Editorial: Special Issue on the Commission's "Single Market Review"

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In 2007, the Commission published its Communication on "A Single Market for 21st Century Europe".[1] In that report, the Commission set out its vision of "a strong, innovative and competitive market, which maximises the potential of services, directly benefits consumers and entrepreneurs and positions Europe to better respond to and shape globalisation".[2] The Commission also indicated its programme for translating that vision into action by building on the Single Market's existing strong foundations, while repositioning Europe to respond to new challenges such as globalisation, the rapid pace of innovation and change, and evolving social and environmental realities.[3] However, to achieve those objectives, the Single Market Review did not provide for a classic legislative action programme, but aspired rather that the EU institutions, in partnership with the Member States, should adopt a more flexible and adaptable range of measures.[4] For that reason, the Commission in its subsequent 2009 Recommendation on measures to improve the functioning of the Single Market envisaged the establishment of a coordinated and cooperative approach with a common objective of improved transposition, application and enforcement of Single Market rules and for stronger cooperation in the monitoring of their observance and enforcement.[5]

In response to the 2007 Communication, the Liverpool Law School and the European Commission Representation in the United Kingdom co-organised a conference to reflect critically upon some of the main themes identified in the Single Market Review. The conference, "*A Single Market for the 21st Century*": *Challenges and Perspectives*, was held on 25th June 2009 at the new Arena and Convention Centre in Liverpool. We are very grateful to all of our speakers, discussants and chairs for their contributions to the event: Thomas Ackermann, Anu Arora, Catherine Barnard, Fiona Beveridge, Dermot Cahill, Marise Cremona, Luigi Daniele, Jacqueline Dutheil de la Rochère, Ioannis Lianos, Niamh Nic Shuibhne, Sacha Prechal, Joanne Scott, Jukka Snell, Eleanor Spaventa and Geert van Calster. We are particularly grateful to Jörgen Holmquist, Director General at DG Internal Market and Services, for opening

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "A Single Market for 21st Century Europe", COM(2007) 724 final.

[2] *Ibid.*, p 3.

[3] *Ibid.*, p 3.

[4] *Ibid.*, p 4.

[5] Commission, Recommendation on measures to improve the functioning of the Single Market, 2009 OJ L176/17, para. 5.

the event and sharing his thoughts on the Single Market Review with the participants. The conference was generously funded by the European Commission Representation in the United Kingdom and the University of Liverpool. The organisers also wish to thank Steve Cairns for his sterling administrative support, and the staff at Liverpool's Arena and Convention Centre for provided a superb service.

This Special Issue draws together some of the papers from the conference for the benefit of a wider audience. The resulting collection is not intended to offer a comprehensive or systematic exploration of the Single Market Review. Its aim is rather to take the themes identified by the Commission as a point of departure for critical reflection upon some of the Single Market's recent travails and future challenges. Thus, on the one hand, some of the issues raised in the 2007 Communication are not addressed directly or at all in this Special Issue: for example, encouraging the greater mobility of researchers, modernising the framework for electronic communications and commerce, or addressing the problems posed by tax fragmentation across the EU. But, on the other hand, various topics raised by the Commission have provided our authors with the focus for detailed contextual, doctrinal and policy analyses: for example, empowering consumers to enforce their rights more effectively, expanding the competitive space and regulatory influence of the Single Market within the global economy, reconciling market integration with Europe's commitment to shared social rights and values, and rethinking how the Single Market is governed and managed so as to improve its capacity to deliver substantive gains. Furthermore, given that the 2007 Communication was published before the full scale of the banking and financial crisis, incubated in the US subprime mortgage market, had become apparent – let alone before it had unleashed the worst recession for many decades, posing new and fundamental problems for the Single Market and its Single Currency – it seemed appropriate also to include an analysis of this crucially important issue. The remainder of this short editorial summarises key issues raised by the papers gathered together in this Special Issue.

Pursuing open and efficient markets, while protecting the legal position of consumers, constitute key concerns for the Commission; at the same time, ensuring that the conditions governing those markets are transparent, predictable and based on a level playing field for native as well as foreign businesses remains at the forefront of the functioning of the Single Market. To this end, genuine competition, stable payment and financing systems, meaningful consumer protection and effective market management are paramount to the Review's goals. In his paper, Ioannis Lianos reflects on the question of how a high level of trust between different actors, regulatory frameworks and legal systems within a common business environment can allow for market access on the basis of the principle of equivalence, without there being the need to introduce harmonising measures. He argues that the identification of a suitable and effective array of trust building tools, ranging from the mutual recognition of the domestic laws of individual states to the establishment of mechanisms for the sustained exchange of information and for the constant monitoring of compliance with the monitoring regime of the host State, is likely to lead to the establishment of frameworks for economic governance that, even in the absence of explicit

harmonisation, are capable of allowing market access in accordance with principles of equivalence and non-discrimination.[6]

The recent financial crisis, whose aftershocks are still perceptible, demonstrated how a banking crisis can irremediably jeopardise confidence in the economy and hamper future growth. On this point, the Commission stated in its 2009 Recommendation that a well functioning Single Market is a crucial factor for economic recovery, in as much as it fosters the incentive to invest and to create jobs, on the one hand, and, on the other hand, it encourages consumer confidence and thereby boosts demand. However, an essential factor for the recovery of the economy is the restoration of an effective banking system, through appropriate sector regulation and especially through measures designed to increase its stability, as a means to improving its transparency, good functioning and reliability for businesses and consumers alike. In her contribution, Anu Arora analyses the nature and the implications of the measures adopted at EU level in order to respond to the financial crisis and especially to stabilise and rebuild the European financial sector in a way that allows it to meet the challenges of the current economic climate as well as to withstand future shake-ups. Arora begins by analysing the measures adopted by individual Member States against the backdrop of EU State Aid principles: she argues that measures such as guarantee schemes, recapitalisations of banks and controlled winding up of failing institutions, were motivated by the need to tackle the serious disturbances caused by the crisis to the entire financial sector. Consequently, and even though they were clearly proportionate to that end, they should not be regarded as being applicable beyond the circumstances in which they were adopted. The second part of her article considers a number of other initiatives designed to boost the transparency and stability of the European banking system, ranging from the new regulatory regime on credit reference agencies to the call for limits on executive pay in the financial sector. Arora focuses in particular on the question of whether such measures are capable of helping to prevent future crises. In her conclusions, Arora argues that a response at EU level to the financial crisis was probably necessary in the circumstances and, despite being slow in its inception, resulted in a number of positive changes. However, she also points out that, to reconcile the apparently diverging needs of effective regulation and good management, those rules should be accompanied by adherence to solid standards of integrity and due diligence by individual operators themselves.[7]

The theme of consumer protection is central to, yet goes far beyond, the banking and financial sector, being one of the key leitmotifs of the Single Market Review. In his contribution, Thomas Ackermann analyses the contents and implications of the proposals made by the Commission to fulfil this objective. He argues that those proposals show a clear commitment on the part of the Commission to achieving standards of protection that are compatible with the needs of an efficient Single Market. However, he also raises the question of whether the willingness on the part of the EU institutions to take the lead in this policy field may mean a further shift of

[6] See article by Lianos in this volume.

[7] See article by Arora in this volume.

law-making power from the Member States to the Union and whether this development may be justified in the light of the principle of subsidiarity.[8] On this point, Ackermann, whilst making a convincing case in favour of maximum harmonisation in this area, points out that it is indispensable for the Union legislature to provide a solid and convincing rationale for the enactment of such comprehensive and wide-ranging legislation, something which seems to be missing from the Commission's Consumer Protection Strategy 2007–2013,[9] or indeed from the proposal for a Directive on Consumer Rights.[10] Consequently, Ackermann argues that, if the Commission is seriously committed to the idea of enabling European consumers to "shop from anywhere in the EU, from corner-shop to website, confident that they are equally effectively protected", as well as to set out a "level playing field" for retailers across the Single Market,[11] it should be prepared to reconsider its proposals so as to ground them more strongly in the general principles governing EU legislative competence and to render it more coherent with the philosophies underpinning Union and national contract law.[12]

According to the Commission's 2007 Communication, the Single Market is Europe's best asset in reaping the benefits of globalisation as a formidable source of innovation and progress, since it allows the EU as a whole to take the lead in setting benchmarks not just within its boundaries, but also beyond Europe's geographical limits. Unitary action at EU level therefore facilitates exports while at the same time protecting businesses and individuals, by relying on a common regulatory and supervisory structure in a number of key areas. At the same time, states the Commission, it is also clear that ever-changing international circumstances call for deeper cooperation in this area and for responsive policies as well as targeted actions to ensure an optimal level of convergence.[13] The contribution of Marise Cremona analyses the nature and consequences of the measures adopted at EU level to expand the competitive space of European businesses and to enlarge the regulatory space of the Single Market. Cremona focuses her attention on two types of instruments: regional trade agreements and international sectoral conventions. In relation to the former, she argues that broader action in this sphere is part of the EU's external trade agenda, aimed at further opening markets through provisions allowing for deeper regulatory cooperation, in order to benefit European enterprises as well as to encourage the attainment of other objectives, such as the transition to market economies.[14] With respect to international sectoral conventions, the article emphasises their potential as instruments designed to extend the scope of the EU *acquis* to non-Member States, albeit with specific safeguards for its integrity, and argues that these developments,

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[8] See article by Ackermann in this volume.

[9] COM(2007) 99 final.

[10] COM(2008) 614 final. See article by Ackermann in this volume.

[11] COM(2007) 99 final, p 3.

[12] See article by Ackermann in this volume.

[13] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "A Single Market for 21st Century Europe", COM(2007) 724 final, p 7.

[14] See article by Cremona in this volume.

despite taking place within the "EU neighbourhood", constitute a significant development for the creation and the strengthening of regulatory cooperation with third countries.[15]

Reconciling the needs of free movement and competition law with the social consequences of market opening has been a long-standing theme for the development of the Single Market – and the relevance of that challenge has been brought into even sharper focus by the recent economic recession. Balancing the goals of the "European social agenda" with free market tenets has therefore taken centre stage in the Single Market Review, raising a number of important questions as to how the potential adverse impact of deeper economic integration can be assessed and addressed. It is unquestionable that the Court of Justice has played a prominent role in this process. In her contribution, Niamh Nic Shuibhne analyses some "uncomfortable questions" arising from the much discussed judgments in *Viking Line* and *Laval un Partneri*,[16] and considers especially the issue of whether short term gains resulting from the orthodox application of free movement principles should be privileged over the protection of equally important social guarantees. Drawing upon an in-depth analysis of those decisions, as well as the academic debate arising from them, the article argues that, even if *Viking* and *Laval* constituted predictable outcomes of the existing *acquis*, they also highlighted more general questions as to how far Union law's emphasis on free movement principles should trump social considerations. Nic Shuibhne argues that the Court of Justice, while being attuned to the need to uphold the centrality of Single Market law in the overall process of European integration, missed an important opportunity to fashion a more nuanced approach to possible conflicts between free movement principles and other important social values, as provided for at the national level, especially when the questions arising from the *Viking* and *Laval* cases do not appear to have been addressed anywhere else, including in the Commission's 2007 Communication.[17]

Considering the social dimension of the Single Market raises additional questions about the extent to which Member States should be allowed to intervene in the economy, via the provision of services of general economic interest and of state aid. In his article, Dermot Cahill considers a number of issues relating to the role of Article 106 TFEU (ex-Article 86 EC) and suggests that the Court of Justice's case law in the area of state aid and services of general economic interest seems to be evolving increasingly around an autonomous set of principles vis-à-vis the rules on competition, in which the concepts of solidarity and of transparency – the latter especially in the area of public procurement – are frequently relied on to justify a departure from market principles. His discussion concentrates on the interplay between the existing *acquis* as developed by the Court of Justice, the Commission's 2007 Communication

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[15] See article by Cremona in this volume.

[16] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*, [2007] ECR I-10779; Case C-341/05, *Laval un Partneri*, [2007] ECR I-11767.

[17] See article by Nic Shuibhne in this volume.

on services of general economic interest,[18] and the Protocol annexed to the Treaty of Lisbon concerning services of general economic interest.[19] Thereafter, consideration is given to the extent to which the principle of solidarity influences the EU's free movement and competition rules: Cahill argues that, while the Court of Justice was mindful of the need to guarantee the supply of certain "essential" services, if necessary by limiting the reach of the principles governing the Single Market, its jurisprudence has taken a decidedly different direction in the area of health insurance, by allowing individuals to rely on their free movement rights so as to obtain access to health services in other Member States. In conclusion, Cahill illustrates how the application of the principle of transparency to public procurement procedures has allowed the Court of Justice to ensure that the free movement of services is not hampered by State practice, thus reinforcing the application of Single Market principles in this area.

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We are indebted to our contributors for agreeing to write up their conference papers for publication, and of course for their time and effort in doing so. We are also very grateful to the *European Business Law Review* for generously offering us the opportunity to publish these papers in the form of a Special Issue.

[18] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "A Single Market for 21st Century Europe – Services of General Interest, including Social Services of General Interest: a New European Commitment", COM(2007) 725 final.

[19] Protocol on Services of General Interest, OJ 2008 115/308; OJ 2010 C 83/308.