting, harmonization would become easier, as measures could no longer be blocked by individual Member States. The second strategy was the increased focus on what has become known as the principle of mutual recognition. According to the White Paper, the general principle should be that, “if a product is lawfully manufactured and marketed in one Member State, there is no reason why it should not be sold freely throughout

22 Wisse Dekker, *Europe 1990: An Agenda for Change* (1985), quoted in Sandholtz and Zysman, “1992: Recasting the European Bargain,” 117.
23 Quoted in Sandholtz and Zysman, “1992: Recasting the European Bargain,” 95.
24 Quoted in European Commission, Completing the Internal Market, p. 5.
25 European Commission, Completing the Internal Market.
26 See *ibid*., Annex.

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the Community."[27] This principle implied that product standards would not necessarily have to be harmonized before products could be traded in Europe. The third strategy consisted of the "new approach in harmonization": harmonization measures prior to the 1980s laid down product standards in detail, which could make the legislative process long and difficult. According to the Commission's new approach, harmonization measures would focus on essential requirements only, such as health and safety concerns.

While most of the measures proposed by the White Paper were of a mainly technical nature, the Commission nonetheless succeeded in making "1992" a project that raised broader political hopes and altered expectations on the future of European integration. This change in expectations was particularly noticeable in the business sphere, where companies merged in increased numbers and expanded to prepare for the changed requirements of a fully integrated European market.[28]

The Single European Act (1986), the first major reform of the Treaty of Rome, brought the institutional reforms envisaged by the White Paper. From the perspective of the internal market, its most important element was the expansion of majority voting in the Council. This included, most notably, the introduction of Article 100a EEC (now Article 114 TFEU), which allowed for harmonization measures based on a qualified majority in the Council. Moreover, the SEA made the European Parliament part of the legislative process, though at that time with rather limited competences.

Maastricht, Amsterdam, Nice and Lisbon

The Treaty of Maastricht, which established the European Union, brought numerous new fields of activity into the European realm. From a perspective of economic policy, the most important and far-reaching reform may well have been the adoption of the European Monetary Union (EMU), which introduced the euro as a common currency. Also of central importance was the introduction of the concept of Union citizenship. With regard to the internal market, the most significant reform concerned changes made to the free movement of capital provisions, which subsequently were found to have direct effect by the Court.

The subsequent Treaty reforms – the Treaties of Amsterdam, Nice and Lisbon – have again significantly altered the institutional and political shape of the Union. Most notably, they expanded the competences of the European Parliament, which significantly altered the political dynamics on the European level. From the perspective of this book, the most important reform may well have been the introduction of the Charter of Fundamental Rights, first as a nonbinding document (2000), and then with full legal force in 2009.

27 *Ibid.*, para. 58, p. 17. 28 See e.g. Hoffmann, "The European Community and 1992," 37.