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paper

**« Social Europe »
versus the « Internal
Market »: A False
Dichotomy ?
The example of the
Machinery Directive.**



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**Title Opinion paper " Social Europe" versus the "Internal Market": A False Dichotomy?
The example of the Machinery Directive.**

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Ian Fraser is an official of the European Commission - Directorate General for Enterprise and Industry. This opinion paper expresses his personal views and should not be taken as the position of the European Commission or of the Commission services.

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Table of contents

Introduction	4
1. Harmonisation to the highest level	6
2. A major development of technical standards.....	7
3. The positive attitude of industry.....	8
a) Simplification of legislation	8
b) Improving harmonised standards	9
c) Improving enforcement	9

Introduction

Many partisans of a more 'social Europe' perceive efforts to consolidate the EU internal market as antagonistic to their objectives. The controversy over the 'Bolkestein' Directive on the internal market for services was a clear example of this apparent conflict. The idea that the consolidation of the internal market was leading to a lowering of protection and a worsening of social conditions was a major factor leading to popular rejection of the proposed EU Constitution in several Member States in 2005.

In this paper, I shall not deal with the internal market for services. The Services Directive ⁽¹⁾ aims to remove legal and technical obstacles to the free movement of services but does not attempt to harmonise social conditions, which remain essentially those in force in the Member State where the service activity is exercised. Furthermore, the Services Directive is too recent a development to draw clear conclusions about its social impacts, if any.

I shall rather take the example of the field of machinery safety, to argue that the consolidation of the internal market, far from hampering the development of improved social protection, has in fact led to the development of an unprecedented body of protective regulations and standards.

The original impetus for developing rules for the design and manufacture of safe machinery was a social one. In the 1970s, in several European countries, there arose a strong social demand to reduce the number and severity of occupational accidents and illnesses and to take preventive measures at the earliest possible stage in the production process. Occupational health and safety had previously been the exclusive responsibility of employers, but with the increasing complexity of the machinery and other equipment used in workplaces, it became also necessary to make rules for the manufacturers of work equipment in order to integrate the preventive measures at the design stage.

However the harmonisation of these rules was driven by an economic rather than a social objective: the establishment of the single market for goods. The original basis for the internal market was established by what are now Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU) prohibiting restrictions on the movement of goods between the Member States. These Articles were supported by the 'mutual recognition' principle developed by the jurisprudence of the European Court of Justice following the famous 'Cassis de Dijon' ruling. The 'mutual recognition' principle has now been formalised in Regulation (EC) No. 764/2008 ⁽²⁾.

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1. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market – OJ L 376, 27.12.2006, p. 36.
 2. Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC.

However, Article 36 TFEU admits restrictions on the movement of goods on several grounds, including the protection of the health and life of humans, provided they are not arbitrary or disguised restrictions on trade. Thus, certain national regulations on the design, manufacture and inspection of products were considered to escape the 'mutual recognition' principle. In 1984 for example, following complaints from German manufacturers, the Commission challenged French regulations on the design and inspection of safe woodworking machinery. The ECJ ruled that these regulations, which applied without discrimination to all woodworking machinery sold in France, were not incompatible with the Treaty ⁽³⁾.

The existence of such national regulations, differing from one Member State to another, was clearly an obstacle to the achievement of the internal market. The only solution was to adopt harmonised requirements for the products concerned. In the case of machinery safety, the requirements were harmonised by the Machinery Directive, first adopted in 1989 ⁽⁴⁾.

EU legislation adopted in order to establish the internal market is based on Article 114 TFEU. This Article refers to *"the approximation of the provisions laid down by law, regulation or administrative action in Member States"*. This wording gives the impression that the internal market Directives harmonise provisions already in force in the Member States. There are indeed some fields where nearly all the Member States had national provisions before the relevant EU Directive was adopted: radio and telecommunications equipment, pressure equipment or measuring instruments, for example. In such fields, the EU Directive replaced the existing national laws or regulations on the same subject. But in many other fields, the impression given by the wording of Article 114 TFEU is somewhat misleading.

In the case of the Machinery Directive, in 1989 when the initial Directive was adopted, only a few Member States had national regulations on the design and manufacture of safe machinery. For most of the countries entering the EU since 1989, the Machinery Directive was entirely new. Even in the Member States which had some legal obligations for machinery manufacturers, the scope of the regulations was limited to certain categories of machinery for professional use - machinery for use by consumers was usually not regulated at all. The Machinery Directive applies to all categories of machinery, from 50 metre-long paper-making machines or tower cranes to gardening machines or hand-held power tools, including machinery for consumer use.

It is nonetheless true that the existence of a comprehensive EU Directive forestalls the adoption of new national regulations in the area it covers. It is likely that if the Machinery Directive had not

3. ECJ - Judgment of 28 January 1986 - Commission/France - Case 188/84 - Rec. p. 431.

4. Now Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast) – OJ L 157/24 of 9.6.2006, p. 24.

been adopted in 1989, hundreds of new national regulations and standards in the area of machinery safety would probably have been adopted in the intervening years.

In reality, the Machinery Directive did not so much harmonise existing national provisions as create, for the first time, a comprehensive EU-wide body of rules for the protection of the health and safety of users and other exposed persons in the design and manufacture of machinery. The employers still have responsibility for the safety of workers, based on the complementary social legislation on the use of work equipment (also adopted in 1989) ⁽⁵⁾. However the availability of machinery incorporating the necessary protective measures by design greatly facilitates the employers' task.

What about the level of protection afforded by the EU Directive? In this respect, it may first be noted that Article 114 TFEU requires the Commission, in its proposals for approximation of laws concerning health, safety, environmental protection and consumer protection, to "*take as a base a high level of protection*". It is legitimate to enquire whether this principle has been followed in practice. Several factors inherent to the dynamics of the internal market tend in that direction:

1. Harmonisation to the highest level

To be effective, internal market legislation must achieve total harmonisation – the rules for the design, conformity assessment and sale of products must be the same in all the Member States in order to avoid unfair competition. The Member States are not allowed to introduce requirements more stringent than those set out in the EU Directives which would constitute new obstacles to trade. Consequently, when negotiating such a Directive, each Member State is concerned to ensure that the harmonisation measure will not lead to a lowering of the level already achieved at national level. The dynamic of harmonisation therefore tends towards the generalisation of the highest level achieved by the Member States.

It can be noted that this positive dynamic does not operate in the field of social policy. For social measures adopted on the basis of Article 153 of the TFEU such as the Directives on occupational health and safety, the EU legislation provides for a minimum level, the Member States remaining free to maintain or introduce more stringent protective measures. Thus Member States that already have a high level are able to keep it or even improve it without having to convince the other Member States or the Commission to improve the general level of protection applicable throughout the EU. In that context, employers and many Member States are mainly concerned to

5. Now Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (codified version) – OJ L 260 of 3.10.2009, p. 5.

ensure that the harmonised legislation does not oblige them to raise their existing level of protection.

2. A major development of technical standards

A positive dynamic is also at work in the arena of European standardisation. The Machinery Directive is based on the so-called 'New Approach' to technical harmonisation (which is not so new, since it was explained in 1985) ⁽⁶⁾. This means that the Directives set out so-called essential health and safety requirements, which fix the objectives to be achieved. Technical specifications enabling manufacturers of particular categories of product to comply with the applicable essential requirements are provided by European harmonised standards. These standards remain voluntary but their application confers a presumption of conformity with the legal requirements they cover.

During the development of the first generation of harmonised machinery standards, national delegations were concerned to ensure that the protection level foreseen in the European standards did not undercut their existing national standards. The new European standards were thus often a synthesis of the best specifications available in the existing national standards and usually represented a significant step forward for safety. Now the first generation of standards are being revised, and national considerations play a less important role in the debate. Standards are now being improved on the basis of practical experience of their application.

The EU Directives based on the 'New Approach' have given rise to an unprecedented development of technical standards in Europe. In the machinery field, there are now more than 600 safety standards for the different categories of machinery as well as general standards covering various aspects of machinery safety. Many of these European standards have been 'exported' to the rest of the world via ISO (they have become so-called 'EN ISO' standards). In many cases, machinery designed to European harmonised standards is accepted all over the world, despite the cost differential with machinery produced in other regions of the world.

This important role given by the 'New Approach' Directives to technical standards means that the important debates about machinery safety have largely been transferred from the legislative arena to the forum of standardisation. Standards are developed on the basis of consensus between the interested parties. These include manufacturers, occupational health and safety institutions, national authorities and the representatives of users: employers, workers and consumers. When

6. Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards – OJ C 136 of 4.6.1985.

The 'New Approach' has now been revised and codified as the 'New Legal Framework' for the marketing of goods (NLF) in:

Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC;

Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 - OJ L 218 of 13.8.2008.

the system works well, it produces high quality technical documents translating the legal requirements into practical specifications, based on the state of the art, that facilitate the task of designers and manufacturers and ensure good application of the Directives.

3. The positive attitude of industry

While industry is not the prime mover in the harmonisation process, internal market Directives are generally supported by the EU manufacturing industry. The rules are stringent, but they are unified and thereby contribute to a strong home market for European manufacturers. Safer products are usually more sophisticated products with higher added value which helps European producers resist competition from other regions of the world.

Does this mean that, for the internal market, *"All is for the best in the best of all possible worlds"* (7)? Of course not. Although the EU product safety legislation and the associated harmonised standards have undoubtedly made a major contribution to the improved protection of European workers and consumers and have had a positive influence on developments in other regions of the world, the system is by no means perfect. Three aspects, in particular, are in need of improvement:

a) Simplification of legislation

Despite the Commission's ongoing simplification programme, the internal market legislation remains excessively complex. The EU legislators have progressively lost sight of one of the original purposes of the 'New Approach', *"to make it possible to settle at a stroke, with the adoption of a single Directive, all the problems concerning regulations for a very large number of products"* and *"to halt the proliferation of excessively technical separate Directives for each product"* (8).

Increasingly two, three, or more Directives are applicable to the same product, often with different logics and procedures. In particular, there is a growing body of measures relating to environmental protection for products already subject to health and safety requirements. Identifying and applying these multiple requirements and procedures is a daunting task, particularly for the SMEs that make up the majority of the mechanical engineering industry. Major new efforts to simplify the legislation are clearly needed. For example, a discussion is currently being opened on the possible

7. *Candide ou l'Optimisme*, Voltaire, Genève, 1759.

8. Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards - OJ C 136 of 4.6.1985 - *Criteria for choosing the priority areas in which this approach could initially be applied* - 2 (d).

merger of the Machinery safety Directive with the environmental protection Directive on noise emissions from equipment used outdoors (⁹).

b) Improving harmonised standards

In practice, the quality of harmonised standards is uneven. Although many harmonised standards achieve a high level of safety, some of them still provide little added value to the legal requirements or worse, fail to deal with several of the essential health and safety requirements that apply to the products they cover. Certain manufacturers attempt to limit the specifications of the harmonised standards to a minimum level that will not affect their traditional designs.

To remedy such deficiencies, it is important to improve the influence of the less powerful interest groups in the standardisation process, including health and safety agencies and the representatives of SMEs, workers and consumers. This is becoming more difficult since harmonised standards are increasingly being developed out at international level in the framework of the cooperation agreements between CEN and CENELEC and their international counterparts, ISO and IEC. Consequently, the relevant standardisation meetings may be held in the USA, Japan or Australia.

Measures to address these issues are included in the Commission's proposed Regulation on European standardisation currently before the Council and the European Parliament (¹⁰).

c) Improving enforcement

The level of enforcement of the internal market Directives (referred to as 'market surveillance') is inadequate. Too many non-compliant products are reaching the EU market undetected. This not only compromises the health and safety of users but also gives rise to unfair competition, since responsible manufacturers are liable to lose market shares to unscrupulous competitors who avoid the cost of complying with the rules.

The NLF Regulation has now established basic rules for national market surveillance systems (¹¹). The new rules have been in force since 2010, but their practical application is proving slow and

9. Directive 2000/14/EC of the European Parliament and of the Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors – OJ L 162 of 3.7.2000.

10. Proposal for a Regulation of the European Parliament and of the Council on European Standardisation - COM(2011) 315 final - 1.6.2011:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0315:FIN:EN:PDF>

11. Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 - OJ L 218 of 13.8.2008.

difficult. In some Member States and for some products, there is still next to no enforcement activity. Even in the Member States with a serious market surveillance system, the public services concerned are all suffering cuts in budget and staff. The Commission has yet to devote significant new resources to the coordination of market surveillance activity.

On this subject, industry representatives, better known as advocates of deregulation, are pleading with the Member States and the Commission to devote more resources to market surveillance ⁽¹²⁾. They have understood that the correct functioning of the internal market requires both strong regulation and strong enforcement. But the message has not yet got through to political decision-makers.

In the short term, progress can be made by ensuring better coordination of the national market surveillance activities, for example by providing a permanent structure to support the work of the existing Administrative Cooperation (ADCO) Groups.

In the longer term, it seems clear that effective enforcement of the internal market legislation will need more than just coordination and will eventually require the establishment of a unified EU market surveillance system. Since the budgets of public administrations will doubtless continue to be under pressure, it may also be necessary to seek alternative means for financing market surveillance, such as a levy on the sales of machinery, along the lines of the levies used to finance the collection and recycling end-of-life electrical appliances. Given the common interest of producers and users in ensuring more effective enforcement, such a proposal might well be generally welcomed.

12. See the contributions to the Conference on Market Surveillance and Machinery, 24 November 2011, Brussels:
http://ec.europa.eu/enterprise/sectors/mechanical/machinery/market-surveillance/index_en.htm