LAND OF THE FREE, HOME OF THE (UN)REGULATED: A LOOK AT MARKET-BUILDING AND LIBERALIZATION IN THE EU AND THE US

by

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DISSERTATION ABSTRACT

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In my dissertation I argue that because the European Union and the United States of America have been largely treated as unique or at least special cases, both the literature on American-state building and that on European market integration have missed how close comparison alters both our descriptive views and social-scientific explanations of the shape of each polity. In particular, scholars have not sufficiently recognized that the European Union has gone further than the United States in many elements of the creation of a centralized, liberalized single market, nor have they produced explanations that account well for this development.

This study challenges the dominant assumption that the United States is generally more hierarchical and centralized than the European Union and more of a single free market in the sense of fewer allowable trade barriers. By analyzing the rules of market integration in services (over 70% of GDP), public procurement (15 – 20% GDP) and the regulated goods markets (goods like elevators with their own regulatory regimes), I demonstrate that in all these major cases the European Union has adopted rules that open exchange to competition more than the United States. While the actual integration of

flows on the ground is still generally less across European states than American ones, the political rules are more - and more liberally - integrated in Europe.

I offer an institutional and ideational argument to explain these differences, with two main parts. First, there is no American parallel to the institution of the European Commission, which is mandated to continually push liberalization forward. My research shows that Commission leadership has been critical to each of the examined cases. Second, broader norms of legitimate governance favor centralized authority - including liberalizing central authority - more in the European Union than in the United States. Despite all the criticism we hear of the European Union, the basic notion of federal governance of market integration is far more strongly accepted across Europe at both elite and mass levels than in the United States. As interview evidence in this study displays, many Americans consistently object to any role for the federal government.

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As is the case with many large research projects, the idea for it goes back some time. Its genesis took place in 1992, the year that was set for the realization of the European Union's single market program. It was also the year of my first visit to the United States as a young exchange student. Having been hosted by a family in Oregon, a state without a sales tax, I did not at first realize that contrary to European customs sales taxes were not included in posted prices. This led to an awkward situation at the San Francisco airport on my return flight where I wrongly accused a sales clerk of stealing from me because of the tax added on the price of a postcard. Perplexed, it raised for me the question how the internal market in a single nation could apparently be so diverse in its market rules while at the same time a great number of sovereign nation states in Europe where aiming at the creation of one single set of coherent market rules.

I wish to express sincere appreciation to all my committee members, Gerald Berk, Alexander Murphy, Lars Skålnes, and especially my chair Professor Parsons, without whose assistance and inestimable comments this manuscript would have never seen the light of day. In addition, special thanks are due to all those who graciously participated in the series of interviews providing me with answers, guidance and invaluable insights into the actual workings of the American and European single markets. Much of the material for this study was obtained in over 60 interviews with government officials and business representatives on both sides of the Atlantic. I want to especially thank the surviving members of Lord Cockfield's cabinet, who all impressed me with their kindness and patience in responding to my inquiries. They are indeed a formidable group of people.

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Last but not least, I want to express my gratitude to my late great-uncle Ernst Hopfen, who constantly encouraged me to study hard so that I do not end up working in a coal mine like him. I am also deeply grateful to my late maternal grandmother, Erna Mander, as well as my parents, Erna-Luise and Rolf Hoffmann, who made my academic adventure financially possible. *Mein Dank von ganzem Herzen!*

I will instruct thee and teach thee in the way which thou shalt go: I will guide thee with mine eye. Psalm 32:8 (King James Version)

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CHAPTER I

INTRODUCTION

"Do we want the United States to be like Europe? […] the answer to this question is "no". […] They are countries where jobs are most carefully protected by government regulation and mandated benefits are most lavish. […] Call it the Europe Syndrome".
Charles Murray, American Enterprise Institute,
in *The Washington Times*, 2009, p. B02

To begin this dissertation, consider a little tale about regulation and markets in two federal polities on either side of the Atlantic. In one, a state has just proposed to increase museum fees for out-of-state residents. In the other, the federal authorities have just advanced a law to "enshrine the right of non-discrimination, which would, for example, prevent [...] citizens being charged different entry fees to museums on the basis of their [residency]". The latter polity sounds like it is coming much closer to a genuine single market. These two polities are the United States of America and the European Union (EU), but which is which? Though almost everyone would expect the United States to be closer to a full single market than the European Union, the first example is from Kansas, and the second from statements made by the European Commission on the effects of the EU's 2006 services directive (Commission 2004; Kansas 2006).

This is a trivial illustration, but it turns out to be the tip of the iceberg. In many substantial economic areas, as I will argue, the EU has adopted rules more like a single market than the US, both with respect to the centralization of the market (having a single set of coherent rules for exchange) and its liberalization (adopting rules that open exchange to competition). A brief look for instance at postal services and interstate legal practices is revealing. In the EU, the European Commission considers the postal services sector as a sector of "vital importance" not only for the "economic prosperity and social

well-being" by producing overall 1% of the EU's overall GDP, but also for the "cohesion of the EU" (European Commission 2007a and 2007b; cf. COM (2006) 595 final, 2; Dierz and Ilzkovitz 2008). With the Postal Directives 97/67/EC, 2002/39/EC and 2008/6/EC, the European Union has decided on a strategy usually associated with the United States: competition across jurisdictional units in enforcing the gradual liberalization of this sector. Thus, each state retains the right to its own postal companies but has to open up its market to its competitors from other states and reduce to (nearly) zero any reserved domains. Finland, Germany, the Netherlands, Sweden and the UK have completely opened up their postal markets years ahead of the 2013 final deadline for all member states.[1] In the US, on the other hand, postal services remain a monopoly with very limited exceptions, such as international remail and overnight mail, and no liberalization in sight.[2]

Interstate legal practice is another example where the European Union has been setting the bar for market liberalization for several decades now. As Michel Petite, member of EU Commissioner Cockfield's Internal Market cabinet in the 1980s and

[1] According to the 2008 directive, the majority of member states must have fully liberalized their postal market by the end of 2010. 11 member states, mostly Eastern European member states plus Cyprus, Greece, Luxembourg and Malta, however, have received a derogation until the end of 2012.

[2] The United States Postal Service (USPS) retains several key monopoly powers, including a monopoly over letter delivery, a mailbox monopoly, and the ability to suspend the delivery monopoly in certain cases (cf. Geddes 2003). The monopoly of delivering letters is (nearly) absolute. These exclusive rights to deliver letters are known as Private Express Statutes. American federal criminal statutes (18 U.S.C. 1693-1699) "prohibit anyone from establishing, operating, or using a private company to carry letters for compensation on regular trips or at stated periods over postal routes or between places where U.S. mail regularly is carried" (General Accounting Office 1996, 10). Yet, the Postal Service nevertheless went ahead and created "administrative exceptions for newspapers, magazines, checks (when sent between banks), data processing materials (under certain circumstances), urgent letters, and international remail" (Campbell Jr. 1996, 19). The last two represent today the main, even if still small, exemptions to the postal service's overall letter monopoly. It is the suspension of the urgent mail or overnight monopoly which enabled companies, such as UPS and FedEx to prosper (cf. Cohen et al. 1999, 1-2). However, "federal law mandates that private-sector prices for the service must be at least $3 or twice the cost of the first-class equivalent" (Hudgins 1996: xviii; cf. USPS Appendix-U, 2002, 11). In 1998 a study by Price Waterhouse estimated that "about 90 percent of domestic volume and about 80 percent of revenue was protected by the Private Express Statues" (USPS Appendix-U 2002, 12).

former Director of the European Commission's Legal Services, sees it, lawyers should be allowed to practice freely across jurisdictions:

> [I]f you are trained as a German lawyer, the important [thing] is not so much that you know German law only, but that you are trained as a lawyer, [then] you will adapt to French law very rapidly (personal interview 2009).

Thus, with the adoption of several directives since the mid-1970s, especially Directive 77/249/EEC on the freedom to provide services, Directive 89/48/EEC on the recognition of diplomas, and Directive 98/5/EC on the establishment of lawyers, the EU "explicitly permits the lawyer [from one EU member state] to practice law permanently in another EU member state, likely without any additional licensure requirements" (Perschbacher 2004, 747). Indeed, in the European Union today "it is theoretically possible […] that [a] lawyer may never have passed any formal examination nor even been required to formally register with the local court, and yet be able to assume the professional title of the host jurisdiction" (Perschbacher 2004, 747).

Anti-competitive discrimination in the arena of interstate legal practice in the US, meanwhile, is still the rule and unlikely to change in the near future. Despite the far greater differences in legal practices across EU member states than between the sister states in the United States, the rules adopted in the European Union "are significantly more liberal than U.S. rules" (Perschbacher 2004, 747).[3] Americans in this sector see separate state-level regulation – quite intentionally designed to set a high bar for offering services across borders – as normal and legitimate, as illustrated in the following comment by Allen Etish, chairman of New Jersey's State Bar Association's task force on multijurisdictional practice:

[3] Following the conventions in the respective literature on American and European state-building and market integration, I will refer to the component units of the European Union as member states and the component units of the United States as sister states.

> New Jersey has the unique geographic position of being surrounded by large jurisdictions. We feel we have an obligation to our citizens to ensure they are represented by people who know what New Jersey law is, rather than just slipping over a state border (cited by Capuzzo 2002).

In the United States today, no single set of coherent rules governs the exchange of legal services. There is simply no US parallel to the EU's overarching, federal-level framework allowing "nonresident lawyers the right to provide temporary interstate transactional services in states where they are not admitted to the bar" (Turina 2005, 226). States not only retain the right to set the rules for the admission to the bar but also set the rules governing interstate legal practice and therefore the access to their own market. These rules, allegedly designed as "a type of consumer protection […] and for the efficient administration of court litigation", are often seen as "mask[ing] a desire to protect the local legal profession against interstate competition" (Goebbel 2000, 308). As several European and American commentators see it, these "quite dramatic rules allowing free movement of lawyers" put in place by the EU to open exchange to competition are "more in consonance with modern commercial needs than the approach currently existing in the United States" (Lonbay 2005, 610; Turina 2005, 235).

Yet, as the Charles Murray quote at the beginning indicates, such observations contrast strongly to near-universal assumptions of a relatively liberal, unified US and a relatively protectionist, fractious Europe in broader public or academic discussions. Pundits and scholars alike tend to assume that in terms of institutional shape the US is generally more hierarchical and centralized than the EU and in terms of market integration the former is more of a single free market than the latter in the sense of fewer allowable trade restraints. As Harvard scholar Frank Dobbin once put it: "In the United States, restraints of trade were associated with political tyranny, and policies adopted to

guard liberty by precluding restraints of trade were soon cast as positive measures to promote growth" (Dobbin 1994, 225). As another Harvard political economist, Benjamin M. Friedman, puts it, the United States is exceptional because "more so than any other large nation, America has maintained a flexibility and fluidity in its economic arrangements that has facilitated the continual reallocation of both labor and capital resources and has fostered economic initiative, entrepreneurship, and creativity". For him America's economic success is first and foremost due to two major factors. First, "[t]he absence of many of the restrictive labor practices and laws found in many other advanced industrialized economies, together with Americans' willingness not just to change their workplace but to relocate their home, often over great distances, has allowed human resources to move to where they can be most productive". Second, by "generally impos[ing] fewer burdensome regulations", "public policy in America has played a positive role in creating a setting in which private initiative can flourish". Thus, America's success story is largely based on "what American [federal] government does not do (or at least does to a lesser extent than elsewhere)" (Friedman 2008, 88 – 89). In short, these authors, and many others, suggest that the US is almost the archetypal example of a large internal market with few barriers to the free exercise of competition across the entire polity.

This perception that the US compared to the EU is home to a full-fledged and competitive internal market is reinforced by the fact that, as Goldstein has previously noted, "[m]ost people consider the United States to have been a sovereign nation since 1787 and consider the states of the European Union to be sovereign nations today" (Goldstein 2001, 12). The underlying assumption is that the independent sovereign

nations composing the EU are going to be more reluctant in the creation and the practice of a free internal market and more protective about the jobs of their own respective markets. Consequently the European Union's single market is often described as being riddled with exceptions and restraints on trade, where, according to *The Economist,* for instance, "France, Italy and Luxembourg have little lists of national champions they think should be immune from foreign ownership" and where "the merger of two French or two Spanish energy firms is acceptable, but a takeover of a French or Spanish firm by a German one is not" (The Economist 2006, 50). And Kalypso Nicolaïdis, Director of the European Studies Center at the University of Oxford, notes that even when working on completing the single market in the last decade, the EU has done so by "creat[ing] many kinds of firewalls against all-out competition *à l'americaine*" (Nicolaïdis 2007, 687). The US, on the other hand, is usually seen as "born as a commercial republic", "addicted to the pace of commercial enterprise", which "will never be Europe" (Brooks 2009). Thus, while the United States is acknowledged as a fully functioning federal polity with a complete internal market, the EU is continuously seen as facing the choice "between becoming a fully fledged United States of Europe, or remaining little more than a modern-day Holy Roman Empire, a gimcrack hodgepodge of 'variable geometry' that will sooner or later fall apart" (Ferguson 2010, 48).

Despite being "only" a supranational organization, however, the EU, appears to have created a single market that in many significant and economically important areas is more complete and liberal than in the US. Simply as a descriptive statement about the world, this claim runs against a great deal of common wisdom and academic writing. But its larger importance concerns its implications for our analyses and theories that seek to

explain the shape of political arenas. We have a pattern that is much more puzzling than most experts on either side of the Atlantic have perceived. It calls for a comparative study that poses basic, general questions: how are single markets constructed? And why do multi-level governance entities pursue different trajectories in regards to having a single set of coherent rules for exchange (centralization) and adopting rules that open exchange to competition (liberalization)?

While we have many coherent explanations for market integration and institutional outcomes about the US or about the EU, their empirical support tends to focus exclusively on one or the other of the two federal polities. Yet, when the respective logics of these explanations are applied to the two polities comparatively, they appear to be insufficient at best, leaving us to wonder why the EU went beyond the US in centralizing and liberalizing certain policy arenas and vice versa.

The purpose of this study therefore is to compare the construction of single integrated markets in the United States and the European Union. The story which the following chapters will tell is that the emergence of strongly centralized rules for liberalized markets arise for two reasons: where executive institutions are given a mandate and strength to pursue liberalization, and where broader norms in society are accepting of the emergence of a centralized commitment to liberalization.

By analyzing the rules of market integration in services (over 70% of GDP), public procurement (15 – 20% GDP) and the regulated goods markets (goods like elevators with their own regulatory regimes), I demonstrate that in all these major cases the EU has undeniably adopted rules that open exchange to competition more than the United States. While the actual integration of flows on the ground is still generally less

across European states than American ones, the political rules are more - and more liberally - integrated in Europe. Thus, in the case of public procurement the European Union has completely preempted the policy sector, establishing an EU-wide public procurement regime based on non-discrimination, transparency and economic efficiency, while in the US, states still freely discriminate against out-of-state bidders. The US Supreme Court, in the absence of Congressional preemption, has repeatedly validated the right of states to discriminate when acting in their roles of proprietor of their respective public domains or as employer leading to pervasive preferential treatment for in-state products and companies, including openly exclusionary preferences in various states. A similar pattern materializes in the services and even the goods sectors. As regards the former, in the United States providers from regulated professions cannot freely cross state borders and offer their services on a temporary basis while the EU has largely succeeded in liberalizing the services sector by facilitating the provision of temporary services across member states. Concerning the latter the European Union has put in place a regulatory regime that allows simultaneously for the elimination of technical barriers to trade in goods and the guaranteeing of high safety and health standards, while in the US important sectors of the goods market tend to remain disjointed among the great number of states and even local governments. In short, both in terms of strongly forbidding anti-competitive practices by state governments and in terms of encouraging competition at the federal level, EU rules often aim for more "integration" than US rules.

Though even experts on these polities rarely recognize it today, my findings therefore demonstrate that the EU has gone substantially further than the US in creating a centrally-governed and liberalized single market. I offer an institutional and ideational

argument to explain these differences, with two main parts. First, there is no US parallel to the institution of the European Commission, which is mandated to continually push liberalization forward. My research shows that Commission leadership has been critical to each of the cases I examine. Second, broader norms of legitimate governance favor centralized authority - including liberalizing central authority - more in the EU than in the US. Despite all the criticism we hear of the European Union, the basic notion of federal governance of market integration is far more strongly accepted across Europe at both elite and mass levels than in the United States. As interview evidence throughout my study displays, many Americans consistently object to any role for the federal government.

The study will proceed as following. Chapter II will briefly review the literature on American state-building and European market integration. It will note that due to *sui generis* concerns for both the American and European polity direct comparisons of the two have been rare. In fact, although there are a great many books striving to explain the construction of a single market in the US or in the EU, not much work has been done from an empirically-oriented comparative perspective. Hence, in addition to solving an empirical puzzle, the study attempts to contribute to the still small but growing field of direct comparisons of the EU and the US which regards the two polities less as unique or economic rivals but as institutional peers. Despite the fact that most of the research has so far exclusively focused either on the American polity or the EU, similar coherent explanations of market building can be derived. I divide these explanations into three major categories: 1) structuralist-materialist / rationalist-functionalist; 2) institutional; and 3) ideational / cultural. After briefly describing what reasonable expectations for market

building can be extrapolated from these approaches, I will lay out my own explanation for resolving the puzzle based on a combination of institutional and ideational elements. The argument is that in the analyzed policy areas the European Union has succeeded in having a single set of coherent rules for exchange and in adopting rules that open exchange to competition, because of an unusually strong executive institution with a clear liberalizing mandate – the European Commission – and because there is actually more acceptance of a strong central authority in the EU than in the United States.

Chapter III describes the organization and legal framework of the public procurement regimes in the United States and the European Union. It will show that while the US looks as if it is largely settled in certain decentralized, fairly protectionist ways, the EU has gone much further in eliminating interstate barriers.

After establishing firmly the descriptive claim, Chapter IV will attempt to explain these variations in centralization and liberalization across the two polities by emphasizing that the European Commission has actively pushed for the creation of an EU-wide public procurement by creating its own supportive environment for market liberalization in the procurement sector while a similar push has been so far absent in the United States.

Chapter V strengthens the descriptive claim that the European Union has become more liberalized and centralized in a free market way than the US by contrasting the legal regimes in place for the provision of temporary services across state borders in the case of regulated professions, notably hairdressers. It will be pointed out that from a comparative perspective the recent literature on the EU services directive has it largely wrong in emphasizing the directive's shortcomings instead of noting that it actually

establishes a more open and competitive internal market for services than the United States.

Chapter VI analyzes again how we can account for the divergent outcomes. It argues that the services case is particularly noteworthy given that despite facing in this instance the most vocal opposition to further market liberalization, the Commission still emerged largely victorious, especially seen from a comparative perspective. Indeed, it appears that even in situations of vocal opposition to further market liberalization, a large enough consensus exists for the elimination of non-tariff barriers to trade. In the US on the other hand no federal-level actor has promoted further market integration by highlighting the remaining obstacles to the free provisions of services between sister states. Many actors are either unaware or deny that the present system poses significant costs. National organizations tend to refer back to the individual states and many are skeptical of federal-level solutions to the present situation.

Chapter VII examines the goods market at the example of elevators. It reinforces the notion that European Union emerges here as the more liberalized internal market of the two due to an executive institution with a clear liberalizing mandate. It further demonstrates once more that the dominant culture in the US is characterized by asking for less government overall and not interfering with state rights. Federal-level intervention in the regulation of the market in the US is seen nearly exclusively in terms of hindering trade. It also observes that the European approach to the elimination of technical barriers to trade is envied by those actors acutely aware of both regimes and still confronted by a diversity of rules in place in the US.

Chapter VIII offers concluding reflections on what may be derived from this study for a better understanding of state-building and market integration in federal polities.

CHAPTER II

THEORETICAL APPROACHES TO MARKET-BUILDING

"Europe's unique outcome in terms of integration is the result of its unique political and cultural history".
L. Alan Winters, in *Europe* Is *Sui Generis*, 2010, p. 2

"[The] organizing principles and founding political institutions […] are […] qualitatively different from those of other Western nations. Hence the United States has developed as an outlier".
Seymour Martin Lipset, in *American Exceptionalism*, 1996, p. 13

Both the literature on American state-building and that on European market integration have suffered largely from a very myopic view. Although there are many important scholarly studies on political and institutional developments, especially market-building, in the United States and in the European Union, until a decade ago very few attempts have been made to compare them systematically. Comparisons were largely discouraged in emphasizing each entity's exceptionalism and uniqueness. "American exceptionalism" and the *sui generis* character of the European Union were taken for granted. American exceptionalism especially stressed the unusual decentralization of the US in comparison to other nation-states. The EU literature, mostly focused on comparing the EU to other international organizations, emphasized, on the other hand, the unusually centralized nature of the EU. Scholars as a result tended to overlook the potential common characteristics between an uncommonly centralized international organization and an uncommonly decentralized state.

In the last couple of years we have, however, seen some reversal of this trend. Comparisons between the EU and the US have become more frequent and accepted in the scholarly community. Indeed, it has been pointed out that while the two polities might be

exceptional in comparison with the European nation-states, they are less so when compared to each other. Leading scholars talk today about "institutional convergence" and both being examples of the same democratic model, a compound democracy, or practicing the same type of "regulatory federalism" (Fabbrini 2005, 2007; Kelemen 2004).

Still, although there are a great many books striving to explicate the construction of a single market in the US or in the EU, not much work has been done from an empirically-oriented comparative perspective. Some more conceptual, theoretical works have come out lately, laying the groundwork for the comparability of the US and the EU (Fabbrini 2005, 2007; McKay 2001; Menon and Schain 2006; Nicolaidis and Howse 2001).

However, the most well-known empirical work directly on constructing an internal market in Europe, Michelle Egan's 2001 book *Constructing a European Market: Standards, Regulation and Governance*, limits its comparisons to some brief allusions at several junctures in the book and to the five final pages. In the absence of her announced subsequent study on a comparative look at 19th century American and 20th European market-building, we simply do not yet have a theoretically-informed and empirically careful comparative study on market-building in the two entities.

This chapter therefore will in a first step briefly highlight why direct empirical comparisons of American and European market-building have so far been in short supply. It will touch on the shortcomings of the *sui generis* perspectives of American and European market-building and the recent attempts to move away from it. This section will especially try to make two major points. First, even those who would now argue that

the EU and US are highly comparable do not seem to have noticed that the EU has further liberalized its internal market than the United States by adopting a single set of coherent rules. Second, while there is a dearth of empirical comparative work of the two polities, general expectations can nevertheless be derived from the explanations made to separately explain American state-building and European market integration. In short, it does not matter so much whether one believes the US and the EU to be respectively unique or quite close on an imagined comparability scale, the logic of the arguments made in one case should be transferable to the other.

Consequently, the second part of the chapter will review the arguments which have been made in the respective literatures of American state-building and European market integration. The existing approaches can largely be divided into three major categories: 1) structuralist-materialist / rationalist-functionalist; 2) institutional; and 3) ideational / cultural. The goal is to enrich our knowledge of the applicability of the existing theories by deriving from the different theoretical frameworks expectations on what we should see happening on the ground. This will help us to establish later on whether the existing approaches are sufficient to explain the empirical evidence in the ensuing case studies.

In the third section, I will offer my own explanation. I will note that the empirical differences between the United States and the European Union in regards to the liberalization and centralization of the respective internal market can only be explained by taking simultaneously into account institutional and ideational explanations of market integration. Market integration is facilitated where executive institutions are given a mandate and strength to pursue liberalization, and where broader norms in society are

accepting of the emergence of centralized commitment to liberalization. I argue that the European Commission is such an unusually strong executive institution with a clear liberalizing mandate. A similar actor is absent in the United States. Moreover, this view predicts that there is actually more acceptance of a strong central authority in the EU than in the US.

The fourth and last section briefly describes the qualitative methodology employed as well as the choice of public procurement, services and goods as the investigation's case studies.

Beyond American and European Exceptionalism

To this day comparisons between the EU and the United States have been largely "partial and strictly impressionistic" (Donahue and Pollack 2001, 108; and personal communication 2006).[4] A major reason for this is that journalistic as well as scholarly accounts have usually fallen in the exceptionalism trap when talking about American state-building and European integration.

The prevailing wisdom has been that the United States of America and the European Union are so unique that any comparison with other polities and in particular with each other are considered a stretch at best, leading to very unique theoretical challenges. Thus, scholars making the case for the EU being *sui generis* have repeatedly pointed out that the EU is a novelty, representing a "Hegelian moment […] that has no current analogies" and that the EU represents an n=1 because it "is unique in the world as

[4] An important exception is Goldstein, who, somewhat similar to the puzzle of this dissertation, explores the "evident paradox" why "the nominally sovereign government of the United States of America experiences several decades of overt and occasionally even violent official defiance of its authority by the member states of the American union, while the nominally sovereign member states of the European Union virtually from the start obeyed as a legitimate higher authority the dictates of the judiciary of their federal union" (Goldstein 2001, 15).

an experiment in political and economic integration, and hence students of European integration have only a single case – the EU itself – to study" (Caporaso et al. 1997, 1 and 4).

Americanists, for their part, have come repeatedly to the conclusion that the US is exceptional due to the absence of socialism and the dominance of a liberal tradition from the on-set (Hartz 1955; Lipset 1950, 1977; Lipset and Marks 2000) as well as the country's unique institutional features characterized by a "combination of extremes [of] a highly developed democratic politics without a concentrated governing capacity" (Skowronek 1982, 8). Thus, not only does the United States remain "the least statist Western nation […] with its suspicion of the state and its emphasis on individual rights", but "there can be little question that the hand of providence has been on a nation which finds a Washington, a Lincoln, or a Roosevelt when it needs him" (Lipset 1996, 14 and 289). The US in short is blessed by its extraordinary historical circumstances and the derivative set of cultural and institutional features. Given therefore that the United States was created and developed differently, even in comparison to its North American neighbor Canada, it is argued that she also needs "to be *understood* differently – essentially on its own terms and within its own context" (cf. Lipset 1963, 1990; Shafer 1991, v). While the roots of the concept of 'American exceptionalism' gets traced back as far as 1630 and John Winthrop's "city upon a hill", it is Alexis de Tocqueville's *Democracy in America* which receives the honor for coining the phrase and anchoring it in the American consciousness and intellectual discourse (Calabresi 2006; Lipset 1991).[5]

[5] The expression 'American exceptionalism' goes back to Volume II, Chapter IX of *Democracy in America,* where Tocqueville notes that "[t]he position of the Americans is therefore quite exceptional, and it may be believed that no democratic people will ever be placed in a similar one. […] Let us cease, then, to

Today the term 'American exceptionalism' largely comprises three different meanings. First, it refers to a merely descriptive, particularistic, definitional view of the United States, i.e. it concerns itself simply with describing elements that are clearly differentiating the US from other places. Secondly, the term connotes that the US does not fit the standard account or model of how societies and nations develop and progress as delineated by the earliest modernization theorists and their intellectual successors. This second view has for the most part become discarded due to the overall demolition of a single, general model of political and economic development from which the US could deviate. The third approach, which is considered as keeping the concept of American exceptionalism "alive" and maintaining "its vigour" is "described as an effort to highlight distinctively American *clusters* of characteristics, even distinctively American ways of organizing the major *realms* of social life", such as government, economy, culture, education, religion and public policy (Shafer 1991, viii; sic.; cf. Schuck and Wilson 2008).[6]

The reasons scholars have proffered why the US and EU are different and especially why they are not comparable are multiple, including arguments derived from

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view all democratic nations under the example of the American people, and attempt to survey them at length with their own features".

[6] A fourth meaning of American exceptionalism can be found in the politicization of the term. It is frequently used in the press and by politicians to evoke a sense of superiority vis-à-vis other political systems and being partakers of a divine will. The focus is here much less on an analytical understanding of comparative differences and commonalities but rather on a self-congratulatory version of American exceptionalism. Mostly, but not exclusively used by the political right in the US, American exceptionalism in this sense is the idea of being an elect nation, a beacon of hope and liberty for the rest of the world, and being at the heart of the American cultural identity (cf. Madsen 1998). Thus, President Ronald Reagan in his farewell address to the nation on January 11, 1989 spoke once again about the "shining city" that is America, and former presidential candidate and Southern Baptist minister, Mike Huckabee observed that "[t]o deny American exceptionalism is in essence to deny the heart and soul of this nation" (quoted in Martin and Smith 2010).

disparate geographical, cultural, historical and institutional circumstances.[7] It is not that scholars contend that one single factor *per se* makes comparison impossible, but rather that the combination of these different factors creates large hurdles for undertaking a rigorous comparison of the two political systems.

Perceiving the United States and the EU as respectively unique, however, has led to much navel-gazing. Even scholars who point to the fact that EU integration studies in their original focus were everything else than a "clamor for "*sui generis* theory"", noting that the earliest scholars, such as Karl Deutsch (1957), Ernst Haas (1961) and Joseph Nye (1971) took a comparative approach to the study of regional integration, limit themselves largely to conceiving the EU in terms of an international organization which does not warrant much comparison with other nation-states (Caporaso et al. 1997, 1). In a series of short essays for example, well-known scholars, such as James A. Caporaso, Gary Marks, Andrew Moravcsik and Mark A. Pollack, engaged the question whether the EU represents an *n* of 1 and the fundamental theoretical challenges going along with it. Yet, in their conclusion and advice, while highly relevant for everyone wanting to escape the n=1 calamity, they still mostly restrict themselves to comparing the EU either to other international and regional organizations or to following King, Keohane and Verba's methodological advice to "generate multiple observations within the EU" (Caporaso et al. 1997, 5; King et al. 1994;).[8]

[7] Cf. Hoffmann (2011) for a detailed account of the differences listed in the literature.

[8] Gary Marks, however, already observes that some scholars have started recently to conceptualize the EU as a polity instead of simply an international regime or an example of a process of fundamental institutional change. While raising the caveat that the "EU is more diverse than" Switzerland, Germany, Canada and the USA, he concedes that reconceptualizing the EU with the help of "some meaningful underlying dimension" allows in the end for comparison "even assuming that the EU is unique" (Caporaso et al. 1997, 3).

Due to the emphasis on each polity's uniqueness, few attempts have been made to conduct systematic comparisons of the USA and the European Union. This has led to the formulation of very similar explanations for market integration and state-building, but which have not been tested cross-polity wise. Such short-sightedness has hampered our understanding of the developmental similarities and differences of the two polities and weakens our understanding of each polity considered on its own. If the arguments we make about one polity are also logically applicable to the other, but turn out to be wrong there, then this poses a problem for the polity in which they may have looked right in the first place.

The emergence in recent years of new scholarship on the comparability of the EU and the US with each other, however, has begun to reverse this trend. Most of those who have undertaken this new work, though, are specialists of the EU. Scholars of the American body politic still rarely engage in this kind of comparison and when they do, such as Theodore Lowi, they focus on "What can European Union learn from United States?" (Lowi 2006; sic). The reverse, of course, is as much applicable, but frequently gets overlooked, with maybe the notable exception of Goldstein (2001). Thus, most of the efforts so far have focused on a preliminary step, i.e. to demonstrate that the EU and the US are similar and that comparing them not only makes logically sense, but is appropriate to advance the research agenda. Much of the appropriateness of comparing the EU and the US rest on the observation that both polities exhibit a similar wide dispersal of power and the accompanying shunning of institutional concentration of it, compared to other advanced industrial democracies (Sbragia 2006, 16).

Thus, similar descriptive terminology has been used in recent years for the European Union and the United States. Zimmerman for instance uses the *Imperium in Imperio*, i.e. an empire within an empire, with each possessing substantial powers, concept to depict the United States, noting that "[t]here would be no federal system without the exercise of relatively autonomous political powers by a national legislature and subnational legislatures as political powers otherwise would be centralized in the national plane (a unitary system) or in the subnational plane (a confederate system)" (Zimmerman 2005, 97). This concept very well applies to the European Union today, where "[t]here is no issue area that was the exclusive domain of national policy in 1950 and has not somehow and to some degree been incorporated within the authoritative purview of the EC/EU" (Schmitter 1996, 124). Therefore, the European Union "resembles nothing so much as the American conception of 'marble cake federalism', in which there exists no rigid delineation of authority among the federal and state levels of government" and where depictions of the EU as "a quasi-federal, "multilevel" or "multitiered" political system" have become more and more common (Donahue and Pollack 2001, 108; Pierson 1998, 28; cf. Stone Sweet and Sandholtz 1998, 1). Sergio Fabbrini summarizes these perceptions in reasoning that the EU and the US "are two different species of the same political genus: *the compound democracy*" (Fabbrini 2007, 3; sic). With the exception of Switzerland, both, the US and the EU, are the only two polities characterized by a multiple separation of power, both vertical and horizontal (Fabbrini 2005, 2007). Sbragia concurs in observing that in contrast to the EU's member states as well as other parliamentary systems, such as Canada and Australia, the United States and the European Union are characterized "by the collective exercise of public

authority rather than by a 'government' which, as the executive, possess asymmetrical power vis-à-vis the legislature" (Sbragia 2006, 17). Consequently, according to these authors, "[t]he EU is unique *vis-à-vis* the European nation-states, but not in comparison with another continental federal experience like the American one" (Fabbrini 2005, 3). Indeed, given that the "institutional web of the EU governmental/governance system appears to be a species of a genus of democratic polities which are compound rather than unified - as is the case of the US", […] it does not seem convincing to claim that the EU is a polity without any precedent, in the modalities of both its formation and its functioning, in the history of the democratic world" (Fabbrini 2005, 6).

The European Union and the United States share another very important theoretical similarity with each other as well as with Switzerland and Germany. They are all examples of the "coming-together" type of federalism. Very simply put, we can differentiate between federations that came into existence by the devolution of an unitary state and those that came about as a result of the unification of existing states (Friedrich 1968). Most of the modern federal entities, such as Belgium, Canada, India, Australia, and Spain, have to be characterized as "holding-together" federalisms, while the EU represents with the "older" federations, like United States, Germany and Switzerland, the "coming-together" type (Linz 1999; Lowi 2006, 95; Stepan 1999).[9] Yet, Germany is not a compound democracy with multiple separations of power. Its powers are fused at the federal level. Switzerland, the US and the EU, are the only polities characterized by a multiple separation of power, both vertical and horizontal (Fabbrini 2005, 2007, cf. also

[9] Also it can be questioned how much modern Germany actually represents the 'coming-together' type of federalism given that the post-Third Reich Germany "arose from the disaggregation of a previously centralized state and not, as in the case of America, from the aggregation of previously independent units" (Fabbrini 2007, 88; Watts 1987, 1988).

Sbragia 2006). Yet, size and complexity can matter significantly, making the United States a better comparator to the EU and vice versa (Dahl and Tufte 1973). Thus, the limited demographic, geographic, economic size and international role reduces the value of Switzerland as comparator.

Additionally, previous works, as described below, have highlighted in their theories the centrality of the internal market in the building of the US and EU polities. In both cases the establishment of a functioning internal market was one, if not *the* core mission of the EU since the Treaties of Rome and of the US since the drafting of the US constitution. [10] Much of American constitutional history and the growth of the European Union are similar in their focus on interstate commerce (Farber 1997, 1283). What is more, Zimmerman notes that the demise of the confederacy was predestined because of the "failure of the article to authorize Congress […] to regulate commerce" and that this defect was clearly "the most serious one and contributed greatly to the increasing public pressure for the amendment of the Articles of Confederation and Perpetual Union" (Zimmerman 2002, 6, 2005, 28). Thus, one of the prime roles of the US constitution was to reduce interstate trade barriers. This observation is shared by Lowi who notes that "[c]ommerce was what had led to rejection of the Articles of Confederation after a dozen years, because confederation tolerated barriers to trade that interfered with creation of a common national market" and "[t]he new Constitution with its stronger national government produced policies that earned America the designation by Europeans as a

[10] Other authors, such as Alberta Sbragia (2002), who talks about the EU as being a 'mirror image', have argued that while in the past federalist entities like the USA started out as a defense compact, the EU was first constructed on an economic basis. Elazar makes a similar argument noting that the European integration process was the reverse of the American process, given that NATO already took care of the quest for security (Elazar 2001, 32-33; cf. Menon and Schain 2006, 6–7). While this might be true for the Articles of Confederation, it seems that this becomes less evident with the ratification of the US constitution and the establishment of the United States. Also, as has been noted earlier, the US similarly profited from Pax Britannica throughout the 19th century.

commercial republic" (Lowi 2006, 96; emphasis in original). Moreover, in the words of Geraint Howells, "[t]he Commerce Clause and the internal market Treaty provisions can be viewed as functional equivalents", the differences being "mere semantics" (Howells 2002, 603).

Besides, it is generally the United States, not Switzerland or Germany, which serves as a point of reference for many politicians and scholars from the very onset of European integration. Using American imagery, Sir Winston Churchill called for an "United States of Europe", [11] Jean Monnet founded the "Action Committee for the United States of Europe" in 1955 and Piero Malvestiti, the former president of the High Authority, invoked the American motto of *e pluribus unum* in front of the European Parliament not as a "mere literary tag" but as an "admonition, a precept, an aspiration" for the European Community and as "an eloquent and irrefutable example to confound any who may still imagine that federations or confederations must inevitably be weaker than unitary, centralized States" (Malvestiti 1960, 29). The European Commission in its market analyses tends also to use the US as the benchmark and comparator. Thus, Dierx and Ilkovitz from the European Commission write that "[a] priori, the US is an appropriate benchmark for this exercise given that it is a well integrated market of a size comparable to the EU" and that "[g]iven the other structural similarities, namely in terms of factor endowments, the US is a direct competitor to the EU for many products in the world market" (Dierx and Ilzkovitz 2008, 16). And during the run up to the 1992 single market, not only did the EU commissioned Cecchini report compare the market conditions, such as public procurement, with the US, but the team around the Internal Market

[11] While it is Churchill's speech in Zürich in 1946, which made the term "United States of Europe" famous, it has longer antecedents. Churchill himself already employed the term in a *Saturday Evening Post* article on February 15th 1930 (cf. Lénárt 2003).

Commissioner Lord Cockfield actively studied the US at the time, among other things as regards VAT, adapting their arguments for market integration strategically based on the situation they found in the US (WS Atkins 1988; interviews with former EU officials in 2009).

Finally, big business deals with the European Union as they do with any other national government around the world. Consequently, in contrast to some scholars' own views, big business did not and "do not perceive the European Community as some "would-be polity" (Cowles 1994, 48). For them "relations with Community officials and their involvement in the regulatory process is not some international regime comprised of states in an anarchic world, but a system of governance that embodies the rules, institutions and norms found in Member States" (Cowles 1994, 48). In short, the EU is seen and treated as a domestic political system. And once we admit the present exceptions of welfare and defense, the United States and the European Union look very similar as regards the allocation of policy function.

But even those who would argue that the EU and the US polities are highly comparable do not make the case that the European Union has adopted rules that open exchange to competition further than its transatlantic neighbor. Indeed, is certainly not unreasonable in a first cut but arguably the obvious expectation of anyone, including experts on the polities as the introductory chapter noted, to imagine the United States to be a much more homogenized and centralized entity than the European Union.[12]

[12] Egan yet observes "that the European single market was established with much more interference upon the sovereign powers of states than in the United States" (Egan 2001, 85). However, it doesn't become quite clear in what way the US is characterized by less interference and why. As she notes herself, "Like the United States, the European Union has been confronted by clashes over the 'reserved' powers of constituent states" and "courts can shift positions in assessing the degree to which the federal level can restrict states regulatory activities" (Egan 2001, 107).

First of all, and in stark contrast to the United States, the EU in 2011 encompasses a wide variety of democratic political and market systems, such as federal and unitary states, presidential and parliamentary systems, constitutional monarchies and republics, liberal market and social market economies, etc. Given this greater institutional diversity within the European polity, it seems reasonable to expect that centralization, whether for liberalization or any other purpose, will never go as far in the EU as in the US.

Second, the GDP per capita spread between states is much larger in the EU than in the US. It varies in the United States between $ 44,731 in the District of Columbia and $ 22,008 in Mississippi. In the EU the GDP per capita in Luxembourg ($ 42,767) is about 7 times the size of Latvia's ($ 6,264) (United National Development Programme 2001, 178; US Department of Commerce). The greater economic disparity among EU member states than US sister states assumedly leads to a greater variety of potential economic interests in the European Union. This in turn then leads to the reasonable expectation that the adoption of a single set of coherent rules for exchange is much harder to come by in the European Union than in the United States.

Third, the European Union differs from the United States in regards to its lack of a common *demos*. It is home to twenty official languages, making communication and the creation of a common identity among its citizens difficult. As Weiler observes, the EU "does not presuppose the supreme authority and sovereignty of its federal *demos*" and therefore differs from any other federal state (Weiler 2001, 57). While some scholars expect that such a demos will develop over time (Hurrelmann 2005), others argue that empirical observation of existing federalist entities actually undermines the claim of a fundamental difference with other existing federal polities and the necessity of a federal

demos. Trechsel remarks that "in Switzerland institutional procedures have emerged […] allowing for the co-existence of a number of sub-national *demoi*, speaking different languages, belonging to different religious and cultural groups, in the absence of a real federal *demos*" (Trechsel 2005, 405). Fabbrini also disagrees with Weiler's position in noting that the debate on the importance of a common *demos* in the EU is largely based on the experiences of the individual European nation-states and not the American experience. The former "have tended to assume the historical correlation" that "democracy came after the nation, or better after the nation-state was fully recognized" as "a logical necessity" (Fabbrini 2007, 49).[13] In the United States, on the other hand, "nationality has been the product of the democratic process, not its precondition" (Fabbrini 2007, 49). However, Fabbrini does not make the claim that a common *demos* already exists in Europe. Thus the generally accepted view remains that the support for the integration process and the European Union is based on specific advantages rather than on a diffuse support for a European polity (cf. Hix 1999, 135–38). Additionally American identity has been forged together over time in fighting wars collectively against others.

Fourth, the comparably much higher mobility rates of American citizens within their polity would also let us assume that there would be more pressure for instance to harmonize the American internal market and eliminate any barriers for its citizens than would be the case in Europe. According to the US Census Bureau 7.628 million people

[13] The notion common across Europe that a democratic regime requires a pre-identified demos was highlighted in the case *Manfred Brunner and Others v. The European Treaty* of 1994 before the German Constitutional Court (Bundesverfassungsgericht). The court decided that the EU can "claim superior legitimacy over its member states only if its decisions are the democratic expression of the will of European *demos*, a condition 'does not yet exist'" (Fabbrini 2007, 31). This decision, as correctly pointed out by Fabbrini, is largely the by-product of Germany's own path towards modern democracy (cf. Fabbrini 2007, 30–31).

moved to another US state in the period of 2002 – 2003, representing 2.69% of the US population (2004). Samuel Huntington, noting the absence of "intense attachments to particular localities" of individual Americans from the very beginning of the country, even talks about "the moving American," lacking sustained territorial passion, loyalty, or commitment" (Huntington 2004, 50 and 52).[14] In the European Union in contrast an estimated total of 6.951 million EU nationals lived in another member state as of January 1st, 2003 (European Commission 2003).[15] This nearly 7 million people represent about 1.52% of the overall EU population. The difference in the mobility rate is actually much bigger in considering that the US percentage reflects only those who moved in one year while the EU percentage accounts for all EU nationals living in another EU member state, no matter when they moved.

Fifth, the historical trajectories of the EU and the US, especially between their respective component units, vary considerably.[16] It is generally argued that because the two polities developed in different centuries, they faced different external constraints and circumstances. Thus, while the US "has the status of being a very old political system" given that it is "governed under the oldest written constitution in the world" and had two centuries to develop, the EU on the other hand is considered a polity in its infancy, a product of WWII and the industrial age as well as predominantly an artifact of the Cold

[14] The high level of mobility in the United States compared to other nations has been frequently commented on by many different observers throughout American history (cf. Huntington 2004: 50).

[15] This 2003 estimation is based on 25 member states, not including Romania and Bulgaria.

[16] McKay, however, hints at that a closer look at the historical trajectories of the EU and the US actually reveals many significant similarities. Thus, even after having replaced the Articles of Confederation with the US Constitution, US defense remained in the hands of state-controlled militias until 1812, a national police force, the FBI, wasn't created until the 1920s and a real Central Banking System until 1913 (McKay 2001). Furthermore, early commentators saw an American people as a "chimera" in the first half of the 19th century, and states remained the key providers of transfer payments to the needy until 1930, 140 years after the ratification of the US constitution (McKay 2001).

War (Sbragia 2006, 15). In fact, the EU's eventual demise was predicted with the collapse of the Berlin Wall and the end of the bipolar world in which intra-EU relations were able to flourish (Mearsheimer 1990).[17] Moreover, the historical trajectories of the individual EU member states are characterized by a greater diversity than those states composing the United States. Most of the US states, especially the original thirteen colonies largely shared and share, comparatively speaking, a much closer historical bond. In comparison therefore and despite its decentralized nature, the United States looks fairly homogenous at the macro-level.

Most importantly, however, the entire subtext of the EU literature is that while the EU has become more centralized than any other international organization, it still falls short of being considered a state. Hence, while scholars won't quite call the EU a 'state', no one is arguing that the US label as a 'state' should be questioned. As Magnette et al. argue, "the EU is not a state, and not likely to become one in the foreseeable future" (Magnette et al. 2003, 834). And Vivien A. Schmidt observes that "[a]s everyone reminds us, the EU is certainly not a nation-state" (Schmidt 2004, 976). According to this view, the United States is a full-fledge nation-state and the EU simply a young, still developing political system, which makes a comparison between the two rather awkward (Sbragia 2006, 15). In other words, the United States is a single sovereign nation while the European Union is a composite of twenty-seven individual sovereign nations (cf. Goldstein 2001). Characterizations of the EU therefore as an "experimental polity", "a regional state" of "ever-increasing regional integration and ever continuing national

[17] Fabbrini, however, points out that the argument that the "the integration process of post-Second World War Europe was made possible by a sort of European isolationism - an isolationism protected by US military forces within NATO", overlooks that the US was able to enjoy a similar isolationist experience in the 19th century thanks to the British navy (Fabbrini 2005, 19).

differentiation", a "first truly postmodern political form" or as a major challenge for scholars of integration because of the EU's "betweenness" have been common (Laffan 1998, 236; Nicolaïdis 2007, 682; Schmidt 2004, 976; Ruggie 1993, 139–40). Dierx and Ilzkovitz also note that "the EU remains a less integrated market than the US: trade integration is still 70% lower in the EU than in the US and the price dispersion for tradeable between EU capitals remains higher in the EU than in the US" (Dierz and Ilzkovitz 2008, 3). And Sbragia concurs by contending that "even in the economic area, precisely the area in which the Union is the strongest" the EU lacks power in many important areas (Sbragia 2006, 23). She adds that "[i]n spite of having created an extremely important single market, it does not yet have an economic identity: no product carries a 'Made in the EU' mark; an EU patent does not yet exist, and the Union is not even considering an EU postage stamp" (Sbragia 2006, 23). Consequently that the European Union is more heterogeneous in nearly every sense than the US appears therefore to be obvious to most. As we will see later, however, this does not seem to be always the case when we look more closely.

In sum then, one of the greatest shortcomings in the American and European literature on market and state-building has traditionally been a lack of comparison between the two. This is problematic, given that even if one only buys barely into the comparability of the two polities, one should be able to accept that the logic of arguments derived from studying one polity should be applicable to the other. Thus, even if one compares only to show that the two are essentially different, the logic of the arguments should still apply. Given the notorious difficulties of n=1 causal inference, this possibility for comparative leverage offers a crucial opportunity to better evaluate the various

arguments that have been made about either the US or the EU. In other words, exceptionalist arguments are "always theoretically sterile" and have led in the US and in Europe to "an unfortunate parochialism of political analysis" (Fabbrini 2007, 204). To gain a better understanding of either polity and what might be specific about them, it becomes necessary to compare them. Indeed, to use Fabbrini's words, "specificity does not mean uniqueness, since specificity can be recognized as such only through comparison" (Fabbrini 2007, 204; cf. Sartori 1984). In short, it does not matter so much in the end where the two polities meet on an imagined comparability scale to accept that the theoretical arguments should hold up when comparing the two.

The next section will therefore in a few words describe the main approaches to market-building in the respective American and European literatures and their empirical implications. These implications, as the rest of the dissertation will demonstrate, fall largely short of the empirical evidence.

Three Views of Market Integration and State-Building

If practically all scholars take as given that the US is more integrated and centralized than the EU, the literatures on market integration and state-building in these two polities display a contradictory emphasis. The EU integration literature—which tends to compare the EU, explicitly or implicitly, to other international organizations—is largely set up to explain how the EU became so centralized. For instance, Sbragia observes, that "[t]he centralization of power in Brussels is striking if one compares the organizational capacity embedded in the EU's institutions with those of a traditional secretariat in an international organization" (Sbragia 2006, 22). Prominent books on the US state and market, conversely, are usually set up to stress that the US is a relatively

decentralized and fragmented state in comparison to more unitary states, especially European ones, and to explain why. Skworonek's landmark book (1982) on *Building a New American State* was written to deal with exactly this question. It was the common wisdom presumption that the US should be more centralized that made his book so forceful. Other books on the American state and market have overlapping backgrounds. Thus, Bensel argues against the 'conventional explanations' that 'an unregulated national market existed in the United States, almost as a birthright of national existence' (Bensel 2000, xxi). And Berk in *Alternative Tracks* documents multiple competing early-American industrial orders, against the widespread impression that there has long been a strong entity called the 'US economy' (Berk 1994). By comparing the US with other nation-states, such as France and the UK explicitly (Dobbin 1994) or implicitly (Skowronek 1982, 5), and the EU with other free trade areas and custom unions, such as the Association of Southeast Asian Nations (ASEAN), the European Free Trade Association (EFTA), the Mercado Común del Sur (Mercosur), or the North American Free Trade Agreement (NAFTA) (Winters 2010), both literatures, as the previous section has pointed out, reached a similar conclusion: the US and the EU are respectively one of a kind.

Given that the arguments to explain a specific set of institutional outcomes have almost always been made about only one set of institutions, they appear, when placed in comparative perspective, to end up being reasoned backward from the outcome. Yet the explanatory frameworks being used to explain one or the other polity's absence or present of a coherent set of rules for market exchange and the degree to how much they open exchange to competition are very similar. Hence, in theory, we have three different

coherent explanations of institutional outcomes and market integration. One category is "structural" in a materialist sense, and includes many other arguments that have also been called rationalist or functionalist. Another category is institutionalist. A third category incorporates ideational and cultural approaches to market building.

Structuralist-Materialist & Rationalist-Functionalist Explanations

I place here structural, materialist, rationalist, or functionalist arguments in the same category, given that they share the same idea in regards to how institutional outcomes come about (cf. Parsons 2007). All of these arguments have at their core the notion that a certain kind of institutions with a certain degree of centralization and liberalization is the direct result of the aggregation of rational individuals' straightforward responses to an objectively real obstacle course of material challenges. In other words, actors are seen as having similar, constant preferences for material concerns, such as economic well-being, and act rationally to reach their goals given objectively available options. As Parsons has noted previously with respect to institution-building in the EU, scholars from this school of thought see centralization and liberalization outcomes "either as solving objective *collective action problems* among actors, or as securing objective *distributional benefits* for the actor(s) with the power to set rules (Parsons 2003a, 3; emphasis in original). Differences in outcome, according to the logic of these arguments, are largely due to people being "positioned differently in the 'material landscape'" or to "exogenous changes in the 'material landscape which orient people toward new actions" (Parsons 2007, 51). In short, what the different variants of this school of thought have in common is that the variation in material structure explains

variation in institutional outcomes. Because people's actions are simply rational reactions to a given external environment, similar material structures in the European Union and the United States should therefore lead to largely similar adoptions of a single set of coherent rules for exchange and rules that open exchange to competition.

However, what distinguishes structural-materialist arguments from functionalist arguments is that the former focuses more on the rational interests of individuals or specific groups. Functionalists, on the other hand, concentrate their attention largely on the overarching needs of the political system, i.e. the needs of a specific polity to increase economic gains and efficiencies or to maintain or establish political stability and order.

The first variant of this explanation, structural-materialism, therefore mainly concentrates on the traceable self-serving agendas of specific interest groups. Typical for structural-materialist arguments is the notion that market integration and centralization across sectors is a function of variation in the economic interdependence of private actors where rising interdependence leads to domestic politics and national preference formation which then via intergovernmental bargaining leads to the delegation of authority and a change in the organization of the market (Garrett 1992; McCurdy 1978; Moravcsik 1991, 1998).

In the American context the work *American Law and the Marketing of the Large Corporation* by McCurdy (1978) is an example of this logic. McCurdy contends that it is the rise of big business, which enabled integration of the national market in the US (McCurdy 1978, 633). The Supreme Court needed "litigants with sufficient resources to finance scores of lawsuits in order […] to combat the tendency of state government to mobilize counterthrusts against the Supreme Court's nationalist doctrines" (McCurdy

1978, 648). It was in short these new big business groups which led due to a vigorous expression of their interests and strong pressure on domestic politics to further market integration and centralization.

In the European context, works by Moravcsik (1998), *The Choice for Europe*, and by Garrett (1992), *International cooperation and institutional choice: the European Community's internal market*, are representatives of this logic. Moravcsik makes the claim that European economic integration is mainly the result of the decisions the politicians of the major member states of the European Union made in reaction to general structural economic pressures and to particular powerful business interests. Thus market building and liberalization in the EU is first and foremost the result of

> A series of rational choices made by national leaders who consistently pursued economic interests – primarily the commercial interests of powerful economic producers and secondarily the macroeconomic preferences of ruling governmental coalitions – that evolved slowly in response to structural incentives in the global economy (Moravcsik 1998, 3).

Similarly Garrett argues that while steps towards internal market integration can be considered as a functional response to the changing patterns of market interdependence, conventional theories based on a functional orientation are only "helpful in delineating both the general environment in which cooperative solutions may emerge and the general institutional forms that such solutions may take" (Garrett 1992, 560). Therefore, he emphasizes that such an approach "downplays the fundamentally political nature of most bargaining over cooperative agreements" and that '[b]oth the economic and the political institutions governing the internal market reflect the preferences of the most powerful countries in the EC: France and Germany' (Garrett 1992, 560–61).

Functionalist arguments represent a second variant. Instead of focusing on rationalist interest-group or coalition logics, functionalist arguments emphasize the shared interests of many socio-economic groups in functionally efficient institutional arrangements. David Mitrany, generally considered the father of functionalism, for instance advocated for the transfer of functional tasks from governments to international agencies to solve specific societal problems, such as war (Mitrany 1966, 1976). Explanations about market integration and liberalization based on functionalist logics of various sorts therefore tend to argue that whatever turned out in the US or EU was most functional in that case. In other words, the existence and form of present-day institutions is attributed to the functions they perform for the collective system as a whole (or for the powerful actors that benefit from a particular institutional arrangement). But problematic with this kind of explanations is that in this literature the existence of specific occurrences is simply explained with reference to the effects of those occurrences (Thelen 2004, 24). In short, functionalist scholars so far have generally focused more of their attention on institutional effects than institutional origins and change, leaving the lacunae filled with functional reasoning (Pierson 2000, 475–76).

A prominent example of functionalist reasoning in regards to market building is Chandler. He for instance not only takes the existence of a national market in the United States for granted, but also argues that "the rise of the modern business enterprise in American industry" was an inevitability in that "it was little affected by public policy, capital markets, or entrepreneurial talents because it was part of a more fundamental economic development […], the organizational response to fundamental changes in processes of production" (Chandler 1977, 376; cf. Bensel 2000, 6–7). In brief,

"managerial capitalism" and the modern large corporation came about in the United States as a result of the size and homogeneity of the country's market, which "hastened the adoption of new technologies", "stimulated the rapid spread of fundamental innovations – the railroad, the telegraph, and the new coal technologies", and "encouraged Americans to pioneer in the machinery and organization of mass production" (Chandler 1977, 498 – 99).

Closely linked and generally subsumed into functionalist and structuralist-materialist arguments, are transaction cost and efficiency based approaches to market building. Indeed, transaction cost, efficiency-based approaches have been very common in the multi-level governance and federalist literature and span both the functionalist and the structuralist-materialist variants. While struturalist-materialists, however, tend to highlight more the economic benefits and transactions costs of more narrow and specific groups, functionalist generally argue that outcomes are due to efficiency gains for the entire polity. The main focus of economic efficiency-based argument generally is on the correction of market failure and the reduction of transaction costs. In general the idea is that Coase's notion of the nature of the firm gets extended to the establishment of a government and market integration (Coase 1937). Thus, a central government or state is supposed to emerge in those cases where a very short term contract would be unsatisfactory and where free-riding incentives threaten to prevent efficient bargains. Hence, a central government might be given independent authority to promote the efficient allocation of national resources. However, a single authority may also use its power for purposes that are inimical to allocative efficiency. Hence, 'thriving markets require not only an appropriately designed economic system, but a secure political

foundation that limits the ability of the state to confiscate wealth' (Weingast 1995, 1). Competition among various jurisdictional units is thus considered beneficial (cf. Tiebout 1956). Consequently, in a multi-level governance entity or compound polity we should see the adjudication of authority to 'the smallest area necessary to optimize the information available to the government decisionmaker […], while ensuring that it internalizes all the consequences of its activities' (Triantis 1997, 1276). Oates calls this the basic principle of fiscal federalism and it has been the standard view of functionalist, efficiency-based arguments for a while (Oates 1997, 1323). In short, based on this model compound polities, like the EU and the US, should ensure that competition in diverse policy fields across jurisdictional units is alive and kicking. Zimmerman seems to support this view by arguing for a facilitative role for the US Congress in interstate commerce and in noting 'the ability of [US] states to function as laboratories of democracies developing new solutions for problems' (Zimmerman 2003, 36).

Yet, in more recent years, newer efficiency-based arguments have come to argue the contrary, blurring the line and making predictions or explanations based on an efficiency model even harder. Alice Rivlin (1992) for instance argues that tax competition among the states leads to inefficiently low levels of public services. As Oates (1997, 1322) therefore notes, her 'basic contention is thus that competition among jurisdictions (be they nation states within the European Community or political subdivision within a nation) leads to distorted outcomes in the public sector both in terms of fiscal and regulatory policies'. Competition at the state level is seen as destructive, i.e. as a system that needs to be carefully circumscribed to enhance efficiency by avoiding

races to the bottom. This then leads to the expectation of more harmonization, i.e. the adoption of a single set of coherent rules, of various policies, including tax policies.

Thus, from a structuralist-materialist / rationalist-functionalist perspective we can anticipate to find empirical evidence supporting the following suppositions when looking at market centralization and liberalization in the EU and the US.

Concerning more structural-materialist approaches to market building, we should first be able to find in both polities that an increase in economic interdependence in a market sector leads to demands for this sector to become centralized and liberalized to facilitate trade across the entire polity. In other words, the polity with the greater amount of economic interdependence can be assumed to be the polity which more likely has adopted a single set of coherent rules for market exchange. Second, based on the logic of the same variant, we should also see that the centralization and liberalization of a market sector is the result of the decisions of the most powerful states based on their national preferences derived from pressure groups. As a corollary, therefore, we should expect similar outcomes in both polities to the extent that the preferences of the most powerful interest groups are similar across the most powerful states in the US and the EU. Indeed, this explanatory variant lets us assume that what we see happening in the public procurement, services and regulated goods arenas in the EU are in the end the outcome of Europe's most powerful states. By the same logic what we see happening in these policy arena in the United States should also be the result of America's most powerful states. In fact, US sister states frequently see themselves comparable to sovereign EU member states. Former California Governor Schwarzenegger described his state as "a nation-state […] acting as a new country" (Breslau 2007, 60). Furthermore, this variant expects us to

find strong evidence that the push for extensive market centralization and liberalization was primarily coming from powerful business interest groups within the states, particularly from the most powerful states. Business, especially the most competitive among them, consequently should have consistently been at the forefront of initiatives leading to further market integration and liberalization, bringing its full attention and resources to bear.

As regards more narrowly functionalist arguments, in all cases similar economic circumstances and necessities should lead to similar institutional arrangements. The entire premise of such arguments it that we should see very similar (or at least functionally equivalent) institutional arrangements where we see similar underlying opportunities for efficiency gains. In other words, we should find that large variations in economic circumstances in a market sector leads to different outcomes in regards to the adoption of a single set of coherent rules and the adoption of rules for facilitating market exchange. Moreover, we should be able to observe similar responses to similar fundamental processes of economic development.

More concretely, if outcomes are indeed in the last resort based on reactions to the size and the homogeneity of a polity's market as functionalist theories argue, the similar size and greater homogeneity of the US to the EU market would lead to the expectation that it is the United States which would have taken consistently more steps in integrating the public procurement, services and goods sectors. The opposite logic, i.e. the potential notion that due to greater complexity and more veto points a polity might have to centralize more to be able to function efficiently, simply does not hold up as a logical

extrapolation of this approach, given that this would imply that the most centralized and integrated polities must be those with the greatest number of obstacles.

Consequently, given the similar sizes today of the European and American markets and similar technological stimuli and pressures on both sides of the Atlantic leading to, as Turina (2005, 225) has pointed out, "a broad geographical expansion of corporations' areas of interest" and to the desire for instance of service providers to "break through established local barriers", the argument by Chandler as well as in extension by McCurdy lead toward the assumption that the US will have taken by now at the very least steps not unlike the EU to eradicate still existing stumbling blocks to the sale of regulated goods, the provision of services, and to the free competition in the public procurement sector either out of commercial necessity or because of powerful business interests.

Evidence in the later chapters, however, will show that the expectations derived from both, the rationalist-functionalist and the structuralist-materialist, variants do not hold up. First, despite similar economic constraints, the European Union ends up in having adopted a single set of coherent rules and rules that facilitate trade to a much greater degree in several important economic sectors than United States. Second, France and Germany, the EU's two most powerful countries and the so-called 'motor of European integration', for instance, were the most resistant to the far-reaching liberalization of the European services market. Yet, a services market much more liberalized than in the US, specifically in regards to the temporary provision of services, has been put in place. Regarding public procurement, it is for instance especially some of the less-populated states and therefore usually considered the less powerful states in the

US that have the greatest barriers to public procurement, e.g. Wyoming, Alaska, or Hawaii. Third, business groups played a role but were neither at the forefront nor the critical catalyst of market-building in Europe. They, however, frequently tended to play an important supportive role for the European Commission. More importantly, however, the Commission in at least in one case ensured that business would play the role of strong supporter when dealing with potential member states' resistance. On the other hand, business groups in the US either did not show any interest in further market centralization and/or liberalization or when they did show some interest, the feeling was that they could not do much because out of one or an amalgam of three reasons. First, to push for more market centralization and liberalization within the US would mean that they would have to favor one of their members headquartered in one state over another and that they cannot do institutionally. Second, nothing can be done because state rights would probably not let them ever reach a polity-wide outcome. Third, nobody really has so far taken the initiative for the entire polity and not just for their sector and they don't want to take the risk or assume the costs.

Institutionalist Explanations

Path-dependence advocates assert that earlier institutional developments channeled people in certain directions later on (Sandholtz 1996). Concerning state-building in the United States, Skowronek for instance contends that "states change (or fail to change through political struggles rooted in and mediated by preestablished institutional arrangements" (Skowronek 1982, ix). Thus, the functionalist formulation is not only inadequate in "approaching state building as the natural and adaptive reaction of governments to changing conditions", but also "distorts the history of reform" by

ignoring "the limitations of modern American state building" (Skowronek 1982, viii). In brief, Skowronek argues that centralization, and in extension market liberalization, or rather the lack of it in America compared to other unitary states can be explained by the low level of federal resources and the vested interests in the state level, dating back at least as far as the American Constitution. Hence, he observes that America is "distinguished by incoherence and fragmentation in governmental operations and by the absence of clear lines of authoritative control", by "a meager concentration of governmental controls at the national level", and by the fact that "the American Constitution has always been awkward and incomplete as an organization of state power" given that it was "[f]orged in the wake of a liberal revolt against the state" (Skowronek 1982, viii, 8 and 287).

Institutionalist explanations are the oldest tradition in the analysis of the European Union, going back to the writings of Ernst Haas in the late 1950s and early 1960s (Haas 1958, 1961; cf. Rosamond 2005).[18] Haas argued that the creation of the European Coal and Steel Community had the power to redirect the loyalties and expectations of political actors in the future. Thus, the assertion is that the creation of innovative, supranational institutions unintentionally changes the future behavior of political actors by changing their expectations. Actors start to shift some of their resources and policy efforts in the direction of further integration by envisaging "these new centres of authority as potential suppliers of outcomes that [are] consistent with their preferences" Rosamond 2005, 244). This leads to a self-reinforcing process which Haas called 'spill-over'.

[18] Rosamond described the publication of Haas's seminal work *The Uniting of Europe* (1958) as "the founding moment of the field of what we now routinely term 'EUs studies'" (Rosamond 2005, 238).

While Haas's neofunctionalist approach to market integration and state-building was largely abandoned by the late 1970s, even by Haas himself (1975), it saw a revival in the 1990s and 2000s (Stone Sweet 2010; cf. Rosamond 2005). Stone Sweet and Sandholtz for instance attempt to explain centralization in the EU not only as a function of variation in the economic interdependence of private actors, and thus of the presence of active interest group demands for easier transnational exchange, but additionally emphasize the importance of policy feedbacks, path-dependence and institutionalization (Stone Sweet and Sandholtz 1998, 22 – 25; cf. Pierson 1998). To answer therefore the question "why does integration proceed faster or further in some policy areas than in others?", the authors contend that:

> We would look to variation in the levels of cross-border interaction and in the consequent need for supranational coordination and rules. In sectors where the intensity and value of cross-national transactions are relatively low, the demand for EC-level coordination of rules and dispute resolution will be correspondingly low. Conversely, in domains where the number and value of cross-border transactions are rising, there will be increasing demand on the part of the transactors for EC-level rules and dispute-resolution mechanisms (Stone Sweet and Sandholtz 1998, 14).

In short, both, Skowronek and Sweet Stone and Sandholtz, argue that change is driven by demand for integration from non-state actors. Thus, while the latter stress the variation in the level of cross-border interactions, the former notes that "the expansion of national administrative capacities in America […] was a response to industrialism", the disappearance of "the bucolic environment", "[t]he close of the frontiers, the rise of the city" and "the end of isolation", all changes leading to "raised demands for governmental capacities" (Skowronek 1982, 4, 8-9). The institutional outcomes of this change are, however, heavily channeled by the shape of previous delegations of power to the central state (or the lack thereof). In short, pre-existing institutional arrangements, mediated by

the presence or absence of active interest groups, hinder or facilitate mobilization in favor of more centralization, or create difficult-to-alter organizational constellations that either lend themselves to more centralization or do not. Crucial to institutionalist logic is that these pre-existing arrangements were not set up to deal with the same exact problems, but that the facilitation or obstacles that they present for subsequent decisions on centralization is unintended.

It is important to distinguish here between broad institutionalist expectations and a more specific one. From a broad perspective *à la* Skowronek as well as Stone Sweet and Sandholtz, the expectation is that the United States, comparatively, centralized more power and resources than the EU early on, and continued to build these resources and power over time. Consequently it seems like this should have led to greater centralization of rules in the key area of mark-building as well. We will see, however, that a more specific variant of an institutionalist hypothesis – whether or not a specific organization was given a clear mandate and at least some resources to pursue centralization and liberalization in market-building per se – is an important part of the story.

Indeed, as will be described in more detail in the chapter's next section on my own explanation, one specific institution might especially be responsible to explain the different degrees of centralization and liberalization in the US and EU. Thus, differences in the two entities might be an artifact of the unique role of the European Commission, which as an agent has the peculiar role of the guarantor of the treaties and promoter of an internal market, not lastly due to holding the sole right to initiate EU-wide legislation (Article 17 Consolidated version of the treaty on the European Union). Accordingly it can be hypothesized that the European Commission's unique role as promoter and guarantor

of the internal market and the relative absence of having to carry out many other institutional functions, for instance in contrast to the US Supreme Court or federal government, leads to more attempts to centralize and liberalize policy sectors.

Of course, readers should note that an explanation based on the European Commission as being an extraordinary policy actor could either be an institutional path-dependence argument or an ideational one. They are, obviously, not mutually exclusive and might most likely exist in combination. Yet, it is important to be aware of the two different logics. Thus, on the one hand, the Commission can be seen as having been a fairly rational institutional innovation for early EU tasks that, because of its specific construction for those specific tasks, turned out to be a vehicle for a certain kind of centralization and liberalization later on. On the other hand, the EU Commission can be considered as having been endowed with a certain conceptual task and mandate—giving its members certain goals and legitimacy, and other actors certain expectations about how it would act—in a more cultural way.

From an institutionalist perspective then empirical evidence should confirm across the two compound democracies the following hypotheses. First, especially from a broad institutionalist perspective, greater federal resources and lower levels of vested state interests lead to more centralization and liberalization. Second, the adoption of a single set of coherent rules and the adoption of rules that open exchange to competition should be greatly influenced by pre-existing institutional arrangements that hinder or facilitate the mobilization in favor of them. Third, particularly from a more specific institutionalist perspective, that takes into account the role of a strong executive institution, we should see the European Commission's unique role as promoter and

guarantor of the internal market and the relative absence of many other institutional functions, in contrast to the Supreme Court or the US government, leading to more attempts to centralize and liberalize market-related policy sectors in the European Union.

Once again more concretely, based on Skowronek's work, we should expect to see the polity with greater federal resources and lower levels of vested state interests leading the way towards more centralization and liberalization. Given the, comparably, obvious greater resources of the American federal government[19] and the fact that while state interests in the US may be strong, they are certainly not to be assumed as strong as those of sovereign independent nation-states, we should expect the United States to be the polity to have adopted a single set of coherent rules of market exchange and rules to open up competition across the entire polity.

Furthermore, Stone Sweet and Sandholtz's approach leads to the clear expectation that given the higher rates of mobility across states in the US, we should find the United States to have at the very least integrated and liberalized market sectors as much as the European Union or even further. In other words the assumed pressure from the citizens more frequently moving across the polity should have led to greater pressure to remove any remaining barriers to trade in services, public procurement or goods in the US than the EU.

What is more, Stone Sweet and Sandholtz's argument leads us also to expect more US centralization since the earlier delegation of power to the central government in the US (while not large compared to other countries) was larger than the early delegations of power to the EU in a variety of ways. This delegation of power should have created

[19] The EU's financial resources are severely limited given the budget cap of barely over 1% of the EU's GDP.

federal entrepreneurs with an interest in more central power who should have generated more path-dependent dynamics of centralization and liberalization.

Yet, as the ensuing empirical chapters will reveal, neither Skowronek's nor Stone Sweet and Sandholtz's broad institutionalist explanations hold up to closer scrutiny when the logic of their arguments is transferred to the other polity. Comparably higher mobility rates and greater federal resources and lower levels of vested state interested have not led in the United States to an adoption of a single set of coherent rules as well as the adoption of rules for facilitating market access in the studied policy arenas in contrast to the European Union. The outcomes as will be shown are in fact contrary to the expectations.

Ideational and Cultural Explanations

Ideational and cultural explanations to market integration note that interest group-based arguments frequently fail "to explain why a weak interest group in one country often wins a better policy outcome than its stronger counterpart in another country" and "why parallel interest groups in different countries believe very different policies to be in their interest" (Dobbin 1994, 6). What all the variants of ideational and cultural approaches largely share in common is that the market is not a given and does not arise automatically through adjustments of demand and supply via the price mechanism. Markets, in Polanyi's words, are embedded in politics and society (Polanyi 1957). The state, according to Polanyi, must play a central and active role in managing markets. In other words, liberal market economies "could never exist in an apolitical or asocial space" (Caporaso and Tarrow 2009, 598).

However, while explanations derived from ideational-cultural approaches usually tend to consider the degree of centralization and market integration to be the result of

different political cultures or having been constructed top-down by powerful political actors, they don't agree whether one polity supports centralized authority and liberalization or only one or none of them. There are some arguments in the American context that say that the supports for centralized authority and for liberalization go together. According to this view, we can have centralized authority in the US context to the extent that it promotes liberalization. In other words, scholars espousing this view point to what centralized authority can legitimately do that is built on liberalization. On the other hand, there exist arguments in the American context, that point out that in the United States there is first and foremost a broad commitment to a certain conception of the state and that from this perspective it is not clear that it would be acceptable to have a strong state in the name of liberalization.

Dobbin's work on forging industrial policies in the United States, the United Kingdom and France is an example of the former view (Dobbin 1994). He alludes to the fact that Americans are largely accepting governmental intervention in the market if it means increasing market liberalization. He argues that rationality, or rather what is perceived as such, is cultural. Different political traditions lead to different perceptions of and responses to similar problems, which then in turn explicate different industrial policies (Dobbin 1994, 22). Consequently in Britain, where "the political autonomy of individuals was constitutive of political order [, the] domination by government or other actors was [considered] destructive", while in France "excessive privatism was [deemed] destructive" due to the fact that "central state concertation of society was constitutive of political order" (Dobbin 1994, 24–25). In the United States, in contrast, Washington became "the referee of a free market" focusing on "a policy of enforcing price

competition as a way of guarding Americans' economic liberties against the demon of concentrated economic power" (Dobbin 1994, 2 and 24). In other words, culturally the United States not only focuses on market freedom, but also accepts government intervention, i.e. actions by centralized authority in the market, when it means increased liberalization. Thus, while "[d]irect governmental participation in industry became anathema" in the United States, market regulation with the goal of overcoming the political tyranny of market restraints "became the distinguishing feature of American industrial policy" (Dobbin 1994, 28).

Bensel (2000) and Berk (1994) share with Dobbin the view that market integration is not simply the outcome of technological determinism and that markets are constructed. Yet, the former parts company with the latter when it comes to the idea that the US had only one viable political and economic tradition. Berk for instance observes that "industrialization and statebuilding in the United States were much more contested and open-ended than twentieth-century learning suggests" (Berk 1994, x). And Bensel also challenges the notion that "the national market was [either] a natural [or] an inevitable feature of the American political economy" and that "politics in the age of enterprise [are] epiphenomenal and adaptive" (Bensel 2000, 290; Berk 1994, ix). The construction of a national market was "strongly and persistently contested in national politics" in the nineteenth century (Bensel 2000, 11). Other authors, who espouse "a hegemonic "liberalism" as the major force in American political development" fail to see "that successful suppression of southern separatism and the creation of a national market free from local barriers were, in fact, truly stupendous accomplishments" (Bensel 2000, 526).Thus, for Bensel market integration was the result of "elite-sponsored policies"

where the Republican Party as "developmental agent" played the key role in ensuring that the Supreme Court was packed with Republican judges, who insulated by life tenure appointments were able to suppress "state and local attempts to regulate interstate commerce" (Bensel 2000, xix – xx). The focus here was on an unregulated market. Hence, "[w]ith respect to the political construction of the national market, the United States Supreme Court, dominated by Republican appointees, instrumentally created the legal doctrines that suppressed both state and federal regulation of commerce" (Bensel 2000, 518). These judges were chosen by presidents and confirmed by senators based on "their devotion to party principles" and their "attitude toward regulation of interstate commerce" (Bensel 2000, 7). The Republican Party was ultimately able to become a coherent policy-making organization due to the "emergence of a national party coalition centered in the manufacturing belt that exploited the distributive benefits available through tariff protection while articulating a broad vision of development with respect to interstate commerce and the gold standard" (Bensel 2000, 521). This broad vision was informed by "the conservative ideological orientation of the industrial and financial elite" who "deciding what public policies might provide" the conditions of "fairly high rates of return and a disciplined focus on productive efficiency" focused on the creation of an unregulated national market and the adherence to the gold standard (Bensel 2000, 510). Despite being "a net political liability for the Republican party", the party "choose to make construction of a national market economy one of the highest policy priorities the party would pursue" (Bensel 2000, 515 and 518). In short, Bensel contends the US national market "was politically constructed by the Supreme Court" to avoid it from being "balkanized into much smaller units" and ruling thus "out all but the most trivial

state and local regulations of interstate trade" (Bensel 2000, xix and 7). Consequently, while Bensel disagrees with Dobbin in regards to the existence of only one viable political and economic tradition from the birth of the United States forward, he does share with him the view that centralized authority and liberalization go together.

The view that Americans accept centralized authority to the extent that it liberalizes markets however is not shared by all Americanist scholars. While Louis Hartz's (1955) seminal work *The Liberal Tradition in America* was not about market liberalization per se, it can be deduced from his description of the Americans' conception of the state that even a strong state in the name of liberalization would largely be abhorred. Hartz's explanation of centralization and market integration is based on the idea of American exceptionalism. He emphasizes, similar to Dobbin, cultural differences, noticing the relative uniqueness of the American experience in contrast to Europe's history. Hartz, however, comes to a different conclusion than Dobbin. Bruce Ackerman succinctly summarizes Hartz's view in observing that

> Americans had never experienced anything like European feudalism. Since the first term in the [Marxian] three-stage sequence was lacking, America lacked the social ingredients necessary to spark the later movement from the second capitalist stage to the third socialist state. America was a case of arrested development, permanently frozen at stage two. […] Since Americans never were obligated to use state power to liberate themselves from feudalism, they were "born equal" and could afford to look upon the state as an unmitigated threat to natural liberty. The government that governs best governs least. Let the Europeans say otherwise (Ackerman 1991, 25–26).

Therefore the United States should, in contrast to Dobbin's cultural-based argument, not be expected to centralize many policy sectors given the structural, historical factors and the resulting American mindset. While disagreeing on the origins of the liberal nature of the American identity, proponents of a cultural nationalist view agree

with Hartz's liberal thesis as regards the end result. Thus, while Hartz sees America as not being constrained and conditioned by a feudalist history, Huntington (2004) for instance contends that the liberal practices and values are due to the "cultural predominance of the white Anglo-Saxon, and Protestant stock" that created them in the first place (Fabbrini 2007, 43). Thus, the Anglo-Saxon whites were colonizers, and not immigrants like later groups, and therefore able to impose and continue to impose their liberal values and practices. Hence, while the liberal thesis contends that "American liberal nationalism [is] a necessity" and the cultural thesis argues that it is "the outcome of public policies and social relations" (Fabbrini 2007, 43), they both expect us to see similar attitudes towards central governments and markets.

By implication then the reticence in Europe to market integration via federal government fiat should be much less. Thus we should see policy sectors being centralized and liberalized in Europe, where they are not in the US despite similar economic pressures. This view seems to be supported by Aberbach et al., who note that '[o]n the administrative side, the American bureaucracy lacks the pre-democratic legitimacy that attaches to the monarchical, ex-monarchical, or Napoleonic bureaucracies of Europe' (Aberbach et al. 1981, 23). Yet, the latter authors also observe that "American administrators have long had responsibility for promoting their policies and mobilizing their constituencies with an overtness and an intensity that is foreign to the European tradition", which implies the possibility that on occasion the US bureaucracy might have succeeded in overcoming general reticence towards centralization, providing a different piece of the American exceptionalism mosaic.

In the European context, similar to the works on the American market by Berk and Bensel, Jabko (1999) stresses contingency. He observes that not only markets are constructed but also that alternative outcomes were very well feasible in the building of an European Union. Jabko contends that "there is little evidence that EMU was intrinsically in the economic interest of particular social groups" and that the "euro's recent birth […] are neither the result of grandiose geopolitical design, nor the product of abstract economic necessity" (Jabko 1999, 486 and 488). Instead, similar to what I argue throughout this study and explain in more detail in the following section, Jabko emphasizes that liberalization needs a centralized organizational champion. This agent in the European Union is the European Commission. He writes that "[t]he advent of the economic and monetary union" was the direct result of "the political strategy developed within the European Commission in order to achieve that goal" (Jabko 1999, 475). He goes on to observe that "[a]s part of their integrationist agenda, Commission officials selectively marshaled the political and economic significance of Europe's emerging Single Market" (Jabko 1999, 475). The Commission "induced key actors to reframe their preferences in terms of EMU" by "disseminat[ing] the notion that EMU altogether provided a coherent solution to the problems created by financial globalization and the end of the Cold War" (Jabko 1999, 475).

Andrew Gamble (1988) in *The Free Economy and the Strong States* makes a analogous argument in regards to market liberalization in the United Kingdom during the Thatcher years. Market liberalization needs to be created. To ensure the construction of a liberalized market, a strong governmental agent with a liberalizing ideology needs to be put in place. He observes that one of the Prime Minister Thatcher's main objectives was

"to revive market liberalism as the dominant public philosophy and to create the conditions for a free economy by limiting the scope of the state while restoring its authority and competence to act" (Gamble 1994, 4). Indeed, in Gamble's words, if a free market program is to succeed, it requires a reorganization of the state by "strengthening the authority of government by limiting its size and scope" (Gamble 1994, 5, 1998, 231). In short, for Gamble Thatcherism was a "new hegemonic project", involving "ideology, economics and politics, a politics of support and a politics of power", which was geared towards establishing "a free economy and a strong state, as the new basis for a stable hegemony" (Gamble 1988, 222– 23). In other words, the liberalization of the British market was not only an ideological project by the Conservative party, but necessitated for its realization a restructuring, a strengthening of the governmental institutions. Only strong state institutions in favor of liberalization can overcome obstacles to a free market economy.[20]

The relative open-endedness of many variants of ideational explanations to market integration due to political contestation also challenges the notion that we can predict which policy sector in the end will become more centralized and liberalized in the EU and which one in US. These explanations thus lead to the hypotheses that market integration and centralization is the result of elite constructions. Elites in favor of centralization and liberalization will lead to policy sectors being moved to the federal level. Moreover, the adoption of a single set of coherent rules and rules that open exchange to competition in different policy sectors is the result of many contingencies which makes prediction of outcomes impossible. They do, however, generate predictions

[20] Indeed Gamble observes that the state reorganization in Britain under Thatcher did not go far enough to liberalize the market. Further strengthening of the state needs to be undertaken to succeed in the establishment of a truly free market (Gamble 1988, 231).

about processes, i.e. about the kind of story we should see when we do observe centralization and liberalization. Thus, we should find evidence that those actors in favor of centralization and liberalization have been for instance in the key policy positions to make it happen or vice versa.

The ideational and cultural approaches to explain market-building lead then to the following assumptions as regards the evidence we should see when looking specifically at important market sectors. Ideational and cultural arguments would lead us first to expect that outcomes will be relatively homogeneous and similar across sectors within each of the entities but vary across the EU and the USA. Second, market integration and liberalization is the result of elite constructions. Elites in favor of centralization and liberalization will lead to the adoption of a single set of coherent rules for the entire polity and to rules facilitating trade across the entire polity. If ideational views mattered, we should be able to find evidence separate from the specific cases showing that elites favored centralization and liberalization more generally and on principle. Moreover, despite the fact that according to this view outcomes are often the results of many contingencies and therefore impossible to predict, we should nevertheless be able to offer prior and separate evidence of the ideational views of its advocates, contrast them to alternative views, and show that it was because the advocates of one particular view gained key positions or resources that a certain institutional design was chosen.

As regards the notion of "American exceptionalism" derived from Hartzian thinking, we should expect to find evidence that greater distrust of federal government in the United States and the lack of bureaucratic legitimacy due to the absence of feudalism have favored the retaining of policy authority at the state level in contrast to the European

Union. As a corollary then when market centralization and integration did happen in the US, it should have been largely the result of an active American bureaucracy promoting their policies and mobilizing their constituencies.

Ideational approaches by themselves, however, are far from being completely satisfying. If for instance, as Dobbin argues, the American cultural focus is really on enforced price competition and that the "United States' market-enforcing industrial policies contribute to the conviction that free competition will induce efficiency in virtually every economic sector'" how then do we explain that public procurement, services and important goods sectors, as the subsequent chapters will demonstrate, are shielded from this enforced price competition and the postal sector remains a monopoly while the EU exactly employs this kind of enforcement in these sectors (Dobbin 1994, 3)? It also leaves one to wonder whether the EU is for instance simply following French or British traditions, an amalgam of the two or already has created its own political and economic tradition. Moreover, if Bensel is right that market-integration is the result of Republican ideology pushing via the US Supreme Court for a politically constructed national market with the exception of trivial state and local regulations, why does then the "unregulated national market" in the US continue to regulate public procurement, services and certain goods at the state level while in the EU every effort is made to open up these policy sectors for free competition? These sectors are not more trivial in the United States than in the European Union as will be proven later on.

Facilitating Market Exchange: Executive Promotion and Societal Acceptance

Given the apparent shortcomings of the standard approaches to market-building, I offer here an explanation based on an institutional argument playing out in a broad ideational context. I argue that taking the notion of American exceptionalism, in both the liberal or cultural nationalist form, *and* the role of the European Commission as centralization and liberalization catalyst due to its comparatively narrow mandate into serious consideration does a better job in explaining the cross-polity variation in outcomes. In other words, in combination the institutional and ideational elements explain better why the European Union has adopted a single set of coherent rules as well as rules that open exchange to competition much further than the United States than either of them alone could do.

For instance in explaining the different paths towards market-building in the United States and the respective European nation states (not the EU), Fabbrini already incorporates implicitly Hartzian notions in emphasizing the institutional environment due to the absence of feudalism in the US and the diverging derivative ideological convictions. Thus he notes that

> In America, a modern market economy developed in the absence of a central state; in fact, the market was already developed when the federal state came fully into being at the turn of the nineteenth century (Nettle 1968).[21] In Europe, by contrast, the pre-existence of a central state was a condition for the creation of the market, but it was also its constraint. In fact, the creation of a market economy required the dismantling of many hierarchical relations structured in both state and society, and it was much more difficult to achieve in Europe than in America (Fabbrini 2007, 90).

[21] Of course, Bensel (2000) and Berk (1994) would strongly disagree with this primordialist view.

Given the absence of a central state, American market-building, according to Fabbrini, became mainly the result of judicial action, while market-building in individual European nation states was the outcome of political projects (Fabbrini 2007, 80). The US Supreme Court was very active in the 19th century reducing interstate barriers. Its decisions "favored the dismantling of state trade barriers – a sort of *negative integration* of the national market – thus setting a legislative agenda for its subsequent *positive integration* by congressional legislation" (Fabbrini 2007, 93; emphasis in original). Egan uses similar language when talking about market-building in the European Union. Thus, when talking about EU-wide market-building instead of market-building in individual nation states, she notes that "[i]n dealing with the discriminatory effects of regulatory barriers to trade, the European Court of Justice has played an active role in *negative* integration, by invalidating discriminatory national rules" and that "the Court has provided the window of opportunity for the Community to foster *positive* integration through the creation of a new regulatory regime" (Egan 2001, 108; emphasis in original). Yet, as the rest of this study will show, market integration in the US does not in very important aspects go as far in centralizing and liberalization trade in services, public procurement or certain goods sectors as in the EU. Why then the absence of positive integration in these sectors in the US and their presence in the EU when in both instances the respective Supreme Courts have played similar roles? I contend that the different ideas about the role of the state in market-building, deriving from a different history of state-building, and the limited but clear mandate of the European Commission are key to understanding why today we see differences in the EU and the US regarding the adoption of a single set of coherent rules and rules that open exchange to competition, with the EU,

contrary to the expectations by most experts, to be the one to facilitate trade more within its polity.

Ideational Aspect: Societal Acceptance of a Strong Federal-Level Executive

Broader norms of legitimate governance favor a centralized authority, even a liberalizing central authority, more in the EU than in the US. Thus, Fabbrini and Hartz are right when they note that the United States of American and individual European nation states have developed different attitudes towards central government. Yet, what needs to be taken into account is that these differences now also find their reflection in the attitude of Europeans towards the EU-level, i.e. federal-level, institutions. Thus, comparably and despite all the criticism we hear of the European Union in Europe, the basic notion of federal governance of market is far more strongly accepted across Europe at both the elite and mass levels than in the United States. This, of course, has its roots in the differences described by Hartz, Fabbrini and others regarding the US federal government and the individual European nation states. Thus, Fabbrini observes when looking at the US and the respective European nation states that "[u]nlike the Jacobin legacy for France, republican ideology in America merely deepened the distrust of national [that is, federal] mobilization" and that "[i]n Europe, by contrast the centralized state not only established the legal conditions for the birth of the market, but also intervened in its material structuring" (Fabbrini 2007, 91). He also provides us with an explanation on why, even after the US Supreme Court's interventions in the 19th century, the US internal market might end up being less centralized and liberalized than it could be in observing that "the institutional dispersion of national sovereignty inherent in the

American political system, coupled with the legitimacy enjoyed throughout the nineteenth century and thereafter by the *idea* of an unrestrained market economy, prevented any direct intervention by the federal state" (Fabbrini 2007, 93; emphasis in original). However, while national sovereignty is even more dispersed in the EU than in the US, it is the different notion and legitimacy of a market unrestrained by federal government intervention which is significant. In the US the notion that a market unrestrained by federal-level intervention is akin to an open and competitive market is part of the country's cultural and ideational make-up. In other words, federal-level intervention in the internal market is usually perceived in the US as trade hindering instead of facilitating. In Europe on the other hand, mercantilism "has created a public attitude toward the market based on the idea that it should pursue national strategies defined *only* by the state (i.e. by its political and administrative personne)l" (Fabbrini 2007, 98; emphasis in original). Even after WWII, "the postwar European states became an economic actor per se, rather than the creator of the institutional conditions for a market economy" (Fabbrini 2007, 99). In Europe therefore, citizens tend to be more accustomed to the role of the state in the market and especially in the role of market creator and facilitator.

In a 1970s study on attitudes of American business leaders on state involvement in the economy, David Vogel already observed that "[t]he most characteristic, distinctive and persistent belief of American corporate executives is an underlying suspicion and mistrust of government" (Vogel 1978, 45). He further noted that this belief "distinguishes the American business community not only from every other bourgeoisie, but also from

every other legitimate organization of political interests in American society" (Vogel 1978, 45).

While these broad differences in attitude towards central government and market intervention can partially explain the divergent policy outcomes in the European Union and the United States by highlighting the different levels of demand and acceptance for centralization in the name of market liberalization across the two polities, they are not sufficient to explicate the supply of them.

Institutional Aspect: Executive Promotion of a Single Market

Beyond the divergent attitudes about governance exist also an important difference in institutional mandates. The institutional mandates in the EU, especially the Commission's, depend more on market liberalization than do the similar mandates for US branches of government. The latter govern more broadly given that while the creation of a common internal market was arguably the main reason for abandoning the Articles of Confederation in favor of the US Constitution, it was not the only reason and mandate. In the EU, on the other hand, failure to create an European Defense Community, led the EU's institutions to be narrowly focusing on market integration from the onset. Thus, although in comparative perspective it is not a very powerful executive, the European Commission is a rather unique organization. Essentially it is a well-endowed, official think tank with a basic mandate to propose more and more liberalizing and centralizing policies.[22] Even if the EU executive is much weaker than the US one in broad terms, the

[22] Officially the three main tasks of the European Commission is to be the motor of integration by initiating legislation, to be the guardian of the treaties by ensuring that legal acts are applied by all member states and to be the executive body in most policy areas, by ensuring that EU decisions are put into practice (cf. Sabathil et al 2008).

Commission institutionalizes a running process that actively seeks out liberalizing, federalizing steps. This is consistent with the Commission's role as motor of integration and the EU's origins going back to the European Coal and Steel Community (ECSC) and the European Economic Community (EEC). Similarly, while the European Court of Justice is a rather narrowly-constrained court in comparative perspective - with a mandate based on liberalization but effectively barred from many areas - its very narrowness may have made it a more dynamic and aggressive actor over time. Precisely because the analogous US institutions were set in broader state-building perspective early on, they have not produced the same kind of constant drive toward centralization in market-building policy areas.

Thus, any explanation on the different outcomes in the EU and the US needs to incorporate the role of the European Commission as a strong executive-level actor with a liberalizing mandate. While there have been largely three different views on the significance of the European Commission in market-building with two denying it any decisive role at all, I contend that the Commission does make a substantial difference in the direction of further market integration especially as seen from a transatlantic comparative perspective (cf. Blom-Hansen 2010, 7).

In the first view, scholars see the Commission as largely impartial or simply as balancing between multiple roles (Egeberg 2006; Hooghe 2001; Nugent 2001). These scholars mainly argue that the Commission is neither composed of nor acting primarily as representatives of their national government or as pro-integrationist competence-maximizer. As Neill Nugent observes, "Commissioners do, for the most part, approach and undertake their duties and tasks in an impartial manner" (Nugent 2001, 115). And

Liesbet Hooghe reasons in her study on the European Commission that it is "misleading" to perceive the Commission as an unitary actor given that "[p]olitical preferences differ from office to office" and that "[e]uro-federalists work with defenders of state power and politically agnostic policy wonks" (Hooghe 2001, 193). In short, for her there is no systematic evidence showing that Commission officials are always pro-integrationist or following the positions of the member states that nominated them.

According to a second group of scholars, Commission officials are to a certain degree simply henchmen for national governments. In this view the independent role of Commission officials is downplayed in favor of the influence of member states. These scholars point out that no substantial differences between the Commission and member states can really persist. Due to the procedures for selecting and appointing Commissioners, they cannot follow a more pro-integrationist agenda than desired by all of the member states (Döring 2007; Hug 2004; Wonka 2007). As Wonka puts it, "the European Commission should be considered neither a technocratic nor an overly independent actor in EU politics", but rather as "a political […] actor with close political ties to EU member states" (Wonka 2007, 169). And Hug concurs by contending that "the preferences of supranational actors are related to those of the actors who select or appoint them" (Hug 2003, 41). Oxford professor Vernon Bogdanor yet goes a step further by commenting that the Commission even within the EU institutional system "enjoys very little autonomous power of decision-making" (Bogdanor 2007, 5).

The third view, which mirrors the most closely my own evidence, is that the Commission has played a decisive role and continues to do so in market-building. This is not to say that within the Commission different opinions or assessments of its role and

impact cannot be found. Yet, overall and especially in key moments, Commission officials have played a significant role in furthering market centralization and liberalization especially as seen from a transatlantic comparative perspective. When interviewed about market initiatives and differences between the European and American internal markets, present and former Commission officials, as will be shown in more detail in the ensuing chapters, have regularly pointed to the creation of an internal market as *their* political objective and going even beyond the original demands and desires of their respective member states and how this ideologically differs from their understanding of the United States.

As for instance a former member of Lord Cockfield's cabinet, the cabinet responsible for the EU's internal market dossier in the 1980s, has pointed out in regards to pushing market centralization and liberalization with the creation of the now famous White Paper:

> The White Paper was the result of brain storming effectively by three, four or five, maximum six people. Perhaps I should say ten: Lord Cockfield, Adrian Fortescue, Michel Petite, myself, Brown, Paolo Cecchini, Jacques Delors, Pascal Lamy, François Lamoureux. Those probably were the key people in the Commission. At that time, the Commission was undoubtedly the driver. The first member state to jump on the Single Market Program in practical terms was France under President Mitterrand closely followed, thanks to us, by Margaret Thatcher, who was not naturally predisposed, but who was told by us that you better do something, the French are moving and it is in the interest of British industry. She instructed Lord Young who was her Secretary of State for Trade to do something about it, David Young, and he did. So the member states were really far behind, don't even think about the European Parliament! Although they did start a Kangaroo group and there were various people there who were active. *But it was us, we did it!* (personal interview 2009; my emphasis).

In short, the catalysts were neither the European Parliament nor the member states, but the Commission officials around Commissioner Cockfield and Commission President Jacques Delors. Member states apparently tended to follow, at least on

occasion, the coaxing of the Commission officials. The Commission's catalytic function even more so found its expression in the deliberate change of framing the discourse away, where possible, from simply eliminating barriers to trade to "a market without frontiers" and especially to a "single market". As Helmut von Sydow, former member of Commissioner Bangemann's cabinet, noted

> An area without frontiers, frontiers in the sense of borders - frontiers are nearly again something positive in the English language - was only added by us in 1987 as a definition of the internal market. Previously the treaty only mentioned the removal of barriers to the free movement of goods, services, people and capital. The definition of the target of an internal market without internal frontiers was only added in 1987 Single European Act because of the White Paper" (personal interview 2009; own translation).[23]

But Commission officials have been repeatedly clear that they not only interpret Article 26 of the Treaty on the Functioning of the European Union (formerly Article 14 of the Treaty establishing the European Community) as a market without frontiers, but reframed it into a single market. Thus, as Alastair Sutton, a member of Lord Cockfield's cabinet, observed "that the "word "without" was a word, which was much discussed by us in 1985". He continues

> We discussed whether to reduce frontiers or to abolish them. And so the whole, it's vital that people understand this, the single market is based on the idea of an area without internal frontiers. Now the funny thing is, the US, Australia, and Canada […] have internal frontiers for many reasons, which we in theory at least do not. Of course you can immediately point to exceptions, derogations and the fact the member states don't play by the rules. But in legal theory we have a single continental market without internal frontiers (personal interview 2009).

[23] "An area without frontiers; frontiers in dem Sinne von borders, frontiers ist ja im Englischen schon fast wieder etwas positives, das haben wir erst 1987 eingefuegt als Definition des Binnenmarktes. Vorher stand im Vertrag nur Abschaffung der Hemmnisse gegen den Warenverkehr, Dienstleistungsverkehr, Personenverkehr, und Kapitalverkehr. Die Definition des Ziel eines Binnenmarktes ohne interne Grenzen, das ist '87 in der Einheitlichen Europaeischen Akte aufgrund des Weissbuchs nachgeschoben."

In other words, for Commission officials there is the clear perception that their mandate is a market liberalizing mandate which does not allow for any remaining barriers to trade between member states.

Again this is not to say that member states or the general political environment at a given point in time do not matter at all. As Suzanne K. Schmidt notes, it is doubtful whether the European Commission will be as successful in furthering market access in situations where all member state governments object to a Commission directive "by putting pressure on 'their' Commissioners or appealing in unison to the Court" (Schmidt 1998, 180). However, Commission officials frequently stand at the ready to push for the further elimination of any obstacles to a single market when the opportunity arises. Hence, as a fellow member of Lord Cockfield's cabinet, Sir Andrew Cahn remarked:

> I think the other thing is that the single market program was a really successful example of seizing the moment, seizing an argument when it was, when you know, seizing the crest of the wave and riding it when the political will was there. (personal interview 2009).

And Schmidt herself observes that in situation where the opposition to Commission initiatives is not absolute, as in her study on market liberalization in the telecommunications sector, the Commission ends up "well beyond what the founding members envisaged, and what many contemporary observers believed to be possible" (Schmidt 1998, 181).

Put differently, the Commission has been the linchpin of the promotion of a single market in Europe and in particular in the adoption of s single set of coherent rules for exchange as well as rules that open the exchange for competition. As Joana Cruz has previously noted,"[t]he very breath of integration has inevitably demanded that the Commission be more than just a "problem-solver" on behalf of Member States and that it

should operate as a self-consciously promotive institution charged with shaping European policy" (Cruz 2006, 1). And Majone (1996) famously argued that the Commission is best perceived as an institution that attempts to maximize its influence within the EU system. Wendon agrees by observing that "[t]he Commission is a strategically sophisticated bureaucracy with the ability to expand its own role" (Wendon 1998, 340). He demonstrates that even in less favorable circumstances, when the general political climate is not in favor of the Commission's agenda, the Commission has the "strategic ability to understand the way in which policy images and institutional venues interact affects [its] ability to develop and expand EU policy" and acts accordingly (Wendon 1998, 339). And Schmidt further makes the case that the Commission has much more far reaching powers than simply being an agenda-setter. Indeed, she shows how the Commission "can force the adoption of proposals in the Council which would have been rejected", "[b]y using its competencies as a guardian of the Treaty and as an administrator of European competition law strategically" (Schmidt 2000, 38).

In sum, in my opinion, the EU continues the tradition of the material structuring of the market with the help of the European Commission as an explicit governmental agent, whose main role is market-building (supply function). The main difference being that today instead of pursuing classic and liberal mercantilism, the goal is to create a liberal market with increased economic flexibility. Europeans, even now in the new supranational setting of compound democracy, are more comfortable with state-driven market integration than the Americans due to the difference in the origins of their different systems. Hence, the idea of having the state intervene in market-building lingers on and gives the European Union a different twist as a compound entity from the

American (demand function). Indeed, Vogel notes that it is the *early* liberal, democratic nature of America *à la* Hartz and Huntington which leads American businessmen to be against enlarging government authority over the marketplace:

> It is the relatively democratic nature of the American state – embedded in popular ideals and in legal institutions prior to the development of industrial capitalism – that is in large measure responsible for the particular vehemence of the American bourgeoisie's antagonism toward an expansion of government authority (Vogel 1978, 61).

Thus if, as I believe, a combination of institutional and ideational factors play a role, we should be able to see a confirmation of the following hypotheses. First, there should be clear evidence that the European Commission has been a central force in pushing for market centralization and liberalization in the analyzed cases. Second, there should be evidence that greater distrust of the federal government in the United States has favored the retaining of polity authority at the state level. Third, when market centralization and liberalization did take place in the US, it is due to specific, unique historical circumstances, which helped to avoid or overcome the general distrust. Fourth, when market centralization and liberalization did not happen in the EU, it is due not by expressed distrust in the federal-level institutions, but by specific institutional blockage by one or a handful of member countries.

As the following chapters will show, the evidence largely confirms these hypotheses by showing that in all the major cases examined the European Union has adopted rules that open exchange to competition more than the United States and that the European Commission has largely been the driving force behind it. While business was generally and in the arena of services liberalization cautiously supportive of further market integration, it usually only followed the Commission's lead or provided input when asked. In one case at least, public procurement, the Commission even clearly

established and fostered its own supportive environment among business leaders by providing space and resources for them to get together as the European Roundtable. Moreover, polls and my own interviews with business leaders and national organizations clearly demonstrate a much larger distrust of federal government intervention in the market in the United States than in the EU. Even in the case of liberalization of services in Europe, where the Commission encountered vocal resistance to its project by trade unions and notably the governments of Germany and France, the end result is a much more liberalized Europe than America for the provision of temporary services. And while the original legal act was amended, Commission personal in charge of implementing it have been clearly pointing out in interviews that the changes were largely cosmetic and have not influenced them on how to strictly enforce it based on their conceptualization of the original draft. Last but not least, what is striking in the United States it the absence of an actor that takes the entire market of the US polity into account and attempts to estimate the costs of the remaining obstacles to trade. Multiple times throughout the research actors in the United States noted the absence of such an institutional actor willing to undertake such work.

Methodology and Case Selection

Methodologically this study will focus on within-case and cross-case comparisons over time, analysis and process tracing to weigh the explanatory power of the competing arguments. To answer therefore the question why the EU and the US have pursued different trajectories in the adoption of a single set of coherent rules (centralization) and rules that open exchange to competition (liberalization), we would ideally look at the largest possible variety of policy sectors across the two polities.

One important caveat, however, is that this study does not concern itself with the implementation of rules and regulations on the ground, but focuses mainly on market centralization and liberalization provided by the legislative framework. The European Commission itself notes that the potential of the Single Market has not been fully exploited and that some instruments are not fully operational, e.g. "it is estimated that around 25% of enterprises that rely on this principle [mutual recognition] when selling gods [sic] have problems" (Dierx and Ilzkovitz 2008, 4). Thus, it is possible and even very likely that situations exists where the EU has put rules and regulations into place, which in the long run when completely implemented lead to a more liberalized sector, but which given the delay in implementation is presently in practice still at the same level as the US or occasionally behind it in its degree of market liberalization. However, from a theoretical perspective, it is the existence as well as the authority to make such rules and regulations which are interesting.

A comparative look across the two entities becomes necessary, first and foremost, because of the logic of the major arguments. While one answer to centralization and liberalization is that centralization and liberalization depends on the characteristics of a specific sector, i.e., that a certain sector might be more conducive to be centralized and liberalized, this argument is in direct debate with the ideational and polity-based arguments. These latter arguments, as argued above, contend that it is not so much the characteristics of the specific sector but rather the polity itself or the pre-dominant ideas in the polity which influence the policy outcome. Thus, we cannot get at a basic pattern without looking at cases across sectors and polity. Moreover, there might be more variations between entities than sectors. Hence, if we only look at variations within one

polity we might potentially overlook bigger differences between entities. In short, the comparative method across polities here allows exploring the possibility that similar economic pressures lead to different outcomes. Also more leverage can be gained potentially by verifying a wider pattern.

An integrated market in the abstract has free movement of capital, goods, services and people, which are commonly called in EU-lingo the four freedoms. Centralization of authority in market-building usually reflects the idea that units below the federal level cannot contravene these liberties. Indeed, federalization of authority and liberalization are entangled in many ways. Thus, again the focus of this dissertation is on the adoption of single coherent set of rules for exchange for the entire polity as well as the adoption of rules that facilitate exchange to competition.

Ideally cases should be chosen with a variation on the dependent as well as the independent variable. However, while it is usually easy to see the variations in the dependent variable in looking at the different outcomes, it is difficult to know what all the variations are regarding the independent variable before actually exploring them on the ground. In addition, even if we did know what a good number of independent variables were, we couldn't do enough cases to carefully compare and test variation across many of them. Thus, I will focus on a small number of cases in trying to establish the causal mechanism for the different outcomes. In short, this project's primary methodological focus will be on a small-n case study across cases but within-case causal inference within a two-case comparative framework. As Brady and Collier have noted previously "it is productive to think of these cross-case comparisons as helping to frame the analytic problem and to suggest causal ideas that are also explored and evaluated through within-

case analysis" (Brady and Collier 2004, 100). In brief, a small-n methods focus is useful where few data exists, theories are relatively unclear or underspecified or for the development of new theories (Brady and Collier 2004; Van Evera 1997). Moreover, as has been pointed out elsewhere, the comparative method "is not about the description of sameness, but about variance among similar variables that operate within each system" and provides "an essential step in formulating, testing, or revising theoretical propositions (Menon and Schain 2006, 3).

Yet, the range of potential internal market policies we could look at is, of course, very large and requires substantial narrowing. Thus, given the obvious time and money constraints, but the necessity to look comparatively at both compound polities, it makes sense at a first step look at some of the core economic areas of the respective internal markets, where the similarities between the US and the EU are usually considered as "the most striking" (Donahue and Pollack 2001, 108-9).

The three policy sectors, public procurement, services and goods, examined in this study have therefore been chosen based on their overall economic importance and because they cover the vast majority of either polity's internal market. Public procurement is commonly estimated as representing between 15 and 20 percent of GDP in the United States and the European Union (Manheim 1990; WTO 2009). For instance in the EU, the European Commission calculated that in 2002 total public procurement, i.e. the purchases of goodes, services and public works by governemnts and public utilities, within its internal market represented €1500 billion or about 16% of the EU's GDP (Commission 2006). And in the United States, already in the late 1980s, "the market activities of state and local governments assume[d] an ever increasing share of

[the US] economy – now estimated as high as fifteen to twenty percent of the gross national product, as state and local investments grow to nearly a half-trillion dollars" (Manheim 1990, 589). Services, the largest economic sector by far in both polities, are generally estimated to represent over 70% of the American and European GDPs (CIA 2010; cf. Gekiere 2006). And the freedom to trade goods by especially eliminating any remaining non-tariff technical obstacles to trade is regarded as "the paradigm case for […] an economic system based on free trade and fair competition" (Dashwood 1983, 183; cf. Mastromarco 1990; Pelkmans 1987).

To better illustrate, however, the dynamics within some of these vast policy sectors, notably services and goods, I explore the examplary cases of hairdressers in the arena of services and elevators in the arena of goods. Both are, as will be described in more detail in the respective chapters, indicative of larger regulatory phenomena in these larger policy sectors.

To differentiate between the hypotheses derived from the various theoretical approaches laid out in the previous section, this project has attempted to develop the historical record from multiple sources, including interviews with relevant actors on the two sides of the Atlantic, official transcripts of public hearings and legal documents as well as private and public reports, and secondary scholarship. Large parts of the research presented here are based on a series of in-person and phone interviews and email responses to questionnaires between Fall 2009 and Winter 2011. A research trip to Brussels and Paris in September 2009 led to in-person interviews with most surviving members of Lord Cockfield's cabinet in charge of the internal market dossier in the early 1980s as well as other present and former members of the European Commission,

including members of the Directorate General for Enterprise and Industry and the Directorate General Internal Market. Other interviewees were, among many others, representatives of the European Parliament, U.S. and EU business and governmental organizations or agencies, such as the U.S. Business Roundtable; the US National Association of State Procurement Officers, the U.S. Chamber of Commerce, the US National Association of Manufacturers, the US National Taxpayers Union, US governmental licensing agencies, ThyssenKrupp Access, Kone International, the US National Elevator Industry, the National Association of Barber Boards of America, the American Professional Beauty Association, and the National-Interstate Council of State Boards of Cosmetology. All in all over sixty interviews were carried out to supplement information found in primary and secondary literature to help gauging the validity of the different explanatory frameworks regarding market centralization and liberalization.

Conclusion

As this chapter has emphasized throughout, for most of their respective history the literatures of American state-building and European market integration were, with rare exceptions, closed disciplines unto themselves. Thus, as Parsons has remarked earlier, "[s]cholars with deep expertise on both sides of the Atlantic are few and far between" (Parsons 2003b, 1). While most Europeanists concentrated their research efforts on comparing the EU to its classic field of comparison, other international organizations, Americanists, when doing comparative work at all, focused their attention on other nation-states. Both group of scholars just ended up declaring their *objet d'étude* as exceptional. In recent years, though, scholars have started to challenge the long-held notion that the United States and the European Union are *sui generis.* Yet no study seems

to have been done so far to actually compare systematically several policy areas across both polities to see not only whether the EU might have already gone beyond the US in centralizing and liberalizing specific policy arenas, but also to see whether the existing explanations of market-building need revision when applied to both polities. Indeed, one does not necessarily have to accept that the EU and the US are comparable political entities to acknowledge that at the very least the logic of the arguments that have been made concerning market building in one polity should be applicable to the other.

As has been foreshadowed in this chapter, the standard explanations to market-building – structuralist-materialist / rationalist-functionalist, institution and ideational / cultural – however, are falling short of the empirical evidence. Hence, I offer a more nuanced explanation of why in the examined major policy arenas of public procurement, services and goods, the European Union has in many important aspects succeeded in adopting a single set of coherent rules for exchange (centralization) and rules that open exchange to competition (liberalization) and the United States has not. My explanation is based on a combination of ideational and institutional elements. I contend that in all cases the presence or absence of a major institutional actor at the federal-level perceiving the polity's market in its entirety and being endowed with a liberalization mandate has been critical in the different outcomes (supply function). The European Commission fulfills this role when it comes to market-building within the EU. In the US, on the other hand, no parallel explicit government agent exists, whose main role is to ensure the removal of obstacles to internal trade. Furthermore, ideationally the European Union and the United States differ when it comes to the acceptance of a federal government agent to intervene in the market (demand function). Based on the long-standing tradition in Europe of

having the state intervene in market-building, Europeans tend to be accepting or at the very least resigned to the basic notion of federal governance of market integration. The main difference to Europe's past is that instead of pursuing classic and liberal mercantilism, the goal of the government agent today is to create a liberal market with increased economic flexibility.

The rest of the study will proceed by looking at each of the three major economic sectors separately, starting with public procurement. In each instance, by comparing and contrasting the regulatory regimes in the US and the EU, I will first strengthen the descriptive claim that the European Union has liberalized and centralized each sector more in a free market way than the US, which appears to have accommodated itself to certain decentralized, fairly protectionist rules. After firmly establishing the descriptive claim, I will proceed to demonstrate, by carefully tracing each case, how the existing approaches to market-building are insufficient in themselves to explain the cross-polity pattern and how it can better be explained by a combined institutional-ideational approach.

CHAPTER III

PUBLIC PROCUREMENT IN THE EU AND THE US:

ORIGINS AND FRAMEWORK

"There exists no starker form of discrimination against out-of-state commerce than when a state buys goods or services only from in-state suppliers."
Dan T. Coenen, Harmon W. Caldwell Chair in Constitutional Law, University of Georgia, in *Untangling the Market-Participant Exemption*, 1989, p. 443

"Public procurement covers a sizeable part of GDP and is still marked by the tendency of the authorities concerned to keep their purchases and contracts within their own country. This continued partitioning of individual national markets is one of the most evident barriers to the achievement of a real internal market."
European Commission in the *White Paper for the Completion of the Internal Market,* (COM) 85 310 fin, 1985, p. 23

As these chapter's introductory quotes indicate, an awareness exists on both sides of the Atlantic that public procurement not only represents an important part of the economy but that restricting public purchases to one's own companies represents severe discrimination against one's fellow member or sister states and poses a serious non-tariff barrier. This, however, as this chapter will try to demonstrate, is as far as the mutual awareness goes. While public procurement, i.e. the purchase of any goods and services by public authorities at all levels of government with taxpayer money, accounts for an equally large part of the two polities' internal markets by making up between fifteen and twenty of each polity's GDP, the European Union and the United States of America are very different in their respective internal regulations of the public procurement sector (Commission 2006; Mannheim1990; WTO 2010). This chapter will show that in terms of regulations for public procurement, which covers purchases as diverse as construction jobs, snowmobiles, coal, mulch, agricultural goods, recycled paper and printing services,

the European Union, has gone further than the United in adopting rules more like a single market, both with respect to the centralization of the market (having a single set of coherent rules for exchange) and its liberalization (adopting rules that open exchange to competition). While in the US anti-competitive discrimination among sister states in the public procurement sector is officially sanctioned and widely practiced, the European Union bars anti-competitive discrimination among its units.

Similar to the EU and US market-building literature in general, as discussed in Chapter II, most of the scholarship on public procurement has been written separately about one case or the other. The public procurement literature has focused exclusively on either describing the EU public procurement regime or trying to grapple with the market participant exemption doctrine developed by the US Supreme Court, which forms the basis for continued discrimination among American sister states. This is partially the result of public procurement being "a specialist subject" (Bovis 2005, xix). Few attempts have been made to conduct systematic comparisons of the American and the European public procurement regimes and to highlight what the results of such a comparison might mean for our understanding of market-building in compound democracies. When attempts have been made (cf. Verdeaux 2003), the focus has mostly been on explaining the European regime to an American audience, the international, WTO dimension of public procurement and on purchasing by American *federal* agencies. This limited focus, however, overlooks the fundamental difference of how the US and the EU have structured their public procurement sector within their respective markets and how their approaches vary. This and the ensuing chapter attempt to fill in these lacunae and contend that the land of the federally regulated and centralized public procurement, aka the

European Union, is more indicative of a liberalized, complete internal market than the United States where federal preemption and a serious attempt to eliminate cross-state discrimination in the public procurement sector to this day is absent. There is presently no sign in the US of any serious movement to change it and state-level discriminatory laws are actually proliferating. As we will see in the next chapter, the best explanation for the difference is the role of the Commission as a federal-level entity specifically charged with creating a common market and a different attitude towards federal-level entities in this policy arena.

This chapter is divided into two main sections. The first will describe the legal public procurement framework in the United States, especially the origin and intellectual justifications for the market participant exemption, which undergirds the American regime. The second part focuses on the regulatory framework for public procurement in the European Union and its development over time. Part of the chapter's focus will be to foreshadow how the justifications made in the American context for protectionist procurement could have easily been made by actors in the European Union, but which either haven't been made or haven't been successful in retaining sovereign rights over public procurement completely at the member state level, highlighting the fact that the EU ends up conceptually with a much more liberal procurement regime.[24]

[24] This is not to say that there are no limits whatsoever on the sovereignty of American sister states regarding public procurement in the absence of preemption. However, the sovereignty is quite substantive and qualitatively different from the EU member states. In the US, as we will see below, the US states retain extensive control and wide latitude as proprietor of one's own public domain to discriminate against sister states when buying or selling products or services. The limits so far established by the U.S. Supreme Court concern cases where the state acts beyond its role as market participant and its actions have a downstream, regulatory effect and where other constitutional provisions besides the Commerce Clause, such as the Privileges and Immunities Clause, might potentially make an ordinance or statute invalid. Last but not least, the U.S. Supreme Court has hinted at a natural resource exception to the market participant exemption to the dormant commerce clause. In *Reeves v. William Stake*, 447 U.S. 429 (1980) the majority noted that "[c]ement is not a natural resource, like coal, timber, wild game, or minerals. Cf. *Hughes v.*

American Public Procurement Regime

Notwithstanding efforts and aspirations to the contrary, interstate trade barriers have been common throughout American history. To overcome the previous lack of authority to remove barriers, the drafters of the US Constitution specifically incorporated five provisions designed to promote free trade. These provisions included the authority for Congress to regulate commerce with foreign nations, the Indian tribes, among sister states (Art. I §8), the interdiction to levy export duties and to give preference to the ports of one state over the ports of any other state (Art. 1 §9), the interdiction for states to levy an import or export duty without the consent of Congress which may revise or abolish the duty (Art. I §10) and the proscription for any state to deny any of its privileges and immunities to citizens of sister states (Art. 4 §2).

Moreover, the Constitution granted, as part of a list of delegated powers, Congress the authority '[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof' (Art. 1 §8). The general assumption, however, was that all other powers not specifically forbidden

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Oklahoma, 441 U. S. 322 (1979) (minnows); *Philadelphia v. New Jersey, supra*, (landfill sites); *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923) (natural gas); *West v. Kansas Natural Gas Co.,* 221 U. S. 229 (1911) (same); Note, 32 Rutgers L.Rev. 741 (1979). It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement". Thus, commentators have pointed out that it is different to keep resources, such as oil, fortuitously located within one's borders from keeping for state residents benefits actively produced and gained through their own endeavors and that "[a] natural resources exception also is defensible because state hoarding of natural resources is distinctively disruptive of the goal of national unification" (cf. Coenen 1989, 456).

would be reserved to the states, which was made explicit with the Tenth Amendment.[25] In short, the states were left with broad regulatory authority.

Thus, non-tariff barriers have continued to exist for a long time.[26] McCurdy notes that US "state legislatures also spun an effective web of barriers to internal commerce" and that "[s]tate and local officials prescribed marketing practices, enacted discriminatory schemes of mercantile licensing and taxation, proscribed the entry of unfavored articles of commerce, and devised inspection laws to improve the competitive position of their citizens relative to producers in other states" (McCurdy 1978, 634-35). These non-tariff barriers are generally the results of the states utilising their otherwise legitimate license, police, proprietary and tax powers (cf. Zimmerman 2003). But impediments as a result from regulatory authority and the powers of the states in general can be overcome in theory and practice.

In total, there are four possibilities to remove interstate trade barriers in the US: reciprocity, congressional preemption, judicial decisions and interstate compacts (Zimmerman 2003). Reciprocity agreements are purely interstate arrangements. They have been quite common, but have not eliminated all non-tariff trade barriers. Interstate compacts, according to the U.S. Constitution generally need the consent of Congress. To this day, interstate compacts 'have not been utilized' to remove interstate trade barriers, focusing instead on the settling of boundary disputes (Zimmerman 2002: 54–55). Besides, short of involving every single state, interstate compacts as well as reciprocity

[25] U.S. Constitution, Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[26] Only in 2005 for instance, did the US Supreme Court struck down states laws which allowed in-state wineries to ship directly to consumers but not wineries from out of the state. (cf. Stout 2005; Wiseman and Ellig 2007).

agreements would rather lead to an America à la carte or a multi-speed America, to use phraseology from the European context.

A 'preemption revolution', however, has taken place in the last several decades (Zimmerman 2005, xi). Congressional preemption refers to the right of Congress, based on the necessary and proper clause, the supremacy of the laws clause and, above all in regards to internal market-building, the interstate commerce clause, 'to enact statues invalidating regulatory statutes and regulations of subnational governments' and 'to employ its constitutional powers to remove completely or partially concurrent and reserved regulatory powers of the states' (Zimmerman 2005, 1). The U.S. Supreme Court generally distinguishes between two types of federal preemption of state action. First it recognizes preemption "where an "act of Congress fairly interpreted is in actual conflict with the law of the state" and second "where the state action does not actually conflict with federal statute, but Congress has decided to "occupy the field"" by passing a preemption statute (Locke 1994, 5). While only 29 nine preemption statues were enacted by 1900, by 2004 a total of 522 preemption statues had been passed (Zimmerman 2005, 1 and 5). The enactment of preemption statues accelerated in the 2nd half of the 20th century. While only sixteen preemption statues were enacted in the 1940s and twenty-four in the 1950s, the second half of the 1960s alone saw the passing of 36 preemption statues. The next three decades then witnessed a large increase of preemptions with respectively 102, 93 and 83 statues being enacted. In the period from 2000 to 2004 another 41 preemption statues received Congressional approval. According to Zimmerman, "the bulk of these statutes involve commerce, finance, and health", but with banking having emerged as an important area and civil rights and environmental

protection having played a role in the late 1960s (Zimmerman 2005, 205). Indeed, different acts by the US Congress, such as the *Airline Deregulation Act of 1978* and the *Gramm-Leach-Bliley Financial Modernization Act* of 1999, reversing the *McCarran-Ferguson Act* of 1945, which reversed a previous Supreme Court decision, indeed have shown that on occasion Congress does pre-empt, i.e. occupies the field, in regards to the functioning of the internal market. Zimmerman contends that the increase in preemptions is due to '[t]he greatly increased mobility of citizens and business firms, and inventions and technological developments spurred enactment of congressional statues that remove regulatory powers from states' (Zimmerman 2005, 127). Yet, while there has been in Zimmerman's words a pre-emption revolution taking place over the last couple of decades, this revolution has apparently not reached the public procurement sector. Indeed, while these many steps in pre-emption might lead us to expect that we would see something similar in public procurement, this is not the case. Not only do the American sister states continue to discriminate when it comes to public purchasing and selling., but barriers have actually increased in recent years.

Already in 1940, Melder pointed out that forty-seven of the forty-eight states had at least one statute on the books giving preferential treatment to in-state products or companies (Melder 1940, 58). This practice is largely continued today, where the vast majority of sister states has tie-bid preferences as well as more specific preferences, such as up to 15 per cent limited preferences over the lowest out-of-state bidders and general exclusionary preferences for mulch and compost made in the state (Georgia), coal for heating state buildings (Pennsylvania), and all print jobs (Oregon) (Oregon State Procurement Office 2009; North Carolina Department of Administration 2006;

Zimmerman 2003, 6).[27] In short, it is not unusual in the United States to find statues, such as Wyoming's statute W.S. 16-6-105, which requires all state agencies and political subdivisions to grant preference of up to 5% "in all purchases for […] supplies, materials, agricultural products, equipment, machinery and provisions produced, manufactured or grown in this state" or supplied by a Wyoming resident capable of serving the same.[28] Indeed, Wyoming Secretary of the State's website proclaims in its posted rules that the "in-state preference applicable to the procurement of materials, supplies, equipment, services, or the erection, construction, alteration, or repair of any public building, or for making any addition thereto, or for any public work or improvement *assures that Wyoming resident bidders are afforded an advantage* over out-of-state bidders; thus *retaining as much of the taxpayer's money within the Wyoming economy* as possible"

[27] As of 2009, 47 sister states have some form of in-state preferences and conditions on the books. The only exceptions are New Hampshire, Oklahoma and Rhode Island. Oklahoma, however, has with 34 other sister states a reciprocal law on the books, which allows for the application of similar preferences in public procurement to businesses of those states which have preferences legally mandated. In addition, 34 sister states have tie-bid preference statues for in-state providers in case that two bids, one from an out-of-state and one from an in-state, turn out to be the same. The State of Oregon's Procurement Office maintains a detailed list of state by state procurement preference data. It is available at: http://www.oregon.gov/DAS/SSD/SPO/reciprocal_detail.shtml

[28] Full text of W.S. 16-6-105:

Preference for Wyoming materials and Wyoming agricultural products required in public purchases; exception; cost differential; definition.

(a) Every board, commission or other governing body of any state institution, and every person acting as purchasing agent for the board, commission or other governing body of any state institution or department, and every county, municipality, school district and community college district, shall prefer in all purchases for supplies, material, agricultural products, equipment, machinery and provisions to be used in the maintenance and upkeep of their respective institutions, supplies, materials, agricultural products, equipment, machinery and provisions produced, manufactured or grown in this state, and supplies, materials, agricultural products, equipment, machinery and provisions supplied by a resident of the state, competent and capable to provide service for the supplies, materials, agricultural products, equipment, machinery and provisions within the state of Wyoming. Preference shall not be granted for articles of inferior quality to those offered by competitors outside of the state, but a differential of not to exceed five percent (5%) may be allowed in cost of contracts less than five million dollars ($5,000,000.00) for the Wyoming materials, supplies, agricultural products, equipment, machinery and provisions of quality equal to those of any other state or country.

b) As used in this section, "agricultural products" means any horticultural, viticultural, vegetable product, livestock, livestock product, bees or honey, poultry or poultry product, sheep or wool product, timber or timber product.

(Wyoming Department of Administration & Information, Document 1678; my emphasis).

Continued discrimination against out of state commerce in the US today is mainly based on the state's proprietary power and especially on the development of the market-participant doctrine exempting states to the dormant commerce clause, discussed below. Moreover, while the privileges and immunities clause together with the full faith and credit clause, obligating states to recognise each other's 'public acts, records, and judicial proceedings" (Art. 4 § 1), are generally conceived to "promote interstate citizenship by forbidding a state legislature to favor its citizens over visiting U.S. citizens from other states in terms of privileges and immunities" (Zimmerman 2002, 26), Chief Justice Fred M. Vinson of the US Supreme Court already opined in 1948:

> [T]he privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other states where there is no substantial reason for discrimination beyond the mere fact that they are citizens of other states. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it (Toomer v. Witsell, 344 U.S. 385 at 396 (1948)).

In addition the U.S. Supreme Court has also held that the privileges and immunities clause does not apply to associations or corporations (Hemphill v. Orloff, 277 U.S. 537 (1928); Bank of Augusta v. Earle, 38 U.S. 519 (1839)). Thus, "states are free to discriminate in terms of privileges and immunities against a foreign corporation (chartered by a sister state)" and might completely forbid the corporation "to conduct business in the state" (Zimmerman 2002, 27). Indeed, the U.S. Supreme Court has repeatedly validated the right of states to discriminate when acting in their roles of proprietor of their respective public domains or as employer (Zimmerman 2003, 5).

Market Participant Exemption

The right to discriminate against sister states as proprietor of one's own public domain is in the present day anchored in the market participant doctrine. This legal doctrine established by the U.S. Supreme Court exempts states from the dormant commerce clause as long as states act as participants in the market instead of as market regulators. Thus, over the last decades, "the Court has shielded from commerce clause attack blatant favouritism of local interests when a state or municipality buys printing services, sells cement, purchases goods, or hires workers" (Coenen 1989, 398).

As alluded to above, the commerce clause not only grants Congress the right to regulate interstate and foreign commerce, but was "one of the principal reasons for calling the constitutional convention" (Manheim 1990, 563). The framers intended, by centralization power of commerce, "to curb "Balkanization" of the economy and avoid "interstate economic rivalries of the sort that had undermined the Articles of Confederation"" (Manheim 1990, 563). Thus, according to Manheim, "[t]he commerce clause is now the Congress' most prolific source of authority, enabling regulation in such diverse areas as civil rights and gun control, as well as trade and commerce" (Manheim 1990, 563). While in the early years of the Republic, the Court "debated whether the clause granted exclusive or merely concurrent power to Congress", it is now generally accepted "that a state may validly regulate its internal affairs, whether of trading or policy, without impeding Congress' power over commerce" as long the effects of laws are truly local (Manheim 1990, 563–64). Then federal power would only trump when Congress actually decides to legislate in the same field. However, it is important to realize that the U.S. Supreme Court has recognized that "even when Congress has not

acted, the "negative implications" of the commerce clause can displace state regulation" (Manheim 1990, 564). Thus, the "clause in its dormant state (i.e., unused by Congress)" preempts "state economic and commercial regulations which "erect barriers against interstate trade"" (Manheim 1990, 564). This restriction on state power, commonly called the dormant commerce clause,[29] derives from the basic purpose of the commerce clause itself: "the creation of a "federal free trade unit" to foster "material success" and the "the peace and safety of the Union"" (Coenen 1989, 399). In short, pre-emption doesn't happen because Congress has passed a legislative act expressing its preference for national interests over local concerns, "but because state regulation in the instance impedes the fundamental right of free trade" (Manheim 1990, 564). Accordingly the U.S. Supreme Court considers state laws "that effect [sic] "simple economic protectionism"" as "subject to a virtually per se rule of invalidity"" and also condemns state regulations "that impose "an undue burden on interstate commerce"" (Coenen 1989, 399). These limits on state power were, however, first and foremost applied in cases "involving government regulation and taxation of private market activity" (Coenen 1989, 400). Hence, as the case law expanded under the dormant commerce doctrine, the U.S. Supreme Court has constructed a major exception to the clause with respect to state choices of their own trading partners in its roles as buyer or seller of products and services. This exception became known as the market participant exemption.

[29] The term "dormant" was first employed in relation to the commerce clause when Justice Marshall wrote in *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) that "We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant State, or as being in conflict with any law passed on the subject. There is no error, and the judgment is affirmed." The Court in short upheld in this case a Delaware state law on the grounds that it didn't infringe on the dormant commerce clause.

In 1976 the U.S. Supreme Court officially introduced the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The State of Maryland created a recycling program for abandoned cars, paying subsidies to automobile wreckers and scrap processors for destroying junked cars with a Maryland license plate. At the start of the program, subsidies were paid equally to in-state as well as out-of-state scrap processors. Later on, however, the Maryland legislature imposed more rigorous documentation requirements on sister state processors, leading to a decline of junked cars being processed by out-of-state companies and a lawsuit by a Virginia-based corporation.

The U.S. Supreme Court decided six to three in favor of Harry R. Hughes, Maryland's Secretary of Transportation, overturning a lower court's decision, which previously found the Maryland law invalid on grounds that it represented "substantial burdens upon the free flow of interstate commerce." Justice Powell on behalf of the Supreme Court's majority argued that this case represents an absolute novelty noting that "until today, the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State". Based on the fact that "Maryland has not sought to prohibit the interstate flow of hulks or to regulate the conditions under which the flow may occur, but, rather, has entered into the market itself by offering bounties to bid up the price of hulks", the Court held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others".

Consequently, *Hughes v. Alexandria Scrap Corp* formally established the doctrine that discriminatory actions by the state are exempt from the commerce clause and its negative implications as long as the state acts in the market in the role of a private trader. Only when the state acts in its distinctive governmental capacity, i.e. as regulator and imposer of taxes, is it subject to the commerce clause negative preemption. While the market participant doctrine wasn't established until 1976, it does have some antecedents (cf. Manheim 1990, 577). Four years earlier already, a three-judge District Court upheld in *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (MD Fla. 1972) a Florida statute compelling state agencies to acquire needed printing services from in-state shops. The U.S. District Court contended that "state proprietary functions" are exempt from Commerce Clause scrutiny. This was then subsequently summarily affirmed without opinion by the U.S. Supreme Court (409 U.S. 904 (1972)). According to Manheim, the earliest advocate for a market participant doctrine may actually have been Chief Justice Waite 80 years earlier in *Guy v. Baltimore* 100 U.S. 434 (1879). While the majority of the Supreme Court opined that wharfage fees cannot be charged to vessels of sister states when such fees are not charged to local vessels of one's own state, Chief Justice Waite argued that "discriminatory uploading charges on out-of-state goods were not invalided because the wharfs were owned by the city" (Manheim 1990, 577).

The market participant doctrine was reinforced in *Reeves v. William Stake*, 447 U.S. 429 (1980) when in a 5-to-4 decision the U.S. Supreme Court reaffirmed its holding in *Hughes v. Alexandria Scrap Corporation*. For a period of over fifty years, the State of South Dakota has operated a cement plant selling its cement to both in-state as well as out-of-state buyers. Following a cement shortage in 1978, the State Cement Commission

changed policy restricting sales only to in-state residents. As a result, a concrete distributor from Wyoming, Reeves, Inc., which acquired over 90 percent of its cement from the state-run plant, filed suit. The U.S. Supreme Court held that South Dakota's resident-preference program for the sale of cement does not violate the Commerce Clause. Indeed, according to the majority of the Court, “South Dakota, as a seller of cement, unquestionably fits the "market participant" label more comfortably than a State acting to subsidize local scrap processors”. In the majority opinion, Justice Blackmum further reasoned that “[t]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace, and there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market”. The Court therefore acknowledges the “State's role as guardian and trustee for its people, and the recognized right of a trader to exercise discretion as to the parties with whom he will deal”. Moreover, “[t]o invalidate the program would discourage similar state projects and rob South Dakota of the intended benefit of its foresight, risk, and industry”. Consequently the Court emphasized the significance of a “healthy regard for federalism and good government” and the adverse effects a converse decision would have on state “experimentation in things social and economic”. Thus, a state acting in the market, like a business or customer, rather than as a market regulator, can discriminate when purchasing *or* selling products as owner of its own proprietary domain.

Three years later a seven-judge majority once again applied the market participant rule in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). This time the case involved an executive order by the major of Boston, which compelled

all construction projects funded with city funds to be carried out by a workforce composed of at least 50 percent bona fide residents of the city. Then-Justice Rehnquist (re)asserted for the majority that "[w]hen a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause" and therefore "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant, and entitled to be treated as such under the rule of *Alexandria Scrap Corp".*

Two other cases, *South-Central Timber v. Wunnicke*, 467 U.S. 82 (1984) and ***New Energy Company of Indiana v.*** *Limbach* , 486 U.S. 269 (1988), refine the application of the market-participant doctrine. In both cases the Supreme Court declined to apply the rule. In the case of *South-Central Timber,* the Alaska Department of Natural Resources announced a requirement that before certain timber sold from state lands can be shipped outside the state, it has to be processed within the state first. South-Central Timber Development, Inc., an Alaska corporation purchasing timber and almost exclusively shipping it to Japan, filed suit. The U.S. Supreme Court in a four-Justice plurality considered the Alaskan requirement as invalid. Justice White noted that here "the State is more than merely a seller of timber" given that "]i]n the commercial context, the seller usually has no say over, and no interest in, how the product is to be used". Thus, the State of Alaska is in this case acting as a regulator in imposing "conditions downstream in the timber processing market". Furthermore, the Court observed that in this instance elements were present, which were absent in *Reeves,* "foreign commerce, a natural resource, and restrictions on resale". In sum, the plurality argued that "the [market participant] doctrine is not *carte blanche* to impose any conditions that the State has the

economic power to dictate", but that "[t]he limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further" and that "[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market".

New Energy Company of Indiana involved an Ohio statute awarding a tax credit against the state's motor vehicle fuel sales tax for each gallon of ethanol sold. However, the State of Ohio only provided the tax credit for ethanol produced within the state or produced in a sister state granting similar tax advantages to Ohio-produced ethanol. An Indiana company filed suit due to the fact that its own state did not have a sales tax exemption for ethanol and was therefore ineligible for the credit. While the State of Ohio invoked the market participant rule and argued that its tax credit was functionally indistinguishable from Maryland's state subsidies, the U.S. Supreme Court unanimously disagreed. Justice Scalia expounded for the Court that "[t]he market-participant doctrine has no application here", because "[t]he Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes -- a primeval governmental activity". Thus, the Court concluded that "it [is] clear that Ohio's assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser".

The U.S. Supreme Court has also made clear in a similar case to *White v. Massachusetts* that the market participation exemption does not grant unlimited authority to favor local interests due to the fact that other Constitutional rules or laws might apply. Thus, in *United Building & Construction Trades Council v. Mayor and Council of*

Camden, 465 U.S. 208 (1984), the Court held that "[a]lthough Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents, cf. *White v. Massachusetts Council of Construction Employers, Inc*., 460 U. S. 204, an out-of-state resident's interest in employment by private employers on public works projects in another State is sufficiently fundamental to the promotion of interstate harmony and sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause". In sum, the 8-to-1 majority argued that a city like Camden, New Jersey, can require that at least 40% of the employees of contractors and subcontractors working on city construction projects be city residents based on the market participant doctrine, but that at the same time such an ordinance may be called into account under Article IV of the US Constitution, Privileges & Immunities clause. It doesn't matter that the law equally applies to other citizens of New Jersey, given that "they at least have a chance to remedy at the polls the discrimination against them". Writing for the majority, then-Justice Rehnquist therefore contended that "[t]he Commerce Clause acts as an implied restraint upon state regulatory powers" while "[t]he Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony". The latter is triggered by "discrimination against out-of-state residents on matters of fundamental concern […], not regulation affecting interstate commerce". Consequently the case was remanded to a lower court to decide whether the Privileges and Immunities Clause was violated in this specific case.

Government Procurement Agreement of Marrakech

Besides restrictions from Constitutional provisions and the ever present possibility of preemption via Congressional legislation, one might also wonder how increased global trade and the accompanying world trade rules might have affected the state-federal balance of the public procurement framework in the United States. The short answer is not much at all. The existing regime within the United States is not much affected besides self-imposed restrictions by individual states. Indeed, one shortcoming of Verdeaux's (2003) analysis of the EU and US public procurement regimes and legal developments following the multilateral Government Procurement Agreement of Marrakech, signed by the EU and US April 15, 1994, is effectively the short shrift given to internal arrangements in the United States. While claiming a comparative approach, his focus is mostly on US *federal* government procurement and explaining the EU regime despite his attempt at a comparative approach. Thus, he writes that

> from a U.S. point of view, competing for government contracts in the old continent still raises a number of questions: Is the regulation different from one country to another? Is there any European common government procurement procedure? […] answering these questions first requires understanding the legal framework of the public procurement system in Europe (Verdeaux 2003, 719).

However, as can be deduced from the descriptions above, the U.S. public procurement raises at the very least similar questions. A simple focus on federal level U.S. public procurement substantially overlooks the different rules and regulations put in place at the state levels. It also completely neglects that in the United States, the states, in contrast to the EU public procurement regime, retain the potential to discriminate against out-of-state buyers and sellers. This has largely not changed with the entry into force in

1996 of the Marrakech Agreement. In short, the US regime in the end might require even more explaining than the EU regime.

The Government Procurement Agreement (GPA) was signed separately from the Agreement Establishing the World Trade Organization (WTO). It is one of the so-called "plurilateral" agreements included in Annex 4, which does not bind all WTO members. Earlier efforts to make government procurement part of internationally agreed trade rules led in 1979 to a first Agreement on Government Procurement in 1979. However, this agreement only covered central government entities and procurement of goods. The subsequent discussion to extend the coverage to sub-central government entities and to services, including construction services, led to the present GPA. Currently (2009) forty WTO Members are covered by the WTO Agreement on Government Procurement.[30] Article III of the agreement lays down the two major principle of the GPA: national treatment and non-discrimination.[31] As Verdeaux points out, the national treatment rule is a common principle of world trade rules, "prohibiting any less favorable treatment for foreigners than for nationals", while the non-discrimination goes further by prohibiting "any form of disguised discriminating measure" (Verdeaux 2003, 716).

Most important here is, however, to understand that despite efforts to the contrary, the GPA does *not* automatically apply to all government procurement of the signatory countries. In addition to only including procurement above an individually-decided certain threshold value, the coverage of the GPA is determined with regard to each

[30] Canada; the European Communities, including the 27 member states; Hong Kong, China; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland and the United States.

[31] A third principle mentioned throughout the agreement is transparency.

contracting party in separate annexes, specifying explicitly which central (Annex 1), sub-central (state-level) (Annex 2) and other entities (e.g. municipalities, public utilities) (Annex 3) are committing themselves to the agreement. Thus, while the U.S. Senate ratified the agreement and integrated it into American legislation, the agreement "did not change in substance the principles and rules already present in the Federal Acquisition Regulation (FAR)" (Verdeaux 2003, 716).[32] These rules are only applicable to the U.S. states to the extent that they decided to adhere to the GPA. However, only thirty-seven states have decided to do so and mostly only for executive branch agencies or very specified state departments.[33] With few exceptions, such as the Port Authority of New York and New Jersey as well as the Port of Baltimore and the Tennessee Valley Authority, local government entities, i.e. counties and municipalities, are not part of the coverage in the United States. Furthermore, following the GPA agreement an apparent backlash has taken place against tying a state to federally negotiated trade policy. In subsequent free trade agreements fewer states have committed themselves even partially to rules related to public procurement. While thirty-seven states decided to submit at least some part of public procurement to the GPA, only twenty-one states plus Puerto Rico decided to do so for the 2005 Dominican Republic – Central American Free Trade Agreement and only eight states plus Puerto Rico a year later in the 2006 U.S.-Peru Free Trade Agreement.[34]

[32] However, as Verdeaux points out, it does reduce some preference provisions of Buy American legislations by prohibiting discrimination against other signatories (cf. Verdeaux 2003: 716 – 717).

[33] The thirteen U.S. states not part of the GPA in any shape or form are in alphabetical order: Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Virginia and West Virginia.

[34] U.S. States, which decided to adhere again mostly for their executive branches, to become part of United States – Peru Trade Promotion Agreement are listed in the annex of chapter 9 on public procurement. They

In sum, the GPA has not changed the qualitative framework of the state-federal balance of the public procurement in the United States. States retain largely the right to discriminate against out-of-state buyers and sellers when acting as a participant in the market and not having voluntarily bound certain parts of their public procurement to the GPA. This, as we will see later, is in stark contrast to the coverage of the GPA in the European Union.

Overall, analysts agree in their respective analyses that "the market participant doctrine is anything but uniform" and that the "rule has proven less inflexible than some initially feared" (Coenen 1989, 404; Manheim 1990, 580). There exists also agreement that "there is no consensus on the Court regarding the theoretical basis for market participant immunity" (Manheim 1990, 580). Even in circumstances where "a state looks quite like a buyer or seller choosing trading partners, the Court has left itself room not to treat the state as such" by always retaining the option of "recognizing an "exception" to the "general rule" or by characterizing the state as a "market regulator" notwithstanding its superficial appearance as a "market participant"" (Coenen 1989, 405). This, of course, creates a level of uncertainty for out-of-state and foreign bidders for state-level government contracts in the US. It raises questions, such as: How do the regulations and preferences in Louisiana differ from Rhode Island? Does the state have a tie-bid preference? Has the state bound itself to the GPA? What parts of its public procurement has been bound and at what threshold? Is the Supreme Court going to consider this ordinance or law conform with the market participant doctrine, but maybe not with the Privileges and Immunities Clause?

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include eight states (Arkansas, Colorado, Florida, Illinois, Mississippi, New York, Texas, Utah), plus Puerto Rico.

This being said, the contention is usually made that while no overarching theory of the market participant doctrine exists, the major rationales can be deduced from the existing Supreme Court decisions and the accompanying arguments. As will become clear subsequently, similar arguments should have had a powerful impact in the construction of the public procurement regime in the European Union. Thus, this chapter will now turn its attention to the perceived roots of the market participant exemption.

Justifications for the Market Participant Exemption

This section will pace in detail the different major arguments underlying protectionist procurement in the United States. A good understanding of these rationalizations of the market participant exemption is necessary to be able to highlight comparatively later on that while the same arguments should have been as powerful, if not more so, in the European context, they haven't come up significantly in Europe. Consequently these justifications are, as argued below, also far from self-evident as explanations for the American rules.

The market participant exemption does not derive from a single rationale or justification. As has been pointed out and argued previously by Coenen, "five key justifications underlie the market-participant rule" (Coenen 1989, 419). Manheim, while disagreeing with some of the major rationales, nevertheless identifies similar arguments as having been made in the search for a basis for market participant immunity. This section mostly follows Coenen's rationalizations. Indeed, especially from an European perspective as we will see below, Coenen undertakes an intellectual balancing act by on the one hand admitting that there is "no starker form of discrimination against out-of-state commerce than when a state buys goods or services only from in-state suppliers",

and then to firmly proclaim that "the in-state purchasing preference does, and should, represent the classic form of state action protected by the market-participant rule" (Coenen 1989, 443-44). Thus, why according to American commentators should states be free to discriminate against other sister states?

The first and one of the most common arguments being made is based on the notions of fairness and sowing and reaping. Underlying this argument is the alleged distinction between the regulatory and taxation activities of the state and the state as trader in the marketplace. When acting as regulator, the state "compels private action through the exercise of raw governmental power" and "turns over nothing that belongs to it" (Coenen 1989, 422). This contrasts with the state "controlling and distributing its own resources" when buying or selling goods and services (Coenen 1989, 422). As regards the latter, "the state is not "regulating" commerce any more than is a private trader; it is "contracting"" (Manheim 1990, 583). The state therefore simply acts as administrator of the funds entrusted to it by the state's people. Indeed, states, it is argued, are people who freely banded together and who as one collective activity engage in the accumulation of property. One of the essential features of property, according to this argument, is the right to exclude others. If this right to exclusion exist for individuals, it should also apply to a group of people calling itself state (Coenen 1989, 422). It is therefore "fair and consistent with broadly shared conceptions of property to let state governments favor state residents when selecting the recipients of the state's own largess" (Coenen 1989, 420). Indeed, "[i]f all distinctions of state citizenship are removed, states' raison d'être ceases and the central fabric of our constitutional plan is defeated" (Manheim 1990, 590). States should be able to sow where they reap. This rationale is boosted by the fact that the U.S.

Supreme Court in *Reeves v. William Stake* not only declared that each state has the "role as guardian and trustee for its people", but also that it is appropriate for a state to "channel state benefits to the residents of the State supplying them", even if "[a] cement program, to be sure, may be a somewhat unusual or unorthodox way in which to utilize state funds to improve the quality of residents' lives". Moreover, when deciding whether a specific situation warrants the application of the market participation exemption, the major factor the Court looks at is whether it involves state ownership of the resource in question or not.

One might make a case, however, that many nonresidents, who are doing business in the state, also contribute to a state's income by paying taxes. Yet, Coenen dismisses this summarily by noting that by not residing in the state, nonresidents are also exempt from most state taxation and that the burden of exclusion is reduced by constitutional rules, which oblige a state to grant resident status to those who seek it. Thus, "[a] rule permitting resident preferences is less objectionable when residence itself may readily be obtained" (Coenen 1989, 425). Moreover, while a "person may not enjoy certain trading relationships with a state because she has chosen not to reside there", she might on the other hand benefit from discriminations imposed on nonresidents by her own state (Coenen 1989, 425). Coenen adds that the state also always can decide to allocate the money exclusively to state residents through nonmarket channels and that in the end a line has to be drawn somewhere (Coenen 1989, 425–26).

While the first rationale was based on the notion that it is merely just and fair that a state directs its benefits directly to state residents, the second justification derives from the idea that a role for states as laboratories of experimentation is beneficial for the entire

federal polity. Coenen for that reason observes that "[m]eaningful local governance fosters experimentation and responsiveness to distinctive local conditions, facilitates choice by fostering diversity, and may increase both liberty and participatory democracy by keeping government near at hand" and that additionally "the allowance of substantial local control may promote the healthiest brand of nationalism by fostering pursuit of different traditions in a spirit of shared toleration" (Coenen 1989, 427). In short, judicial interference here would curtail severely state autonomy, the reason being that "state resources are the state's "own" in a way that the state's regulatory powers are not" (Coenen 1989, 427). Meddling with a state's limited resources is considered in a different ballpark than restricting a state's "otherwise limitless power to coerce through government fiat" (Coenen 1989, 427). The market participant doctrine just simply responds to "concerns about state autonomy" (Coenen 1989, 427).[35]

The third major rationale proffered in conjunction with the market participant rule is the argument that the trade distortions effects of this rule are minimal in comparison to regulations or taxation. The reasoning is that "as a participant, a state is subject to the same market forces as a private trader" and the state's ability to therefore "influence private behavior is limited to its market power" (Manheim 1990, 586-87). Thus, it is unlikely that interstate commerce will be burdened "to any appreciable degree", but rather states will create new business as traders in the market (Manheim 1990, 587; cf. Gergen 1988; Tribe 2000). Regan for instance contends that "[t]he very fact that spending

[35] This second rationale reflects the fiscal federalism literature in the United States, which contends that a single, central authority may also use its power for purposes that are inimical to allocative efficiency and that competition among various jurisdictional units is beneficial (cf. Tiebout 1956, Oates 1972). Hence, Weingast for instance argues that a strong federalism helps to preserve free markets and contributes to economic development. He notes that 'thriving markets require not only an appropriately designed economic system, but a secure political foundation that limits the ability of the [central] state to confiscate wealth' (Weingast 1995, 1).

programs involve spending and are therefore relatively expensive as a way of securing local benefit makes them less likely to proliferate than measures like tariffs" and that accordingly they are "less likely to damage the economy seriously in the aggregate, if they damage it at all" (Regan 1986, 1194). Thus, "the built-in "expensiveness" of in-state marketplace preferences may brake the danger to commerce clause concerns that discriminatory state marketplace actions pose" (Coenen 1989, 434). In his concurring opinion in *Hughes v. Alexandria Scrap Corp* Justice Stevens also noted that "the commerce which Maryland has "burdened" is commerce which would not exist if Maryland had not decided" to enter into the market. This statement mirrors largely a Supreme Court decision from a century earlier, when Chief Justice Waite wrote in *McCready v. Virginia, 94 U.S. 391 (1876)* that "productions do not spring from commerce, but commerce to some extent from them". Coenen adds to the overall argument by asserting that while "[t]he creation of a national free market is widely accepted as a major purpose of the commerce clause", "the Framers' central goal in forging the commerce clause was not to maximize economic efficiency", but rather "to engender national solidarity" (Coenen 1989, 431 and 433). Hence, if in-state spending preferences create less damage than regulation or taxation, "then few nonresidents will take umbrage when a state does so; and if few nonresidents take umbrage, then their home states are unlikely to pursue the retaliations and reprisals the dormant commerce clause was meant to neutralize" (Coenen 1989, 434; cf. also Regan 1986, 1194).

The fourth and fifth justifications for the market participant exemption have to do with formal and institutional considerations. Coenen argues regarding the former that when courts interpret a statue they "must pay heed to the text's language and legislative

history even if to do so produces results deemed unfair, unwise or dysfunctional" (Coenen 1989, 436). Thus, when commentators criticize the Court and other analysts for arguing, as in *Reeves v. William Stake,* that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market" by indicating that "there was no indication that they thought about state propriety policy at all", they are approaching the constitutional question from only one direction" (Coenen 1989, 435 and 437–38). In short, it doesn't follow that because they didn't think of it commerce clause limits would automatically be appropriate to discriminatory state proprietary policy. Hence, "[w]hen as here , constitutional language is at best obscure, the absence of a specific design to reach state discrimination in trading its own property cannot be dismissed as irrelevant" (Coenen 1989, 438). As regards the latter, the market participant exemption is an exemption to the dormant commerce clause. Thus, institutionally "Congress remains capable of protecting national interests in this area even if the Court holds back" (Coenen 1989, 438). For nearly a decade, however, it wasn't quite so clear how far Congress actually could go in limiting state sovereignty by invoking the commerce clause. On the same day that the Supreme Court decided *Hughes v. Alexandria Scrap Corp*, the Court also curtailed congressional authority under the commerce clause by arguing in *National League of Cities v. Usery*, 426 U.S. 833 (1976) that the Tenth Amendment trumps the commerce clause. In a 5-4 decision the Court decided that the U.S. Congress does not have the power to amend the Fair Labor Standards Act to force federal minimum wage upon state or municipal employees. Then-justice Rehnquist wrote for the majority that "Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the

conduct of integral governmental functions are to be made". Jointly *Hughes* and *National League of Cities* were dubbed as the inauguration of "the era of the New Federalism" (Tribe 2000, 1088). Yet, the principles voiced in the *National League of Cities* "were never again deployed" to restrict congressional authority over commerce and were in fact voided nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (Tribe 2000, 1088). *Garcia* again involved the application of the Fair Labor Standards Act to local and municipal employees, in this case to the employees of San Antonio's public mass transit system. The Court overruled 5-4 its previous decision. Manheim observes that "[s]carely mentioning the Tenth Amendment by name, the Supreme Court held that there were little if any judicially discoverable and enforceable limits on Congress' ability regulate the states" (Manheim 1990, 560). Locke adds that this decision amounts to a "trend away from judicially imposed restraints on congressional power under the commerce clause" (Locke 1994, 10). Justice Blackmum, indeed, wrote for the majority that "[i]f there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them". This "elsewhere" turns out to be Congress as institution itself. Congress, due to its make-up, is considered "institutionally sensitive to state concerns" and the "guardian of state sovereignty" and therefore state sovereignty can be maintained by the institutional structure created by the Framers instead of judicially limiting it (Manheim 1990: 560-61). Accordingly, the Court's majority comments in their decision that

> Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over

> the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U.S.Const., Art. I, § 2, and Art. II, § 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, § 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V. The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments" (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 at 551 (1985)).

Moreover, *Garcia* also brought into doubt the sovereign/proprietary distinction which props up the *National Cities* and the market participant decisions. The majority in *Garcia* observed that "[t]he problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society" and that "[a]ny rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes". These comments lead Manheim to observe that "[t]he Supreme Court's rejection of the sovereign/proprietary distinction in *Garcia*, in the context of interpreting Tenth Amendment limits on congressional power, strongly suggest that the distinction is not viable for other federalism purposes" and that the "preferred response to new-age federalism is for courts to yield their role as guardian of free trade in favor of congressional vigilance over this national interest" (Manheim 1990, 623). Yet, the market participant exemption is not dead. *In Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of*

Massachusetts/ Rhode Island, Inc., et al., 507 U.S. 218 (1993),[36] the Supreme Court held that "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same. […] In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction". As Locke points out that "[w]hile the Court never explicitly invokes the market participant doctrine, a careful reading of the decision reveals that the logic, as well as the language applied, are mere paraphrases of the logic and language used in *Reeves* and *Alexandria Scrap*" (Locke 1994, 13). Moreover, he concludes that "[e]ven without explicit adoption of the market participant doctrine, this case should stand for the proposition that if a state acts as a market participant, unless specific evidence of congressional intent to prohibit such action exists and is legally cognizable, the state's action will not be preempted" by judicial decision (Locke 1994, 14). Indeed, the Court here has even "tacitly extended the dormant commerce clause doctrine to a situation where Congress has enacted legislation" (Locke 1994, 12–13).

Let's summarize the findings so far. While retaining some interpretative flexibility, the market participant exemption continues to exist, enabling states to discriminate against sister states based on the notion that "when participating in a free market, [states] should be afforded the same rights as private businesses, since they would surely be saddled with the same burdens" (Locke 1994, 10). Thus, the market participant doctrine sets the general tone of public procurement in the United States.

[36] The case concerned the issue whether a prehire agreement on a state owned construction project would be valid as it would be in the private sector or whether the National Labor Relations Act passed by Congress in 1935 would make such an agreement illegal due to federal preemption.

Given that each state can decide for itself whether to bind itself to the GPA, what threshold to apply and what categories of public procurement to include, leaves some uncertainty for prospective out-of-state bidders. This is even more complicated by the fact that each state creates its own specific preferences and the possibility that a municipal ordinance or state law might be exempt from implications derived from the commerce clause but not from the privileges and immunities clause. And, in fact, protectionist measures in public procurement, as the next chapter will show in more detail, are actually spreading across the United States in recent years. Last but not least, it is worthwhile to reiterate once more that Congress has the power to preempt, i.e. to occupy the field of public procurement regulation, but hasn't done so. Following the logic of *Garcia*, one reason might be that Congress is here the 'guarantor of state rights'. Designed with many veto points and representing the local interests Congress might already institutionally not be very likely to intervene and preempt. However, it has done so in other cases.

On the surface the justifications made in the US context for the market participant exemption as well as the institutional obstacles posed by Congressional veto points should travel well to the European Union. Indeed, given the EU's greater heterogeneity, we should expect that, at the very least, similar arguments to ones made in the United States should have been at the center of the European political discourse. Thus, justifications, such as the notions that it is merely just and fair that a state directs its benefits directly to state residents (sowing and reaping argument), that subsidiarity should prevail (laboratories of experimentation & state autonomy argument) and that trade distortion is minimal in comparison to taxation and regulation (minimal impact

argument), should have also surfaced in the European Union and won out. Additionally, since most European states also have larger budgets and own more of the economy, the "market participant" style arguments appear to be more salient in the European context—the states are market participants to a greater extent, so both this notion should be more obvious and the politics around it should be sharper. What is more, the European Union comprises as least as many if not more institutional hurdles. Most decisions have to pass by unanimity or qualified majority voting, which is actually more equivalent to amendment procedures in the United States than simple Congressional majority voting. Thus, the Council of Ministers, representing and protecting the individual state's interests in the EU should have probably blocked any movements towards centralization and liberalization of the public procurement sector. Yet, as we will see shortly this is not the case in the European Union. Thus, what looks like very reasonable arguments and justifications when looking only at the American context raises interesting questions and reveals new insights regarding market–building in compound democracies from a comparative perspective.

Thus, we will now turn our attention to the origins and framework of the public procurement regime in the European Union.

EU Public Procurement Regime

Public procurement is not directly referred to in the founding treaties of the European Union. This absence in the words of Verdeaux is evidence "that the subject was not really identified originally as an element of the construction of the Common Market". Indeed, José M. Fernández Martín talks about public procurement's evolution from "an uncelebrated origin" "to one of the chosen sons of the 1992 Internal Market Project"

(Fernández Martín 1996, 4). And Bovis characterizes public procurement regulation as the "the cinderella of the European integration [sic]", because it was "[o]ften neglected as a discipline of European law and policy" and didn't receive "equal priority to other regulatory regimes by the Member States of the European Union" (Bovis 2005, 1). Yet, despite its arguably Cinderella-style origins, public procurement is now one of the EU's most prominent policy fields and its legal reach contrasts sharply with the legal framework in place in the United States. So how did this transformation from an uncomely maid to a policy princess take place?

Origins of EU Public Procurement Regulations

While there is a general "silence" in the words of Fernández Martín in the treaties creating the European Communities regarding public procurement, some of the basic principles and provisions in the EC Treaty of 1957 had a "major impact on the later development of the public procurement policy and still govern the philosophy of the public procurement regulation in Europe (cf. Fernández Martín 1996, 5; Verdeaux 2003, 720). Generally the development of the EU public procurement regime can be divided into a pre-1984, post-1984 and a New Regime (since 2006) period.

Pre-1984 EU Public Procurement Regime

Commentators widely agree that the Rome Treaty does not contain any explicit provisions on public procurement apart from two relative obscure provisions, Article 183 (4) and Article 296 (1) (b) (EC Consolidated Version).[37] The former article deals with the

[37] Article 183 (4) For investments financed by the Community, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.
Article 296 (1) (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms,

relationship between Member States and the Overseas Countries and Territories. While it stipulates that for Community-financed investments, participation in tenders and supplies shall be open on equal terms to all nationals of Member States, "[a] *general* Community legal regime applicable to public contracts cannot be deduced from it" (Fernández Martín 1996, 5; my emphasis). The second article provides an exemption from the applicability of EC legislation for products bought or sold in the military domain, an exemption, which applies to this day to the EU public procurement regime. Two general explanations are given for the absence of any express reference to public procurement in the Rome Treaty. First, along the intergovernmental line of thought (cf. Moravcsik 1998), some commentators, such as Flamme (1969), have hinted at the fact that member states might have been reluctant to include public procurement specifically in the treaty, because of the strategic importance of public procurement in pursuing social, political and economic objectives at home. Flamme supports this view by citing a letter by the then-Belgian Secretary of State for Economic Affairs, Baron Snoy et d'Oppuers to the *Confédération nationale de la Construction*. In this letter the Belgian Secretary praises the wisdom of the treaty's authors for not including precise language on how to regulate public contracts, because the national parliaments would probably not have accepted it during the treaty's ratification process. [38]

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munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes

[38] "C'est avec sagesse que les auteurs du Traité ont résolu le problème par cette méthode, parce qu'il est à mes yeux certain que l'adoption de règles précises supprimant les discriminations en matière d'adjudication de travaux n'aurait pas été acceptée par les Parlements compétents lors de la ratification du Traité. Les traditions protectionnistes de certains pays de la Communauté sont, en effet, beaucoup trop fortes pour que ceci ait pu être espéré" (Lettre du Baron Snoy et d'Oppuers – a l'époque secrétaire aux Affaires économiques de Belgique et l'un des plus actifs négociateurs du Traité – au président de la Confédération nationale de la Construction, le 24 aoû1960)", as cited in Flamme 1969, 272.

Fernández Martín, on the other hand, argues that this silence can better me explained by the fact that first the EEC Treaty, in contrast to the Euratom and ECSC treaties, has been "conceived as a *Traité-cadre*" only establishing general guiding principles and "an autonomous institutional decision-making structure whose task is to fill in the 'deliberate' regulatory gaps left by the Treaty" and second that the European founding fathers focused primarily on the reduction of tariff barriers to trade (Fernández Martín 1996, 5–6). Thus, Fernándex Martin notes that "[n]on-tariff barriers were not deemed as significant as they later became in the in 1960s and 1970s" (Fernández Martín 1996, 6). This second argument is very much similar to the argument made in the American context where commentators have pointed out that the American founding fathers also focused more on taxation and regulatory policies, such as tariffs, when creating the commerce clause than on proprietary policies.

While there are no direct references to public procurement in the Treaty on establishing the European Community, national public procurement regulations nevertheless were affected by the EEC Treaty. As pointed out by Bovis (1998), Fernández Martín (1996), Verdeaux (2003) and other commentators, several general provisions in the treaty have influenced the development of the public procurement framework from the on-start. Most notably provisions on the free movement of goods and the prohibition to barriers to intra-community trade (Articles 28 et seq.), on the freedom to provide services (Article 49), on the right of establishment (Article 43) , and most significantly on non-discrimination (Article 12). According to Verdeaux it is the last provision which "has driven most of the policy and judicial decisions in public procurement matters" (Verdeaux 2003, 720). Thus, "[a]ll of these provisions have been

motivated by the permanent concern of European regulators to strictly enforce one of the basic fundamental of Europe: the principle of nondiscrimination based on nationality" (Verdeaux 2003, 720). It is, however, the provisions on the free movement of goods, which "[r]ecognized by the European Court of Justice as applying directly to both private and government transactions in Europe, which led, according to Verdeaux, to "the first specific regulatory act of European authorities regarding public procurement" (Verdeaux 2003, 720). Commission Directive 70/32/EEC "require[s] not to make the supply of foreign goods more difficult or onerous than that of national goods when awarding public supply contracts" (Fernández Martín 1996, 7). In the early 1990s, after the public procurement "revolution" as will see below, the European Court of Justice has also on various later occasions applied Article 28 (formerly Article 30) to national measures on public procurement, such as preferential procurement schemes. In *Laboratori Bruneau Srl v Unità sanitaria locale RM/24 di Monterotondo*[39], confirming *Du Pont de Nemours Italiana v Unità sanitaria locale No 2 di Carrara*,[40] the Court wrote that "Article 30 of the Treaty precludes national rules which reserve to undertakings established in particular regions of the national territory a proportion of public supply contracts" and "[t]he possibility that national rules might be regarded as aid within the meaning of Article 92 of the Treaty cannot exempt them from the prohibition set out in Article 30 of the Treaty".

Prior to the Directive 70/32/EEC, the Council issued two General Programmes concerning the abolition of restrictions on freedom to provide services and the abolition

[39] Case C-351/88 Laboratori Bruneau Srl v. Unità Sanitaria Locale RM/24 de Monterotondo [1991] ECR I-3641

[40] Case C-21/88 Du Pont de Nemours Italiana v Unità sanitaria locale No 2 di Carrara [1990] ECR I-889

of restrictions on freedom of establishment based on the general EEC Treaty provisions. Fernández Martín observes that "[w]ith respect to public procurement activities, Member States were required to abolish restrictions progressively on freedom of establishment and freedom to provide services arising from provisions and practices which, in respect of foreign nationals only, excluded, limited or imposed conditions on the power to submit tenders for, or act directly as a party or as a subcontractor in contracts with the State or with any other legal person governed by public law" (Fernández Martín 1996, 8). The General Programmes also "called for a "gradual and balanced" removal of restrictions, accompanied by the 'desirable measures of co-ordination of national awarding procedures" (cf. Fernández Martín 19996, 8). This led, after the submission of proposal by the Commission in 1964, to the adoption of three directives: the liberalization Directive 71/304 and the co-ordination Directives 71/305, concerning the co-ordination of procedures for the award of public works contracts, and 77/62, concerning the co-ordination of procedures for the award of public supply contracts. The latter two directives led the way towards "a positive Community policy" (Fernández Martín 1996, 11). Building a public procurement policy based only on general provisions limited severely the scope of the Community. As Fernández Martín points out, "their negative character, prohibiting discriminatory conduct on the part of the State, prevented their use as instruments to solve the obstacles arising from national legal disparities" (Fernández Martín 1996, 10). Consequently, "[i]n the absence of Community harmonization measure, all provisions and administrative practices which were not of a discriminatory nature were to remain untouched", meaning that "Member States continued to apply their own rules on public contracts, with their different time-limits, procedural requirements,

advertising rules, general conditions to be a candidate and so on" (Fernández Martín 1996, 10). As we will see below, the Commission recognized this dilemma and advocated for a positive approach for public procurement.

Thus, the two co-ordination directives were a first step forward to a full-fledged public procurement regime. The directives had as an objective to increase the transparency of public procurement procedures in the member states to make it easier to compete cross-nationally. The playing field was supposed to be leveled throughout the Community by, while largely respecting national administrative practices, coordinating them as far as possible. The directives distinguish between three procedures based on the degree of competition each of them allowed for. The "open procedure" and the "restricted procedure" allow for competition. They differ in the fact that in the open procedure any business or person can submit a tender, while in the restricted procedure anyone may submit a request for participation by proving that they fulfill the economic, financial and technical requirements delineated by the contracting authority, but then have to wait for the invitation to submit a tender sent out by the contracting author to those who turn out to be qualified. The third procedure is called the "single tendering procedure". Contracts based on the last procedure are generally excluded from the directives and allow a contracting authority to negotiate the terms of contract directly with a supplier. The directives, however, contain a very narrow list of cases in which the single tendering procedure can be applied to. Moreover, the European Court of Justice has strictly interpreted the list in having "never accepted any of the justifications advanced by the defendants" (Fernández Martín 1996, 13). More significantly, however, is that the directives included obligations on behalf of the member states to advertise all contracts

awards, falling under the directives, Europe-wide in the Community's Official Journal and to accept compulsory qualitative selection and award criteria. The qualitative selection criteria relate to the determination of the professional, financial, economic, and technical suitability of a tendering company. Contracting authorities are obliged to base their decisions on admittance of a tender or of invitation of tender in the case of the restricted procedure on these listed criteria. Should the tenderer fulfill the qualitative criteria, then the contracting authority has to base its final choice on the two awarding criteria established in the directives: either the lowest price or the most economically advantageous offer. The latter involving a variety of criteria, including price, running costs, aesthetic and functional characteristics, delivery date, cost-effectiveness, quality, technical merit, after-sales services and technical assistance. Last but not least, the two directives also introduced the concept of threshold for the applicability of the rules. Thus, the directives were only applicable to public supply contracts above 200,000 ECU and public works contracts above 1 million ECU. However, the preamble of the earlier public works directive stated the Commission's intent to lower the threshold in the long run (cf. Fernández Martín 1996, 14).While the two directives represented a step forward for opening up the public procurement market in the Community, they were nevertheless limited in their scope. For instance the two directives did not deal with the enforcement stage of concluded contracts and did not apply to public contracts awarded by public authorities that managed transportation, water or energy services. The public supplies directive also excluded telecommunication services. Moreover, services not directly related to public works were also excluded from the two directives.[41]

[41] Two broad arguments in synch with functionalist-materialist arguments are presented in the literature to explain the early exclusion of utilities in the two co-ordination directives. First, the Commission itself

This relatively limited scope of the first public procurement-related directives in conjunction with the Commission's original focus on tariff barriers might also explain why there has not been much conflict or attention surrounding these early directives. Fernández Martín's research shows that "the Directives were peacefully enacted and that no substantial conflict arose between any of the Institutions, or between the supranational and national levels" (Fernández Martín 1996, 33). The Commission's proposals were readily received by the Parliament and by the Council; the latter only making "minor modifications relating to the use of preferential public procurement" (Fernández Martín 1996, 33. Fernández Martín also highlights the absence of debate in industrial and academic circles and the fact that "no elaborate survey proceeded the adoption of legislation in this area", "[n]o Commission service was devoted, on an exclusive basis, to the subject", the number of persons dealing with public procurement at the Commission was minimal, and "no substantial monitoring activity was noticeable" after the enactment of the directives (Fernández Martín 1996, 33).

In sum, in the early years of the European Union public procurement regulation played more of a side issue in the process of European market-building. Yet, it is

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argued in the preambles of the directives that utilities are subject to different legal statuses in the member states ranging from public, semi-public to private entities. Thus, practical reasons, according to the Commission hindered it to extend the scope of the directives to utilities. If they would have been included at the time, it would have distorted competition, because only public entities would have been covered while private ones would enjoy complete freedom of contract. Thus, the Commission decided to wait until a measure other than legal status could be worked out (cf. Fernández Martín 1996, 15). This happened over a decade later when EC Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunication sectors was passed. Fernández Martín, however, hints at another possible explanation, the reluctance of member states to transfer authority over procurement in the utilities sector to the Community due to the political and economic significance of the sector. He notes that "[w]hen the first Directives were drafted, the issue was not ripe for a political compromise. Due to their economic and strategic importance, these sectors are closely controlled by public authorities which are, moreover, their most important clients" and thus "[t]he reluctance of Member States to limit their economic discretionary powers by subordinating their contracting freedom in those sectors to Community regulation is not therefore surprising" (Fernández Martín 1996, 15).

remarkable in comparison with the US that the EEC was already making progress on procurement in the 1960s and 1970s, focusing on it (even if very narrowly) in the first five years of its existence. It took the US a very long time to focus on procurement and then the trend was towards a justification of trade barriers instead of their elimination. Moreover the side role that public procurement has played in the early decades of the EEC was about to change dramatically when in the mid-1980s, under the Delors Commission, a major push towards a more substantial, positive public procurement regime was undertaken.

Post-1984 EU Public Procurement Regime

The mid-1980s turn out be the pivotal moment in the creation of the EU's public procurement regime. Fernández Martín talks of a "revolution", a change from a large period of "inactivity", where "the Commission's sole significant action in the public contracts area responded more to the necessity of adapting the Community rules to the international obligations contracted under the GATT" than to improve the rules' efficiency, to "sensational vitality" and a moment of transformation of public procurement "from a dormant to a highly dynamic topic" (Fernández Martín 1996, 16). The starting point appears to be the Commission's 1984 communication to the Council assessing the practical results of the Directive on public supplies contracts.[42] This communication was the result of a 1976 Council Decision inviting the Commission to provide such an assessment by 1980. The Economic and Social Committee of the European Community attributed the four year delay not only to "the Commission's tardiness", but also to the member states which didn't even perform the "apparently

[42] EC Commission, *Public Supply Contracts. Conclusions and Perspectives,* COM (84) 717.

rudimentary statistical requirements of Directive 77/62" (ESC (86) 399, 1–2). In this and a second communication two years later[43], the Commission emphasized the importance of developing a more positive, active public procurement regime by highlighting that "the impact of the Directives has been marginal" leading to a total absence of "integration" in the public procurement sector (COM (86) 375, 4). The Commission concluded that the general provisions in the EC Treaty and "the obligation not to take certain action contained [in it] is, as experience has shown, not sufficient to bring about the desired interpenetration of the public procurement market" (COM (84) 717, 4). Not only were the general provisions insufficient according to the Commission, but also the co-ordination directives did not have the desired effect. The Commission analyzed the effectiveness of the existing directives by studying the number of notices published in the Official Journal and then comparing it with the number of contracts awarded to businesses from other member states. While the Commission considered itself content with the steadily increasing number of public notices being published,[44] demonstrating a general willingness by the member states to fulfill their notification obligations, the number of awards actually awarded to companies located in other member states was abysmal. Only around 1% of contracts in 1982 were given by the contracting authorities to companies located in another member state (COM (84) 717). This abysmal figure was confirmed, among others, in a 1987 French study by the *Commissariat au Plan*, which noted that "for public works contracts in the Community the share given to non-national firms was only 3.2 per cent in France, 2.0 per cent in Germany, 1.8 per cent in Britain, 1.5 per cent

[43] EC Commission, *Public Procurement in the Community*, COM (86) 375, followed two years later. While the first communication only focused on the public supplies directive, the Commission argued that the findings applied *mutatis mutandis* to the public works directive (cf. Fernández Martín 1996, 17).

[44] COM (84) 717, 15 and Table I, and COM (86) 375, 4; cf. also Fernández Martín 1996, 18

in Spain" and "insignificant in Italy" (Fernández Martín 1996, 19). Thus, the Commission concluded that the "Directives were inadequate to ensure the achievement of their objectives" (COM (86) 375: 4). The Commission blamed the shortcomings on the limitations of the directives themselves as well as on the deliberate disregard of the respective member states' procurement agencies.

First, the scope of the existing regime was severely limited. Sub-national authorities, which account for over 40% of all public expenditure, did only rarely award contracts over the thresholds (cf. Fernández Martín 1996, 20). Utilities, a major consumer in the public sector, weren't included, as mentioned above, and other public service contracts not directly related to public works were also not covered.

Second, unequal competition conditions continued due to the fact that the directives were largely based on maintaining national provisions on public procurement leading to a lack of implementation uniformity.

Third, enforcement was underdeveloped. As Fernández Martín observes, "effective mechanisms for the enforcement of the rules and an operative enforcement policy were lacking" and "the Commission had administered a laid-back approach which did not put Member States under any pressure to comply with the rules at any level" (Fernández Martín 1996, 10, 16 and 22). In the period between the 1977 public supply directive and the first assessment communication to the Council only two cases had been brought before the European Court of Justice (cf. Fernández Martín 1996).

The particular ire of the Commission, however, was drawn, fourth, to the lack of application of the existing directives by the member states. The Commission noted that

there appeared to be a "deliberate underestimation of the contract value and overzealous division of projects" with the aim to avoid the thresholds (COM (84) 717: 13).

It was these two communications in conjunction with the famous White Paper of 1985 and the later so-called Cechinni Report, which provided the arguments for further action by the Commission. Especially the latter provided the economic rationale underlying the expansion and deepening of public procurement pushed by the EU Commission. The economic justification has been at the center for explanations of why the Commission has turned its attention towards an "active shaping of the contents of the policy" field and reneged on a "laid-back approach" (Fernández Martín 1996, 10, 16 and 22). Verdeaux for instance contends that the share of public procurement "in the European economy explains the intervention of European regulators in a field not addressed in the founding treaty" (Verdeaux 2003, 720). And Fernández Martín observes that the findings of the Cecchini Report "provided the necessary economic excuse for the need to enter upon a *new* supranational policy in the field (Fernández Martín 1996, 23; my emphasis). Bovis also notes that with the removal of tariffs complete by 1969, the Commission was now free to start focusing on non-tariff barriers to trade, which included public procurement. In its *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, in 1985 the Commission identifies public procurement as a major economic sector hampered by non-tariff barriers, which to be eliminated as part over the overall goal to create a single market by 1992. Hence, the Commission noted, in addition to continued protectionism in public procurement being "the most evident barriers to the achievement of a real internal market", that "Community-wide liberalization of public procurement is vital for the future of the Community economy" (COM (85) 310 fin, 23–

24). The Commission further argued that, while existing directives have not been completely successful, the general articles contained in the EEC Treaty provide the legal basis for further action in public procurement. The Commission observed accordingly that "[t]he basic rule, contained in Article 30 et seq. of the EEC Treaty, that goods should move freely in the common market, without being subject to quantitative restrictions between Member States and of all measures having equivalent effect, fully applies to the supply of good to public purchasing bodies, as do the basic provisions of Article 59 et seq. in order to ensure the freedom to provide services" (COM (85) 310 fin, 23). Thus, while the *White Paper* and the subsequence Single European Act provided "the political and legal framework of the attempts of European institutions to tackle the issue of public procurement more effectively", the specific impetus and justification for the Commission's activity in the public procurement field was the publication of the very detailed Commission study *The Cost of Non-Europe*, known as the Cecchini Report (Bovis 1998, 222). In Bovis's words, the Cecchini Report provided "empirical proof of the distorted market situation in the public sector" and emphasized "the benefits of the regulation of public procurement by European institutions (Bovis 1998, 221-22). In short, this report argued that the failure to complete the common market had considerable cost. An entire section of the report was dedicated exclusively to public procurement.[45] The report argues that "by not encouraging intra-Community competition [in public procurement], it is implicitly supporting sub-optimal enterprises, which is reflected in European industry being less competitive in world markets" and makes "public expenditure […] higher than necessary" (WS Atkins 1988, Executive Summary, 1). It

[45] Consultants, WS Atkins Management. *Research on the "Cost of Non-Europe": Basic Findings, the "Cost of Non-Europe" in the Public-Sector Procurement*. Vol. 5, Part A: European Communities, 1988.

goes on to note that "the degree of import penetration in public purchases is much lower than for the economy as a whole" and predicts that an opening up the public procurement would lead to "potential savings in annual public expenditure of some 8 to 19 billion ecus" (WS Atkins 1988, Executive Summary, 3 and 6).[46] Thus, the overall report emphasizes strongly that the existing two directives have "so far been very little effective opening up of public procurement", demonstrated by the fact that import penetration to public procurement markets is a mere 1.7% on average[47], although public procurement on supplies, works and services represents at least 15% of the EC-12's GDP[48] (WS Atkins 1988, Executive Summary, 4, 7 and 16-18). The savings from further legislation and opening up of the public procurement sector therefore would derive "from new trade at the prices of the lowest cost country" (static trade effect: 3 – 8 billion ecus), "as a result of competitive pressure on prices in sectors not previously open to international competition" (competition effect: 1 to 3 billion ecus) and as a result of gaining "economies of scale arising from the restructuring of industry in the previously protected sectors" (restructuring effect: 4 – 8 billion ecus) (WS Atkins 1988, Executive Summary, 7 and 10). Additional, not included, savings could derive from an accelerated rate of innovations and private sector purchasers benefiting from similar goods (WS Atkins 1988, Executive Summary, 7).

Therefore, the Cecchini report provided the economic justification, and one might add fig leaf, for further action by the European Commission to deepen integration in

[46] The study is based on looking only a t five countries: Belgium, France, Germany, Italy and the UK.

[47] The report does admit, however, that the import penetration might be "an underestimate since purchasers do not always know whether contracts let with national suppliers include the supply of imported goods" (WS Atkins 1988, Executive Summary, 3).

[48] The total of public purchasing expenditure as % of GDP in 1984 varies between 11.8% in Germany and 21.8% in the UK (WS Atkins 1988, Executive Summary, 18).

public procurement. Fernández Martín for instance observes that "[n]ot surprising a common feature of most writings examining the EC regulation of public procurement is to stress the economic significance of the liberalisation of public procurement by referring to the conclusions of the Cecchini Report" (Fernández Martín 1996, 23). Bovis correspondingly observes that "[t]he rationale behind the whole process of the integration of the public markets of the Member States has been the establishment of an effectively competitive regime similar to that envisaged for the operation of private markets" (Bovis 1998, 223). This process of further integration of public markets was ideologically bolstered by the dominant paradigm of liberal economic theories. Thus, Bovis puts emphasis on the fact that "European institutions have intellectually supported such an attempt (of liberalization public procurement), where enhanced competition in public markets could bring about beneficial effects for the supply side of the equation (industry), by means of optimal allocation of resources within European industries, rationalization of production and supply, promotion of mergers and acquisitions and elimination of sub-optimal firms, creation of globally competitive industries, effects which are deemed to yield substantial purchasing savings to the to the public sector" (Bovis 1998, 223). Moreover, "perpetuating discriminatory and preferential public purchasing […] represents a sub-optimal allocation of resources (human and capital) throughout the common market at the expense of the public sector, which pays more than it should for equivalent or even better products or deliveries"(Bovis 1998, 224–25). And in a later article he notes that "the intellectual paternity of public procurement regulation can be traced in a neo-classical economic approach to market integration" and that "[s]avings and price convergence appeared as the main arguments for liberalizing the trade patterns

of the demand (the public and utilities sectors) and the supply (the industry) side of the public procurement equation" (Bovis 2005, 55 - 56). He notes, however, also that "legal arguments have emerged supporting the regulation of public procurement as a necessary ingredient of the fundamental principles of the European Treaties, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on nationality grounds", which have already played a role in the very first steps towards an EU-wide public procurement regime and which were also noted in the 1985 White Paper. Thus, trade patterns, in which "[p]rocurement by member states and their contracting authorities is often susceptible to a rationale and policy that favors indigenous undertakings and *national champions* at the expense of more efficient competitors (domestic or Community-wide)", inhibits "the fulfillment of the principles enshrined in the Treaties" (Bovis 2005, 56; italics in original). Yet, it clearly appears to be the case that it is the economic importance of public procurement and the accompanying arguments which not only "made the opening up of public procurement a top priority on the Commission's agenda", but also "a 'test case' to measure the progress made towards the achievement of the 1992 ideal (Fernández Martín 1996, 23). Thus, "[g]iven the level of infrastructure and the amount spent on it every financial year by the contracting authorities of the Member States, the public sector has acquired a significant dimension within the European integration process and the need to regulate it with the view to eliminating market distortions became imminent" (Bovis 1998, 225). This need is even bigger given the fact, according to commentators, that "the state and its organs, as contracting authorities possess a monopoly position in the sense that no one competes with them in their market activities" and they also "possess a monopsony position, as

firms engaged in transactions with them have no alternatives to pursue business" (Bovis 1998, 227). Here a huge difference can be noted from the American perspective where the state, as purchasers of goods and services, is considered as acting in the market similar to other market participants as illustrated above.

The Commission, as will be described in more detail in the ensuing chapter, has been clearly at the center of the push for a more centralized and liberalized public procurement regime. Fernandez Martin's for instance remarks upon the key role of Commission in pushing this agenda:

> It is true that the policy was carried out by all Community institutions, not just by the Commission. However, this should not conceal the fact that the main actors in the conception, justification, and implementation of the policy were the Commission services, who were especially active under the Delors' Presidency. Thus, even though the public procurement policy is formally a Community policy, adopted on the basis of the Community's decision-making process, the Commission bears most responsibility for its conception and implementation (Fernández Martín 1996, 23).

In addition, the European Commission has not waited until the result of the Cecchini Report to restructure its directorate generals to focus more on public procurement. Fernández Martín reports that "[t]he renascence of public procurement policy is first witnessed by the serious restructuring of the Commission's DG III 'Internal Market and Industrial Affairs' services" (Fernández Martín 1996, 23). Prior to 1984 there was no division within the DG Internal Market to deal with public procurement exclusively. This changed with the creation in 1984 of Division 4 of Directorate C which a year later "became devoted exclusively to public procurement as an autonomous and independent area in the internal administrative structure of DGIII" (Fernández Martín 1996, 24). Further, "more far-reaching restructuring", led in 1988 to the creation of an entire "Directorate specifically charged with the task of opening up markets to European-wide

competition" (Fernández Martín 1996, 24). The new Directorate was divided into two Divisions, respectively in charge of developing new legislative measures and dealing with implementation and enforcement issues. Moreover, the number of Commission staff assigned to public procurement was "increased substantially by more than 40 per cent", a new Advisory Committee on the Opening-up of Public Procurement was established (EC Commission Decision 87/305/EEC) to serve alongside the 1971 established Advisory Committee for Public Procurement (EC Council Decision 71/306), a "Vademecum on Government Procurement" (EC Commission, OJ 1987, C358/1) was produced by the Commission, and last but not least in the first years over three hundred seminars and conferences have been sponsored by the Commission as part of an awareness campaign targeted at contracting authorities and companies (Fernández Martín 1996, 24–25). The Commission, moreover, had additional plans, such as the "the creation of a 'Public Contracts Committee' within the Commission with far-reaching monitoring competences which would include a right to intervene in national award procedures to defend the Community's public interest", which didn't materialize (Fernández Martín 1996, 25; cf. COM (86) 375, 9). Nevertheless, the Commission put increased focus on a systematic initiation of Article 169 EC, now Article 226 (EC Consolidated Version), "proceedings against any known alleged violation and the encouragement of private persons and indivudals to address complaints to the Commission's services" (Fernández Martín 1996, 25).[49] In addition, the Commission also put in place a computerized system (Tenders

[49] Article 226 (formerly Article 169 EC): If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Electronic Daily) to provide automatically information on any tenders published in the Official Journal.

As a result of this new-found emphasis on public procurement, legislative activity increased over the next couple of years leading to a string of directives directly related to public procurement getting passed in the late 1980s and 1990s amending, enhancing and extending the EU-level public procurement regime. While the Single European Act, similar to the previous EEC Treaty, didn't include any specific provisions dealing with public procurement and while "several new powers were attributed to the Community in different policy areas, but none in the field of public procurement", public procurement policy profited from a change in the Community's decision-making procedures. Unanimity rules in the domain of public procurement were replaced by qualified majority voting based on the new Article 100(a) EC.[50] As Fernández Martín observes, the result was then that "[i]t took less than two years to enact the new public supply Directive and a little over one year in the case of the new public works Directive, whereas their predecessors took over four and five, respectively (Fernández Martín 1996, 26). The provisions in the new public supply and public works directives were "stricter and more far-reaching than those of the original Directives" Fernández Martín 1996, 26). The public works and supply Directives were first amended (Directive 89/440 amending Directive 71/305; Directive 88/295, amending 77/62), before they became consolidated due to the fact that the original and the amending Directives remained first separate texts leading to confusing legal rules spread over separate documents (consolidated public supplies Directive 93/36; consolidated public works Directive 93/37). The consolidated

[50] Another change involved the role of the European Parliament, which now as a result of the co-operation procedure (Fernández Martín 1996, 26 – 27).

Directives codified "the case law of the Court of Justice interpreting what entities or bodies are subject to Community law in general, and public procurement rules in particular" (Fernández Martín 1996, 28). The case law, however, in Fernández Martín's assessment, "adopts the Commission's position in this respect" leading to the widest application and definition of public authorities (Fernández Martín 1996, 28). The goal of defining public authorities as widely as possible is to "fight the recurrent practice in public procurement cases, whereby Member States resort to the fiction of declaring the bodies in charge of the management of public services as formally belonging to the private sector and, therefore, excluded from the discipline of the public procurement Directives" (Fernández Martín 1996, 28).

Besides amending the procurement regime regarding public works and supplies contracts, new Directives were passed to extend the regime to public services (Directive 92/50) and finally utilities (Directive 93/39). While the latter, due to the "supposed diversity and complexity" of the utility sectors, is subject to specific procurement rules,[51] the other three directives are "subject to the same set of rules for each of their procurements exceeding a specific threshold" (Verdeaux 2003, 721). The new directives slightly changed the threshold amount from the original directives in the field of public supplies (minimal reduction from 140,000 to 130,000 ECU) and more substantially in the field of public works, where the threshold was raised from 1 million to 5 million ECU to take into account "the rise in the cost of construction work and the interest of small and medium-sized firms in bidding for medium-sized contracts" (Directive 88/295,

[51] The first time utilities were covered by any European legislation, however, was Directive 90/531 (cf. Bovis 1998; Fernández Martín 1996).. This Directive was substituted three years later by this newer directive which now only included public supplies and public works contracts, but also public services contracts awarded by utilities.

Preamble). Thus, the raise was designed with the goal to partially protect medium and small firms from competition from larger companies (cf. Fernández Martín 1996, 29). The threshold for public services contracts was first set for 200,000ECU. The new directives were also geared towards increasing transparency in the awarding of public procurement contracts and the information obligations of the contracting authorities. Therefore, the directives made the use of the open and restricted procedures (i.e. with open competition) the rule while demanding from the contracting authorities to submit a justification why they used the non-competitive negotiated, formerly known as single tendering, procedure. Moreover, the contracting authorities are now subject to a pre-information and a post-award obligation. Contracting authorities have to inform unsuccessful firms why they were rejected, have to publish an advance notice on how much total procurement they plan to award the following year, provide information to be published in the Official Journal on the results of all awards and under what conditions each actual contract has been awarded as well as prepare a detailed report on each contract award procedure, including, among others, information which companies were rejected and why and which company won and why, that needs to be kept on file and upon request needs to be forwarded to the Commission.[52] It has to be noted here that the procurement directives, while now covering most types of procurement, including dual-use supplies needed by the military, do exclude explicitly military equipment.

To facilitate the possibility of redress and to remedy shortcomings in the existing procurement regime, two Remedies Directives were also adopted by the Council in the following years (Directive 89/665 review procedures for public supply and public works

[52] For more detail on the rules and procedures covered by the public procurement directives, cf. Verdeaux (2003). Also confer Fernández Martín (1996) for some addition details on how the new directives have amended the pre-1984 regime.

and public services contracts; Directive 92/13 review procedures for public contracts in the water, energy, transport and telecommunications sectors).[53] The Remedies Directive became necessary, because "[c]ontrary to other Directives in other areas of Community, the public procurement Directives did not oblige Member States to introduce into their national legal systems such measures which are necessary to ensure adequate and effective means of redress in the form of claims by judicial process" and thus "[n]national systems were to apply unchanged" (Fernández Martín 1996, 205). Yet, as Fernández Martín, points out that the 1989 "Remedies Directive is of a limited scope", given that it only covers breaches of the obligations enshrined in the "public works, public supplies and public services directives "or in the national legislation implementing provisions of the Directives" (Fernández Martín 1996, 28 and 206). It doesn't deal with potential infringements not directly related to Community obligations and, "[d]isputes which may arise between parties to a contract as regards the enforcement of the contractual clauses are still, in the absence of Community rules, regulated by existing national provisions", leading to criticism by commentators and the European Parliament (Fernández Martín 1996, 206-7). Bovis also points out the principle of the Member States' procedural autonomy, i.e. Member States retaining "the power to select a court, a tribunal or an independent authority as the competent forum to deal with public procurement law" is problematic given that it still leaves a high level of heterogeneity and uncertainty (Bovis 2006, 57)

As regards international trade rules and the Government Procurement Agreement of Marrakech, similar to the United States, the EU's adherence has not changed the qualitative framework of the internal public procurement regime. Council Decision

[53] For a detailed description, see Fernández Martín 1996, Chapter 8.

94/800 transposed the GPA into EU legislation simply extending the non-discrimination clause to non-EU Member States. Yet, one important difference between the United States and the European Union emerges right away. As Verdaux notes in passing, "[u]nlike the U.S. provisions, these principles are applicable to all subcentral authorities from the large Spanish *provincias* or German *länder* to the smallest city or even villages of Europe" (Verdeaux 2003, 717; emphasis in original). Thus, in contrast to the US, where each sub-central contracting authority was able to decide its adherence to the GPA, given the EU procurement regime, adherence to the GPA meant that all contracting authorities are automatically subject to it. Consequently the European Union ends up empowering a global-level deal to have much more reach than it has in the United States.

New EU Public Procurement Regime (since 2006)

Following a Commission Green Paper in 1996 and a 1998 Commission Communication the EU's public procurement system was once again amended and modernized.[54] The revision of the existing regime is seen "as an integral part of the Commission's 2000 Work Programme, which pledged to modernize the relevant legislation for the completion of the internal market and at the same time implement the Lisbon European Council's call for economic reform"' (Bovis 2006, 29). The goal was to simplify, modernize and increase the flexibility of the existing public procurement regime with the goal to continue to fully integrate the public procurement market and to eliminate any remaining non-tariff barriers. To do so the new regime merges the four existing European directives into two legal instruments: the so-called "traditional"

[54] Green Paper on Public Procurement in the European Union: Exploring the way forward, European Commission 1996; COM (98) 143 European Commission, Communication on Public Procurement in the European Union

Directive 2004/18/EC for public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC on the "special sectors" of water, energy, transport and postal services. In short, the new regime establishes a clear-cut dichotomy between the public sector and the utilities, largely a result of the liberalization process in the public utilities sector and the introduction of sector-specific regulations. As Bovis comments, the utilities "change in ownership from public to private has stimulated commercialism and competitiveness and provide for the justification of a more relaxed regime and the acceptance that utilities, in some form or another, represent *sui generis* contracting authorities, which do not need a rigorous and detailed regulation of their procurement" (Bovis 2006, 30; emphasis in original). Thus the new utilities directive allows for the total disengagement from public procurement rules should it be proven that a genuinely competitive regime has developed where purchasing patterns based on non-economic considerations have been ruled out (cf. Bovis 2006, 53).[55]

As regards the "traditional" directive applying to public works contracts, public supply contracts and public service contracts, it covers generally all procurement contracts which have a value excluding VAT estimated to be no less than the following thresholds:

- EUR 137 000 for public supply and service contracts awarded by central government authorities (ministries, national public establishments);

[55] However, a legal hole remains regarding public utilities and the GPA. Bovis summarizes this as follows: "The disengagement of the utilities procurement regime as a result of the operation of the relevant entities in competitive markets by virtue of Article 30 of the new utilities Directive does not apply to the WTO Government Procurement Agreement. This represents a legal lacuna as the procedural flexibility envisaged in the European procurement regulatory regime does not cover entities covered under the GPA. Rectification of the problem would require amendment to the GPA with the conferral of concessions and reciprocal access right to the GPA signatories" (Bovis 2006, 54 – 55).

- EUR 211 000 for public supply and service contracts awarded by contracting authorities which are not central government authorities as well as certain products in the field of defense awarded by the central government authorities, concerning certain services in the fields of research and development (RTD), telecommunications, hotels and catering, transport by rail and waterway, provision of personnel, vocational training, investigation and security, certain legal, social and sanitary, recreational, cultural and sporting services;
- EUR 5 278 000 in the case of works contracts.

The thresholds are verified by the Commission every two years and their calculation of their value is based on the average daily value of the euro, expressed in special drawing rights (SDR), over the 24 months ending on 31 August for the revision with effect from 1 January.[56] The public procurement contracts which are excluded from the scope of the directive, include, among others, contracts covered by "special sectors" directives and contracts awarded with the purpose of providing or exploiting public telecommunications networks, contracts which are declared to be secret or affect the essential interests of a Member State (defense contracts), and contracts concluded pursuant to international agreements. Also some audiovisual services with special cultural and social significance, such as relates to the development, purchases and (co)production of broadcasting programs, but not including technical equipment, are excluded.

Thus, once again, in contrast to the sister states in the US, the EU Member States, above the specific minimum thresholds, do not retain the authority to discriminate against

[56] For those Member States which have not adopted the single currency, the European Commission publishes the values in national currencies of the applicable thresholds in the Official Journal. In principle, these values are revised every two years from 1 January 2004.

bidders from other Member States, with exception of military equipment for the defense sector. Article 3 of the Directive 2004/19/EC clearly states that

> Where a contracting authority grants special or exclusive rights to carry out a public service activity to an entity other than such a contracting authority, the act by which that right is granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the entity concerned must comply with the principle of non-discrimination on the basis of nationality.

The new public sector directive also "introduced a series of new concepts which are the product of jurisprudential inferences and policy refining of the previous legal regimes" (Bovis 2006, 32).[57] These new concepts include, among others, the permission of entities governed by public law to compete alongside private sector companies for procurement awards as long as it doesn't cause any competitive distortions injuring private tenderers, the creation of a new award procedure called competitive dialogue,[58] the creation of a central system of certification of private and public organizations for the purposes of providing evidence of financial and economic standing and levels of technical capacity in public procurement selection and qualification procedures, the possibility for contracting authorities to award contracts jointly and to establish a framework agreement between one or more contracting authorities and one or more firms with the purpose to establish the terms and conditions of public contracts to be awarded during a given period time period (maximum 4 years). The new Directive also provides for the rapid expansion of electronic public purchasing systems and electronic auctions.

[57] For a detailed description of these new concepts, see Bovis 2006.

[58] The competitive dialogue has been set up alongside the traditional open, restricted and negotiated procedures. It is supposed to be used exceptionally when contracts turn out to be too complex to be awarded by using the open or restricted procedure and where the negotiated procedure is not justifiable.

Concerning the inclusion of social and environmental considerations as part of the award criteria for public contracts, the new Directives, however, "remain silent" (Bovis 2006: 40). Bovis observes that, given the ECJ's case law, conditions relating to the performance of public contracts, such as on-site vocational training, the employment of the people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment, "are compatible with the public sector Directive provided that they are not directly or indirectly discriminatory and are indicated in the contract in the contract notice or in the contract documents" (Bovis 2006). While, following the insistence of the European Parliament, the draft Directives contained language related to workforce matters as part of awards criteria, it was excluded from the final Directives. Bovis considers the Commission's stance that contractual performance can't be employed as criterion for the awarding of contracts as "myopic" (Bovis 2006, 40). Yet, in Article 19 of the public sector Directive the Commission makes one concession to the Member States. They may reserve certain public contracts to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programs where most of the employees concerned are handicapped persons. While otherwise the socio-economic dimension is not explicitly emphasized in the Directive and the ECJ has maintained the importance of the overall economic approach, the Court has, nevertheless, over the years also recognized "the relative discretion of contracting authorities to utilize non-economic considerations as award criteria" (Bovis 2006, 42). In short, the ECJ has given the award criterion of 'the most economically advantageous offer" a wide and flexible interpretation. In *Gebroeders Beentjes v. The Netherlands*, Case 31/87, the Court decided that combating long-term

unemployment cannot be part of selection criteria to disqualify potential tenderers, but could be part of the award criteria for public contracts in cases where the most economically advantageous offer is selected and as long as it has no direct or indirect discriminatory effect on tenders from other Member States and runs afoul of the earlier mentioned fundamental principles in the EC Treaty. In another case, the ECJ was asked to consider *inter alia* whether environmental considerations could be part of the most economically advantageous criterion. In *Concordia Bus Filandia v. Helsingin Kaupunki et HKL-Bussuliikenne*, C-513/99, the Advocate-General opined that contracting authorities are allowed do so as long as it doesn't discriminate against alternative offers and that to be permissible they "must satisfy a number of conditions; namely, they must be objective, universally applicable, strictly relevant to the contract in question, and clearly contribute an economic advantage to the contracting authority" (Bovis 2006, 45–46). Thus, the important point here to understand is while EU Member States can take into account some social-economic criteria when awarding contracts based on the most economically advantageous offer, they cannot, in contrast to the US, limit themselves to only in-state companies.

As in the previous public procurement regime, the new public procurement directives were followed by a revised Remedies Directive. This new directive, aiming to improve the effectiveness of national review procedures for the award of public contracts, has been formally adopted and has been published as Directive 2007/66/EC on 20 December 2007. Member States have until 20 December 2009 to implement the new Directive into national law. The new Remedies Directive introduces the concept of a 'standstill period' before the conclusion of a public contract. Thus, rejected tenderers

have now the opportunity to initiate an effective review procedure when unfair decisions can still be remedied. The Directive obliges national courts to set aside a signed contract, by rendering it "ineffective", if the standstill period hasn't been complied with. Moreover, to combat illegal direct awards, national courts will now also be able to render contracts infective if they have been illegally granted without any prior competitive tendering or any transparency. In such circumstances, contracts will then need to be tendered once more. It is hoped that these new, stricter rules will provide even stronger incentives for companies to submit bids in other Member States.

On the occasion of the adoption of the new public procurement directives and prior to the new Remedies Directive, the European Commission has also published in 2004 a general assessment of the European public procurement regime established in the 1980s. In a press statement (IP04/149) accompanying *A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*, the then-Internal Market Commissioner Frits Bolkestein summarized the report by observing that "EU laws opening up procurement markets across borders have cut waste by slashing the prices central, regional and local governments pay for works, supplies and services. But there is plenty of scope for making public procurement markets even more efficient. Seizing this opportunity is crucial to Europe's competitiveness, to giving taxpayers high quality and good value for money and to creating new opportunities for EU businesses". Focusing, not surprisingly, on economic factors, the report, indeed, reaches very favorable conclusions regarding the overall success of the public procurement regime, bolstering previous economic claims as well as arguing for the necessity of further steps. Thus, the report concludes that "there is

overwhelming evidence that the current [1980s] directives have actively contributed to reform in the public procurement markets" having led to a price reduction "by around 30% (Commission 2004, 2). Moreover, "[b]etween 1995 and 2002, the number of invitations to tender published in the Official Journal as required by the directives has almost doubled" and the number of contract award notices also "more than doubled" in the same time period (Commission 2004: 7). The report also notes that in the past the full extent of cross-border procurement may have been significantly underestimated. While direct cross-border procurement remains very low at 3%, 30% of proposals are from subsidiaries in other countries (Commission 2004: 12). In addition, the success rate for a given firm to win an award contract only shows minor differences between domestic and foreign firms, with foreign owned subsidiaries slightly being more successful than domestic companies (Commission 2004, 13).

However despite these highlighted successes, there is, as the quote of the former Internal Market Commissioner indicates, still general dissatisfaction with the very low level of direct cross-border procurement penetration and the fact that, given the thresholds, presently only approximately 16% of all European public procurement is published in the Official Journal. Thus, as Mardas et al. comment, "[p]ublic procurement remains only partially exposed to intra-EC competition and European governments find their way in preserving their "buy national" policies", retaining "a "chasse privee" for local suppliers" (Mardas et al. 2008, 185). Yet, it should not be forgotten, especially in contrast to the American procurement regime, that even purchases falling below the thresholds nevertheless need to meet the general rules of the EC Treaty, prohibiting theoretically all discrimination against companies from other Member States. Indeed, the

EU Commission appears to be diligent in holding Member States accountable. In 2005 the Commission for instance decided to bring Germany before the Court of Justice in a case concerning the transport of works of art for temporary exhibitions, which Germany claims concern contracts below the Directive's threshold and therefore didn't need to be advertised. The Commission, though, expressed the view that these kind of public contracts can be quite important for small and medium enterprises (SMEs) and that the ECJ has previously established that public authorities awarding such contracts have to ensure a sufficient degree of advertising, offering a fair chance to all potential bidders (IP/05/949).

Additionally the Commission is well aware of these shortcomings advocating for further steps. Bolkestein accordingly notes that "[t]he adoption of the [new] legislative package after extensive negotiations is just the beginning: Member States now need to put it quickly into practice" (IP/04/149). And not only has a Remedies Directive already been adopted in the meantime, but the Commission is also presently working on clarifying the relationship between the general public procurement regime and the defense sector. Hence, in a Green Paper (COM (2004) 608) the Commission announced its intent to develop the debate on the case for Community action to establish a European defense equipment market.

Any further step in liberalizing the public procurement regime continues to be justified in strong economic terms. Thus, in its 2004 report on the functioning of public procurement markets, the Commission reiterated that "competitive public procurement practices are essential for efficiency in public spending", "[c]ompetitive, transparent procurement markets help public authorities acquire cheaper, better quality goods and

services at lower costs" and that "[a]s a result both the value of taxpayers' money and the allocation of resources are improved" (Commission 2004, 3). But this time the Commission even goes further in establishing a link between public procurement and the Maastricht or euro convergence criteria and the Stability and Growth Pact. In continuing to liberalize the public procurement market and improve on it, conservative estimates would lead to spectacular results: "three countries would turn their budget deficits into surpluses and no euro zone Member State would run a public sector deficit that breaks the 3% limit" (Commission 2004, 5–6).

An independent report published in 2006 commissioned by the Commission to evaluate the effects in the 15 Member States that were subject to the EU Procurement Directives 1992 - 2003 comes apparently to similar results. Thus, the consultant company *Europe Economics* notes that "[o]verall compliance has improved significantly" although it varies across the Member States from low compliance with publication rules in the Netherlands and Germany and better rates in Spain and the UK (Europe Economics 2006, ii). In addition, while "[o]verall the administrative costs for awarding authorities have gone up by 20-40 per cent" and the "[a]dministrative costs for suppliers […] rose by 30 – 50 per cent" as a result of the Directives, "the balance of costs and benefits has been significantly positive" with prices being "lower than they would otherwise have been by more than 2.5 per cent (€ 6 billion) of contract value" and that after deducting the enforcement and compliance costs, the "overall welfare gain should therefore have been more than €4.25 billion a year by 2002" (Europe Economics 2006, ii – iv). However, the report also concludes that "the available information suggests that there is still significant non-compliance" and that while "there is a more level playing field […] comparison with

the efficiency of private sector procurement remains favourable to the private sector" (Europe Economics 2006: x). Moreover, the report's authors also observe that "it should not be concluded from the fact that the Directives had had a significantly beneficial effect in the past that their scope should be extended or that they should be continued in force indefinitely" (Europe Economics 2006, xii). Indeed, "[a]s circumstances change, the need for the prescriptive requirements of the Directives may reduce, and a more generally deregulatory approach may become more appropriate" (Europe Economics 2006, xii). However, even such a long-run change in the public procurement regime would not change the overall qualitative difference between the European Union and the United States, where the latter continue to be *allowed* to discriminate against sister states in public purchasing and selling of goods and services

In sum then, while maybe "[f]rom a legal point of view, the Directives did not allegedly intend to substitute national regimes with a Community one, but rather to set minimum uniform conditions to foster European competition for public contracts" at first, "the truth is that a complete Community policy in the area has developed" and continues to develop with the intent to eliminate any discrimination between Member States (Fernández Martin 1996, 34). In the European Union therefore today the Member States to not retain the right to discriminate against another Member State and to establish official "buy national policies" in public procurement. While in practice the European public procurement regime still is not as efficient and obstacle-free as desired by the Commission and others, no market participant exemption has been put in place to legally allow for discrimination. Indeed, such discrimination, besides being clearly interpreted against the spirit of the non-discrimination article in the foundational treaties, is seen by

the Commission as economic nonsense. Repeatedly the Commission has argued and demonstrated with subsequent in-house and external studies that an EU-wide public procurement regime is overall beneficial to the Member States and their taxpayers and the continuation of non-tariff barriers costly.

CHAPTER IV

PUBLIC PROCUREMENT IN THE EU AND THE US:

EXPLAINING THE DIVERGENCE

"I am sure there are some examples, I am sure there are some distortions, just as there are lots of distortions in Europe as well. But what I am saying as a generality in America if you are in California you cannot require that your motor vehicles bought by public authorities have to been manufactured in California. As a generality I don't believe you for a moment that you are right. I don't believe that in the state of Delaware you can only buy, you know, the state authorities, city authorities could only buy stuff produced in the state of Delaware. I just don't believe it."

Sir Andrew Cahn; former member of Lord Cockfield Cabinet and until 2011 the British government's Chief Executive of UK Trade & Investment (UKTI), personal interview 2009

"We could send that guy [Sir Andrew Cahn] our procurement statutes and he would be a believer, I guess."[59]

Vern Jones – Chief Procurement Officer - State of Alaska, personal interview 2009

The previous chapter has documented a striking contrast: the overall intent and direction of the EU, despite remaining obstacles and limitations, is to eliminate any non-tariff barriers to the public procurement market, while in the United States during the same time a string of Supreme Court decisions and accompanying arguments have led to a legal justification for a continued separated public procurement market and even a recent proliferation of state-level laws in this area that are explicitly protectionist. A clear difference in the perception of the interaction between states as buyers of goods and services and the market also emerges here. The perception, right or wrongly, in the

[59] These quotes derive from a series of interviews carried out in 2009 and 2010. According to the state preference policies from NASPO's 2009 Survey of State Government Purchasing Practices publication, in South Dakota "[p]assenger vehicles must be purchased from a dealer licensed in the State of South Dakota" and in Minnesota "all all-terrain vehicles purchased by the commissioner (of natural resources) must be manufactured in the state of Minnesota" (NASPO 2009, Oregon State Procurement Office Reciprocal Preference Law website: http://www.oregon.gov/DAS/SSD/SPO/detail_mn.shtml; accessed August 20, 2010).

United States appears to be clearly that the contracting authorities are just one specialized area of the market among others, while in the EU, as noted earlier, public procurement has been seen as a market alongside the private market and therefore "[t]he rationale behind the whole process of the integration of the public markets of the Member States has been the establishment of an effectively competitive regime similar to that envisaged for the operation of private markets" (Bovis 1998, 223).

Moreover, as the quotes at the beginning of this chapter indicate, it is noteworthy that even those involved in the creation of the common market in Europe and still active in international trade have a difficult time to believe that trade barriers exist in the US where they have been abolished in the European Union. Thus, while it may seem that the arguments made in the US, such as sowing and reaping, laboratories of experimentation and state autonomy, as well as the minimal impact argument, should be as compelling in the EU context, they don't appear to have played a significant role in the latter as the first sections of this chapter will demonstrate. A common theme in the interviews with European officials was that either they have never heard of these types of arguments or that when a similar argument might have been brought up it was relatively easily countered and dismissed. In addition, even from the US perspective, these arguments don't necessarily make always a lot of sense, though interview evidence suggests that they are nonetheless strongly believed by US actors.

Indeed, this chapter will show that the attitudes towards the federal-level government solving economic issues has been (and continues to be) markedly different in the EU and the US, with the US being more reluctant, even if greater federal involvement would lead to greater market liberalization. Interviews with national US business

organizations, experts and politicians hinted at a more parochial thinking and approach to public procurement.

However, this is not just a story about different ideational contexts, but rather about how powerful political players have mobilized arguments and strengthened elements of the discourse, leading most people to reproduce differently-slanted versions of the discourse of the market on either side of the Atlantic. As Parsons has previously noted, "members of a culture share a restricted set of ways of dealing with any situation", which "limits and channels their strategic choices" (Parsons 2003a, 7). Accordingly, "people who share certain ideas agree on ways of diagnosing problems and organizing action", although this does not necessarily mean they always agree on the desired outcome or even the exact action (Parsons 2003a, 7). It is here at the intersection of ideas and institutions where the presence of an institutional actor, such as the European Commission in the EU, and the absence of a similar actor in the US are most keenly felt. While on the one hand embedded in a larger culture, which accepts federal intervention in the market, the European Commission has, on the other, institutionalized the idea of a market without any borders to a greater degree than has been, at times, desired by the member states. It actively helps to shape and foster the acceptable discourse and solutions. These solutions, and the justifications for them, then in turn tend to slant towards a specific market-liberalizing direction.

Thus, an important part of the explanation for the striking contrast in market liberalization and centralization in the field of public procurement seems to be attributable to the presence of the European Commission in promoting market integration to the greatest degree possible. The European Commission not only set the agenda but

also, in commissioning and distributing studies on costs, partially helped to create a positive business attitude towards the creation of a single market by demonstrating to big business and governments alike how much can be saved or gained by creating EU-wide markets and by giving the latter market policies initiatives to react to. In short, the Commission helped to shape the dialogue and channeled it into a specific direction. Thus, while business subsequently turned out to play an important supportive role in the 1992 Single Market Project in general and in the transformation of the EU public procurement regime in particular, it is, however, rather the apparent absence of awareness of the potential significance of a free, internal public procurement market in US among American business federations, on which their European counterparts were modeled, which is remarkable. No agent in the US context so far seems to have pushed the issue of procurement liberalization for the entire American polity.

In other words, difference between the two polities is largely due to the role of the Commission as a federal-level entity specifically charged with creating a common market and a different attitude towards federal-level entities in this policy arena. The Commission, in creating studies emphasizing the value of a single public procurement market and selling the idea to the member states, played the crucial role for the regime's establishment and deepening and in shaping the discourse. While business has played a supportive role in the creation of the single market project in the 1980s (Cowles 1994), of which public procurement has been a major project, although its antecedent predates it, business didn't play the key role. It is rather the absence of a united business front in the US prodded by a federal-level entity similar to the EU Commission which appears to partially explain, why barriers to trade in public procurement in the US persist. Indeed,

with the exception of state procurement officers, the elimination of barriers to trade in public procurement is not seen as an important issue in the US. Instead of eliminating barriers, we have seen in recent years an increase of such barriers with U.S. states being protective about their prerogative to buy only in-state.

In sum then, each of the competing arguments fails to stand up to comparative evidence. While we might look to the role of business in promoting the EU public procurement regime (which it has done, at least somewhat), it is difficult to explain by this logic the odd silence of US business on similar issues. We might also look to the simple self-interest of less competitive state-level businesses in the US, which have clearly encouraged protectionist laws, but by this logic it is very hard to account for the much weaker defense of national procurement in the EU. We might also look at the interests of the largest, most powerful states composing the polities, but by this logic it is hard to account for why states, such as Germany and France, would accept liberalization and California and Illinois would not. In fact, it is many of the smaller states in the United States, Alaska, Wyoming, Hawaii, that have the most stringent protectionist measures. Institutional blockage within the American polity would also be insufficient in itself, given that in the EU originally unanimity and later qualified majority voting represents even greater institutional obstacles. Last but not least, we might look at the mobility rates of the polity's citizenry and the resources of the federal government, but by this logic it is hard to account for why the US with higher mobility rates and greater federal resources has not acted, but the EU has.

Subsidiarity and Laboratories of Experimentation

As pointed out in the previous chapter, one of the major arguments for continued discrimination in the field of public procurement in the US is the notion that subsidiarity should prevail. If we could accept this as an explanation for the US pattern, though, the idea that experimentation is beneficial for the entire federal polity should have, no pun intended, some purchase in the EU. Indeed, the principle of subsidiarity has been enshrined in the EU Treaties, and the Remedies Directives for example have always put an emphasis on the principle of the Member States' procedural autonomy. Member States in the EU also usually tend to invoke subsidiarity to keep their own prerogatives and therefore should have felt very comfortable with the notion that "the allowance of substantial local control may promote the healthiest brand of nationalism by fostering pursuit of different traditions in a spirit of shared toleration" (Coenen 1989, 427). Yet again the argument does not seem to have played a big role overall in the EU for making the case as in the US to discriminate against out-of-state bidders. In fact, it is striking that in the accounts of the EU public procurement regime's evolution the debates over encroachments were absent despite the absence of a fully developed regime at the beginning of the EU until the 1980s. The EU member states could have carved out in the EU an exemption regarding public procurement as in the US but didn't do so. It was perceived and argued from the beginning that the core principles of the EU, such as the non-discrimination of nationality, for building a common market didn't allow for it. And, as one EU official has put it, the incorporation of thresholds for smaller-sized contracts already took into account any subsidiarity concerns, granting some "leeway to the public authority" and making such arguments mute from the onset (personal interview 2009).

Moreover, according to a former member of Lord Cockfield's cabinet, "it would be absurd not to apply the European procurement rules to cities, towns and villages and so on which straddle frontiers, because you would diminish, you know, opportunities for cross-border competition and economies of scale" (personal interview 2009). This is not to say that absolutely nobody made subsidiarity arguments to avoid or water down EU-wide public procurement directives. Yet, such arguments were and are usually couched in terms of costs and not on fostering experimentation or taking into account different traditions. As an EU Commission official remarked to me, "there has always been a fringe of local politicians, very often from Germany, who were arguing to waive thresholds" and that "[c]ertain industries were arguing it's too much red tape", but at the same time you always have politicians and business arguing for more opening of the procurement market and the Commission's involvement (personal interview 2009). In short, "certain business associations complain about red tape, overregulation, but it is more that kind of argument, the Community legislation is too heavy, and not so much as saying the area, the policy area such should not be subject to Community legislation at all" (personal interview 2009).

Thus, while both the founding fathers in the US and in the EU might not have considered at all public procurement and the inherent non-tariff barriers going along with it, once the issues became raised in the 1970s and 1980s the EU and the US went divergent paths.

Sowing and Reaping

Let's now turn to the sowing and reaping argument. Once again, according to this argument, states should be able to reap where they sow, i.e. use the tax money as they see

fit on their own in-state companies. Thus, the state is seen as an administrator of the funds entrusted to it by the state's people and as a participant in the marketplace, which is considered to be starkly different from taxation or creating state regulation. To put it differently, "[t]he state supposedly looks out for its own economic interests rather than the well-being of third parties" (Manheim 1990, 581). Looking out for one's own state's interest and preferring hence one's own citizens should also be very obviously the concern of the German, British or French government. Indeed, as the earlier Baron Snoy et d'Oppuers quote has shown and the fact that cross-border direct procurement is still very low serve as indicators that EU Member States could have easily bought into this argument. Yet, instead of carving out a similar exception on the same logic in the EU, the Member States create a public procurement regime based on the notion of complete non-discrimination and opening up of the public procurement market. The European Commission has repeatedly pointed out that it is not in the overall economic interest of the Member States in general and taxpayers specifically to continue the practice of 'buy national policies' and segregated public procurement markets. The state, in short, would not be a good steward of the entrusted funds. Indeed, personal interviews and public records confirm this view and the difference with American thinking.

In the US, legislators and officials across party lines, such as Connecticut Democratic Senator Prague and Oregon Republican Representative Bill Garrard, argue in favor of in-state preference bills by noting that "we have contracts in this state that go out of state", "we should give any job we can to an in-state company" and that "Oregon taxpayers would like to have tax money stay within the state of Oregon" (Connecticut Senate Session Transcript May 2, 2008; Interview with Republican Oregon State

Representative Bill Garrard 2009). Rep. Garrard further emphasized that "it's not about the cheapest, but the best" and that he doesn't "want to go to the cheapest but the best doctor" and that we "first have to see for a while if the [out-of-state] providers are reliable" (personal interview 2009).

European officials, on the other hand, largely shake their heads over such sowing and reaping thinking by noting that they haven't heard of any such argument at the European-level in the Council or at other meetings, not even from Margaret Thatcher[60] (interview with Helmut Schmitt von Sydow 2009) and that "people genuinely believe, and I as a taxpayer by the way would believe that I want my money correctly spent and I couldn't care less whether the engineer is from Birmingham or [somewhere abroad]" (Interview with Alastair Sutton). In fact, this argument is perceived as "anathema to any believer in an internal market", because "it runs exactly counter [to] the very basis of the Treaty of Rome" (interview with Michele Petite2009).

Moreover, as Wells and Hellerstein have observed concerning the American context, "if economic Balkanization is the evil that the commerce clause was designed to prevent, what difference does it make whether the evil is brought about by states acting in their governmental or proprietary capacities?" (Wells and Hellerstein 1980, 1125). And as Manheim points out correctly, "differentiating a state's market participant role as guardian from its regulatory role as parens patriae and promoter of the general welfare is

[60] "Ich schliesse nicht aus das der ein oder andere gebracht hat. Auf jedem Fall ist es nicht gekommen bis auf der Ebene der Bruesseler, der Bruesseler Ebene. Es kann sein das hier und da eine nationale Stimme sich in dem Sinne geaeussert hat, etwas veroeffentlicht hat. Aber es nicht, dass im Rat der Europäischen Union oder im dem Ausschuss wo die nationalen Fachbeamten sind, das einer gesagt hätte, das ist mein Geld und ich will es nach nationalen Kriterien, selbst Maggie Thatcher nicht, ich werde es nach nationalen Kriterien verteilen. Denn wir haben, wir wollen das ihr das Geld am Besten einsetzen könnt, wenn ihr, so mehr ihr ausschreibt, um so mehr Offerten bekommt ihr und um so billiger konnt ihr einkaufen. Je billiger und besser ihr einkauft, um so besser ist es für den nationalen Steuerzahler" (Helmut Schmitt von Sydow 2009).

often difficult" (Manheim 1990, 582). Hence, to allow a state as market participant to completely prohibit the buying of specific products from out-of-state suppliers or to grant preferential treatment of 10% to for instance agricultural or forestry products, including meat, seafood, produce, eggs, paper or paper products as the State of Louisiana presently does, does not look much different than from imposing a tariff on out-of-state companies, even if it is limited only to all state and local contracting agencies (cf. Oregon State Procurement Office 2010). Moreover, the underlying distinction between law and contract in the American context, with only the former being subject to judicial and constitutional restraint, is, to say the least, very thin. As Manheim argues:

> Government power in the United States is exercised through a wide variety of mechanisms. Aside from regulation and taxation, the state interacts with its citizens by conferring benefits, providing services and employment, buying and selling goods, and virtually every other form of social intercourse. If these are beyond judicial scrutiny merely because they are "contractual" in nature, then our political bodies have found a convenient way to escape constitutional constraint. Such a theory would invert the "social contract," which posits society as a voluntary agreement among its members to be bound by ordered rules for their common welfare (Manheim 1990, 583).

Coenen also makes the point that challenges to the sowing and reaping argument based on the notion that nonresidents often pay the state taxes that create the state's property are rather unpersuasive . Nonresidents simply can benefit from discriminations imposed on nonresidents by their own state and in any case preferential rules are less objectionable when residency can easily be obtained (cf. Coenen 1989, 425). Thus, basically Coenen makes the argument that the right of establishment and freedom to live in any part of the union contributes strongly to the justification for the market participant exemption, because a company can simply move anywhere. In the EU, however, the same argument was summarily dismissed by the European Court of Justice. In Case C-

360/89, *Commmission v. Italy*, the ECJ evaluated whether an Italian law reserving a proportion of "public works to sub-contractors whose registered offices were in the region where the works were to be carried out, and which gave preference in the selection of candidates to joint ventures and consortia in which local undertakings were involved", was conform to EU law (Fernández Martín 1996, 9). In its decision the Court rejected Italy's claims "that no discrimination on the basis of nationality existed", because "any foreign company could eventually benefit from the preference", and considered them discriminatory, because "Italian companies were more likely to fulfill the criteria than foreign ones" (Fernández Martín 1996, 9–10). And nobody seems to have argued in the European Union that preferential treatment is just fine and should be allowed to continue because their own citizens can profit from their state's own preferential procurement rules.

Yet, in the US the practice continues and even seems to accelerate with arguments based on sowing and reaping being triumphant over potential alternative justifications for preferences, such as the environment. Oregon for instance recently enacted (2010) a new 10% permissive agricultural preference bill. The author of the bill, Kathleen West, Sustainability Manager of Multnomah County, wanted originally *only* a 5% preference enacted based simply on distance with the goal of reducing the environmental impact of shipping agricultural goods from further away. However, West notes that "[w]hen I was figuring out how I was to frame the sale of this to go to the legislature, I originally started out with an environmental argument and I quickly found out that that wasn't popular and that it didn't resonate with people. And so then I switched it to a local economic argument, then everyone was wildly enthusiastic about it" (interview with Kathleen West

2010). Indeed, the new law (HB2763) passed the two chambers of the Oregon legislature without any vote of dissent.

Minimal Impact

The minimal impact arguments, i.e. that state proprietary activities are unlikely to impede commerce because they are subject to the same market forces as private parties, the effect on commerce is difficult to assess for state market entry and therefore preferential treatments don't really create any complaints from other states in the polity, don't hold up well either. Once again, the simple logic of the arguments should then apply to the European Union as well. For instance the argument that "the built-in "expensiveness" of in-state marketplace preferences may brake the danger to commerce clause concerns that discriminatory state marketplace actions pose" would have then to apply to European contracting authorities as well and make a centralized and liberalized European public procurement superfluous, too (Coenen 1989, 434). The same goes for the notion that "states as traders often "create" commerce, rather than impede it"; trade which wouldn't exist without the state (cf. Manheim 1990, 587). Also the argument that while "state regulations or tariffs effectively prohibit interstate trade" and therefore the "state's disruption of the "national common market" is plain and powerful", "something different – and less threatening to social wealth-building – may well be happening when a state favors residents in trading its resources" is clearly applicable to the EU Member States (Coenen 1989, 433). But as illustrated briefly above, the market participant exemption has some trade distortions effects similar to tariffs, if admittedly limited to the state's contracting authorities. However, the important point here again is that from the European perspective preferential treatments are seen as a powerful obstacle to a

common market and not used as a legitimization for continued separate public procurement markets. In addition, EU officials found this argument ludicrous when confronted with it in interviews. Sebastion Birch, former member of Lord Cockfield's cabinet in charge of creating the internal market, observed that

> I would have been delighted if a member state had argued its potential to distort markets is far greater in taxation policies than in public procurement that would have been watching a member state shooting itself in the negotiation foot. But I am afraid that I don't remember them being quite that stupid. The arguments that I tended to be exposed to were quite the contrary; member states jealously guarded their own illusion, in my view, [that] their own freedom to tax as they wish was not a distortion and was therefore not something that the single market should affect. Mrs. Thatcher even went so far to claim that the Single European Act had said nothing about taxation and [I] had to have it read out to her in my hearing by my boss (personal interview 2010).

And, Michele Petite, also a former member of Lord Cockfield's cabinet and Director of Legal Services, easily dismissed "the built-in "expensiveness" part of the minimal impact as absurd in face of political reality. He observed that "experience in history shows that public entities do not act rationally" and that it is "naïve" to think that this won't continue old style procurement politics where simply the "politically more involved, politically more aware" firms will win out. Thus, while "[r]ationally people should not need them [EU-wide procurement rules], is defeated in the face of reality" (interview with Petite 2009). And Birch clearly remembers that when any government attempted only to hint at the distinction between the proprietary and the sovereign role of the state that Cockfield "never worried about being rude" by responding that "that as a regulator you are not very effective and as a procurer you only shop at home. So I am afraid you fail on both counts" (interview with Birch 2009).

It could then be argued that maybe the main difference between the European Union and the American public procurement regime rests in the fact that the US

“Framers’ goal in forging the commerce clause was not to maximize economic efficiency”, but rather “the core goal of the commerce clause was and is to engender national solidarity”, while the EU is set up with economic integration in mind (Coenen 1989, 433). However, this overlooks that the goal of European integration going back to the European Coal and Steel Community was to increase solidarity among the Member States to the point of making military conflict impossible and, as has been noted in chapter II, that in the US “[c]ommerce was what had led to rejection of the Articles of Confederation after a dozen years, because confederation tolerated barriers to trade that interfered with creation of a common national market” and “[t]he new Constitution with its stronger national government produced policies that earned America the designation by Europeans as a *commercial republic*" (Lowi 2006, 96).

The minimal effect arguments rely heavily on the notion that comparatively to taxation and regulation public procurement preferential treatments seem less hostile and that the potential economic damages are difficult to assess. Coenen even goes further by pointing out that “when a state passes out benefits in the specific context of making contracts to buy or sell, its presumed right to distribute benefits to its own citizens becomes aligned with the “long recognized right” of a trader to determine with whom it will deal” and that therefore “[i]f it is “obvious that a state may prefer its own residents in distributing its resources, then few nonresidents will take umbrage when a state does so; and if few nonresidents take umbrage, then their home states are unlikely to pursue the retaliations and reprisals the dormant commerce clause was meant to neutralize” (Coenen 1989, 434). Thus, national solidarity is safeguarded.

Yet, this is wrong on both accounts. Similar to the European Union, public procurement in the US represents a huge amount of money and appears to be of great economic significance with huge potential for savings and reduction of state budgets and retaliations seem to be far more common than Coenen surmises.

As has been shown repeatedly by the European Commission for the European Union, discriminatory procurement practices have huge economic repercussions. Commentators, such as Flamme, also already highlighted decades ago the economic importance of public procurement and therefore the necessity to communitarize it despite or rather because states used public procurement as social and economic policy instruments (Flamme 1969, 272-73).[61] Hence, it doesn't take a great stretch of the imagination to envision similar repercussions for the American economy. Indeed, Manheim has made the case that the minimal effects claims in the American context are bogus. He observed that "[a]s the market activities of state and local governments assume an ever-increasing share of our [US] economy – now estimated as high as fifteen to twenty percent of the gross national product […], as state and local investments grow to nearly a half-trillion dollars, and as the number of public employees reaches unprecedented levels, the claim that the effects on commerce by state market entry is "difficult to assess" rings hollow" (Manheim 1990, 589). Moreover, while, as McCue et al. (2007) note, acquiring data on how much American states are actually spending on purchased material and services any given fiscal year is extremely difficult and akin to a

[61] Flamme observes that "[v]u l'importance économique des «commandes publique» - le secteur public étant incontestablement le plus gros consommateur de produits industriels ainsi que de prestations de services ou de travaux immobiliers – une réglementation communautaire s'impose cependant d'autant plus qu'il s'agit en l'espèce de libérer des activités subordonnées plus que d'autres à l'emprise des Etats, soucieux d'utiliser les marches publics comme un instrument docile de leur politique économique, financière et sociale" (Flamme 1969, 272–73).

wild goose chase,[62] some very conservative estimates can be made, which demonstrate the economic significance of public procurement in the United States. McCue et al. therefore estimate that "[v]ery simply, state and local governments are spending, conservatively, 25 to 40 per cent of every tax dollar on purchased materials and supplies for governmental funds and that "[t]he total costs for all purchases, including hidden payroll costs, waste and misuse, processing costs and inventories could bring the value to almost 50 per cent of the total budget" (McCue et al. 2007, 253). Moreover, "[g]eneralizing this to the entire population of state and local governments in the US, this value could range from $1.598 trillion (50 per cent of all expenditures) to $2.396 trillion (75 percent)" (McCue et al. 2007, 253). While not observing how much the elimination of preferential treatments might contribute to cost savings, the authors do point to similar benefits proffered by the EU Commission as regards the modernization of the public

[62] McCue et al. describe the question about how much money states spend on public procurement as a "question that typically cannot be answered by state and local government officials" and that "[i]n all honesty, no one really knows how much is spent, let alone how it is spent or among how many suppliers" (McCue et al. 2007, 252–53). When searching for the answer one gets shoved back and forward from financial to procurement officers (cf. McCue et al 2007, 252). Indeed, a personal inquiry with the Oregon Public Procurement Office and other procurement officials led largely to similar results. Here is the response by a Oregon Public Procurement Research Analyst in its entirety: "I estimate the amount of spend that takes place off of price agreements administered by this Office to be of the order of $300M annually but this is a *wild estimate* only. This spend includes spend from local governments that purchase from state price agreements through a cooperative program. Spend data on ten or so high volume commodity items such as office supplies, computer hardware, software, janitorial supply, photocopier rentals etc. for a cumulative period of 2.5 years ending December 2007 reveal that such local government and K12 education institutions represent about 36% of the entire spend. This ratio pretty much holds over time with slight fluctuations. The cumulative spend was $262.2M, or $105M annually. This represents *only a sample* of all of the spend, presumably about 1/3 of it. There is also spend that is not managed by this Office, and there exists a myriad of ORS citations that give state agencies the authority to procure independently of SPO under specific circumstances. I understand Oregon to be about mid-range on a totally centralized - totally decentralized continuum. […]I have no figures on [public procurement as share of] GDP" (personal communication June 2009, my emphasis). Neither NASPO nor the National Association State Budget Officers (NASBO) were able to provide any data. Representatives of NASBO responded that "[w]e really don't follow public procurement although on our web site we have the Fiscal Survey and the Expenditure Report -- both of which have aggregate spending information for states, although not to the detail of procurement level spending" (personal communication, January 2010). Thus, while general estimates seem to exist highlighting the great amount of money involved in public procurement, complete centralized data is hard to come by. Indeed, many of the procurement specialists I talked to would love to see some data on the overall state procurement spending in general and specific costs involved with in-state preferences.

procurement regime. Thus, they argue that "if a local government, for instance, were to reduce transaction costs associated with the purchasing process by 5 per cent, this could net a 2.75 per cent tax reduction" and "in some cases the savings from more sophisticated purchasing practices could net much larger savings" (McCue et al. 2007, 253). Thus, analogous to the EU, where the Commission establishes a link between public procurement practices and the Maastricht budget criteria, McClue et al. point towards state budget crises by noting that "[d]uring difficult financial times where governments are looking for ways to reduce expenditures, the procurement process may be one area ripe for cost savings" (McCue 2007, 253). Furthermore, the European Commission itself in the Cecchini report took a closer look at American procurement practices and, while taking into account a potential over-estimate, observed that, according to an unpublished paper by Craig & Sailors from Houston University, "States with percentage preference laws spend 3% more in real terms per capita than other states, equal to $1.6 billion in 1980" (WS Atkins 1988, 304).

The impact of preference laws becomes even clearer when looking at, what appears to be on the surface, the least trade distorting preference law: tie-bid preferences. This is a preference to a local bidder only if that bid is identical in price to a bid from a non-resident firm, all things being equal. This is usually seen as "an acceptable and reasonable method for breaking tie bids in favor of the local vendor" and most states and sub-state procurement authorities have such a provision in their laws and regulations (Zee 1989, 8). However, as the following example from Mississippi illustrates, already these "acceptable and reasonable" laws can and do have a huge impact on trade between sister

states. This example is even more illuminating given the dearth of any substantial data on the overall extent of the impact of public procurement preference laws.

In November 2004 the Court of Appeals of the State of Mississippi affirmed the previous ruling of the circuit court and the decision of the Pontotoc County Board of Supervisors in favor of Hooker Construction, Inc., a resident contractor based in Thaxton, Mississippi, to repair and renovate the Pontotoc County courthouse (NO.2004-CA-02446-COA). What happened? In early 2003, after receiving four constructions bids, the Pontotoc County Board awarded the contract to Hooker on the basis that it submitted the best, though not the lowest bid, at $936,000, referring to the in-state preference section 31-7-47 of the Mississippi Code[63]. The low bidder for the contract, with a bid of $914,000, came from Billy E. Burnett, Inc., a non-resident contractor domiciled in Tuscaloosa, Alabama. Billy E. Burnett, Inc., which subsequently appealed the decision to the Circuit Court of Pontotoc County, which in turn affirmed the board's decision. The Mississippi Court of Appeals agreed, arguing that "[w]e are not at liberty to set aside the decision of a board of supervisors unless that decision is "clearly shown to be arbitrary, capricious, or discriminatory or is illegal of without substantial evidentiary basis". Moreover it affirmed the board's belief that the two bids were "substantially equal" and concluded that "[e]specially in light of the fact that there was a *mere* 2.35% difference

[63] **SEC. 31-7-47. Preference to resident contractors.** In the letting of public contracts, preference shall be given to resident contractors, and a nonresident bidder domiciled in a state, city, county, parish, province, nation or political subdivision having laws granting preference to local contractors shall be awarded Mississippi public contracts only on the same basis as the nonresident bidder's state, city, county, parish, province, nation or political subdivision awards contracts to Mississippi contractors bidding under similar circumstances. Resident contractors actually domiciled in Mississippi, be they corporate, individuals or partnerships, are to be granted preference over nonresidents in awarding of contracts in the same manner and to the same extent as provided by the laws of the state, city, county, parish, province, nation or political subdivision of domicile of the nonresident.

While the statute itself is unclear in its language, the Mississippi Attorney General's office has interpreted it as a tie-bid preference in the most recent instruction before the advent of this case (cf. Ms.Ag.Op. Winfield, January 29, 2004), as cited in *Burnett v. Pontotoc County*, NO. 2004-CA-02446-COA, p. 6.

between the bids, we cannot find that the board of supervisors acted arbitrarily and capriciously in awarding the contract to Hooker" (*Burnett v. Pontotoc County*, NO. 2004-CA-02446-COA, p. 4; my emphasis). Thus, a bid difference of $22,000 is effectively interpreted as being zero. While, of course, this raises the question what percentage difference is not going to be construed any more as being substantially equal (5%, 10%?), it is even more significant that this shows that compared to exclusive and permissive in-state preferences, even relative harmless tie-bid preferences, existing in over two-third of the US states can represent considerable costs to the overall US economy and the country's internal market.

In addition to the apparent economic importance of public procurement in the American compound polity, states *do* appear to take umbrage against preferential laws. If states wouldn't take umbrage, than as Coenen argues, sister states would be unlikely to pursue retaliations. However, a simple tally of reciprocal, or rather retaliatory, laws on the books shows that in 2009 35 US sister states have enacted a law similar to Connecticut's brand-new statute (effective October 1, 2009) which holds that "[n]otwithstanding any provision of law, in the award of a contract, after the original bids have been received and an original lowest responsible qualified bid is identified, a state contracting agency shall add a per cent increase to the original bid of a nonresident bidder equal to the per cent, if any, of the preference given to such nonresident bidder in the state in which such nonresident bidder resides" (Oregon Procurement Office 2010). An inquiry with the Oregon Department of Justice about whether they are aware of any specific cases where reciprocal laws have led to conflict between sister states led to the response by the Senior Assistant Attorney General that "the quick easy answer is yes",

but that “the harder question is connecting the given statute or regulation to specific industries or businesses” (personal communication 2009). In any case, this indicates clearly that preferential treatment laws are seen as less innocuous as thought by commentators like Coenen. In fact, according to the latest NASPO survey, these retaliatory laws are on the rise. NASPO in its 2009 survey reported that “the use and breadth of preference policies seems to be increasing” and that four more states have added a reciprocal law since the last survey in 2007 (NASPO 2009, 6). Connecticut passed its reciprocity bill in 2008 with the wide support of the legislature and the local chambers of commerce. Tony Sheridan, the President of the Chamber of Commerce of Eastern Connecticut, was being cited in the Senate leadership’s press release as saying that “[t]he Chamber of Commerce of Eastern Connecticut has started a similar 'buy local' program and it is effective and popular. The Senate Democrats have my full support in their effort to keep tax dollars in Connecticut and help grow jobs” (Connecticut State Senate Democratic Leadership, June 16, 2008).

So where does this leave us? It appears that states, despite the potential for cost savings and the accompanying benefits for their taxpayers, tend to be reluctant to give up preferential treatment or buy national policies. This goes not only for the United States, but to some extent for the European Union as well, where Flamme has, as noted, pointed out that states have tended to see public procurement as a social and economic policy instrument (Flamme 1969, 273). Moreover, part of the goal of the Consolidating Directives in 1993, incorporating relevant ECJ case law, was to define public authorities as widely as possible with the intent to “fight the recurrent practice in public procurement cases, whereby Member States resort to the fiction of declaring the bodies in charge of

the management of public services as formally belonging to the private sector and, therefore, excluded from the discipline of the public procurement Directives" (Fernández Martín 1996, 28). Thus, here appears a certain similarity in logic with the American situation, where private firms and states as market participants are considered immune from the commerce clause. To gain a similar immunity from EU Directives and to be allowed to discriminate from whom to buy, Member States came up with this strategy of declaring public service bodies as private entities. This, along with the fact that compliance with the EU Directives varies largely, reveals that in practice not all EU Member States have always been keen of a centralized and liberalized public procurement regime. Yet, according to Boncompagni, head of the EU public procurement unit for over 20 years, the sowing and reaping argument was to say the least, not very strong in the EU, because to persist on the right to use one's own tax monies for one's own citizens' businesses would mean not to be European. Indeed a difference in thinking about the polity emerges between the EU and the US. Interviewees in the EU, in contrast to the US, where state rights are emphasized over and over again in this context, none of the interviewees couldn't imagine to leave procurement at member state level and allow for discrimination, because "[y]ou understand, this reasoning is a very national one" (interview with Boncompani 2009).

Furthermore, as shown, the major arguments buttressing the American market participant would equally apply to the European, but haven't played the same role. Yet, big differences exist between the European Union and the American public procurement regimes regarding the overall framework. Thus, while EU Member States repeatedly tried to declare public bodies as private entities, they first apparently never made the claim that

all contracting authorities should be immune based on a principle similar to the American market participant exemption and second they have not even been successful with making even this arguably more limited practice acceptable. Consequently, while the EU public procurement market is far from perfect, discriminatory practices in stark contrast to the US are not allowed. Indeed, while the EU's regime might still lack in the practical effectiveness of its regime, "from a legal point of view the relevance of Community legislation is unquestionable" and in the EU the "pre-emption of national competences has been completed by the extension of a public procurement regime to the enforcement level by the adoption of the Remedies Directive" (Fernández Martin 1996, 35). In the US, on the other hand, we have not seen any similar preemption of public procurement. Thus, while some actors in the EU might have harbored potentially misgivings in the 1950s and later on to transfer authority to the EU for the liberalization of the public procurement market, the fact remains that the process of opening up public procurement continued beyond the 1980s with the implementation of a new regime in 2006.

It is also not very satisfactory to point to the US Congress as 'protector of state rights' by arguing that preemption is unlikely because of the institution's many veto points and that the fact that it represents local interests. As noted before, the European Union consists of at least as many if not more institutional hurdles with most decisions having to pass by unanimity or qualified majority voting, which is actually more equivalent to amendment procedures in the United States than simple Congressional majority voting.

Coming Together, Staying Apart: The Respected Presence of a Market Integrator

So why, given that all indications point in the direction that the United States and the European Union as compound polities should have a similar approach to public procurement or that at the very least it should have been the United States which ended up with preemption and a more liberalized public procurement regime, did the EU come together while the US sister states stay apart?

Based on the development of the respective procurement regimes, the presence or absence of a major federal-level agent, such as the European Commission, and the generally positively viewed perception of such an agent seems to largely contribute to the differences in outcome. As Fernández Martin has stressed "the main actors in the conception, justification, and implementation of the [public procurement] policy were Commission services" and "the Commission bears most responsibility for its conception and implementation" (Fernández Martin 1996, 23). It is the Commission, which in its White Paper and subsequent studies, such as the Cecchini report, singled out public procurement as a major area for intervention in completing a truly single market. The central role of the Commission in pushing for an EU-wide public procurement became clear throughout the interviews. Stefan Pfitzer, who works for the EPP (European People's Party) in the European Parliament and was involved with the internal market work in the economic committee in the European Parliament in the 1980s, recollected that the idea to kick-start public procurement as a major EU-wide policy did not come from a particular member state but directly from the Commission (personal interview,

2009).[64] And Michel Petite concurs that "[a]t the time and on this one the role of the Commission, I think was absolutely fundamental. Nobody had the expertise, the breath of coverage to produce any paper like the White Paper" and "[i]t was felt that [procurement] was a certainly a very important building block of [the single market]" (personal interview 2009). In short, the team around Lord Cockfield had the view that in order to remove discriminations and internal borders […] the best methodology was to list all types of obstacles to free circulation, free everything basically and to get rid of them systematically one by one" (personal interview 2009). Indeed, "the intention to cover all the ground of discriminations was absolutely clear in Delors' and Cockfield's minds" and Cockfield [...] kept claiming [that] if you left a single reason for maintaining controls at borders, then they would stay also for all kinds of other reasons" (personal interview 2009). Thus, the approach of the White Paper was to leave "no stone unturned" by informing every Commission service that they had to list all remaining barriers to a complete single market or risk to be left behind in future debates and developments of the EU (interview with von Sydow).[65]

Members of Lord Cockfield's cabinet pointed out in the interviews that the EU Commission is not politically neutral but dedicated to market integration and that they

[64] "Wenn Ich mich richtig erinnere, dass die erste, das der Kick von der Kommission kam , die damals eine Argumentation ausgearbeitet hatte über die großen öffentlichen Ersparnisse, die die gesamten Haushalte der Unionsmitglieder haben können, wenn sie eine unionsweite Ausschreibung machen. Ich kann mich nicht daran erinnern, dass das aus seiner bestimmten Mitgliedsstaatenecke gekommen sei. Das war glaube ich eine Argumentation, die die Kommission ausgeartet hatte, um gerade eine Gemeinschaftsaktion zu begründen gegenüber den Mitgliedsstaaten".

[65] "Ins Weissbuch haben wir alles gebracht, was so oder so der Vollendung des Binnenmarktes im Wege stehen koennte. No stone unturned. Jeden Stein umgedreht, den einzigen Stein, den wir nicht umgedreht haben ist der innerdeutscher Handel zwischen Bundesrepublic und DDR. Aber alles andere wurde dort erwaehnt und angepackt. Schliesslich deswegen weil wir in einer etwas unbuerokratischen Art intern in der Kommission allen Dienststellen gesagt haben, ihr muesst jetzt sagen was fuer Gruende gibt es noch fuer Grenzkontrollen und fuer Grenzen. Wenn ihr es jetzt nicht erwaehnt, koennt ihr nicht mehr in ein oder zwei Jahren damitkommen."

were actively working on a strategy to persuade any potential doubters against integrating policy areas and that Lord Cockfield personally felt that public procurement needed to be included. Thus, Alastair Sutton stressed that

> there is one feature, factor, which distinguishes Europe from America today, which is that still the role of the European institutions is not neutral. Our political institutions are not neutral. They are committed to, legally, constitutionally, whatever the German Supreme Court may say, to market integration (personal interview 2009).

And Robert Coleman, first director of public procurement in 1986 – 1991, after the procurement directorate had been set up, agrees that "there is no such driver with such a clear mission to the exclusion of others in the United States" (Interview with Coleman, 2009). In short, "the United States government doesn't have the same […] constitutional objectives fixed for it", while "the Commission's duty still is to develop an internal market in a broad sense and every Commission that takes office has to confront the fact that that's what its founding documents say it much do" (interview with Coleman 2009). A view shared by Stefan Pfitzer who contends that "the lack to create an open public procurement market in the US is probably due to the fact that in the US there doesn't exist an institution, such as the Commission, which not only has the legislative initiative, but also the mission to create open markets" (interview with Pfitzer 2009).[66]

Now it can be argued that the Commission is a constant factor and therefore cannot explain as well variation in outcomes as regards why certain policy areas have been centralized and liberalized. That's, of course, true to a certain extent. But, first of all, very broadly speaking in terms of the internal market the EU has made quite some constant progress over the last several decades. And secondly we just see a lot more

[66] "Vielleicht fehlt die Initiative die Marktgleichheit in der USA herzustellen. Deshalb weil dort eben nicht eine Behörde den Auftrag hat und das Initiativsrecht hat und g enau dafür da ist wie bei uns die Kommission".

activity and consideration of change in the direction towards a more complete internal market than in the US. In short, the claim that the Commission with is unique mandate is the key source of this movement doesn't mean that this is a single variable theory of market building where the presence or absence of a market integrator, such as the Commission, explicates everything. There are all sorts of things which affect the success of a Commission proposal, which in turn also broadly affects the pace and ambition of Commission proposals, not least the general economic environment. As an EU official remarked concerning the proposals creating a single market by 1992: "It was a sense of hastening to our doom while Japan and the US in particular were prospering. That was part of the motivation for both the proposal and the acceptance of that program" (interview with Birch 2009). Yet, the recent greatest recession in America since the Great Depression of the 1930s didn't lead in the US to any policy proposals to create a liberalized public procurement market. Moreover, an EU official acknowledged that "it seems from the point of view of American states on [the] public procurement front, we might be seen to have overshot and to have gone further for fear of not getting there at all and actually pursu[ing] the intellectual rigor further: (interview with Birch 2009).

In addition, it is certainly true that on any given proposals what the member states are willing to accept is the limit of what can happen, but the real contrast with the US here is that in the absence of any policy initiatives to push for a further deepening of the internal market, we don't know what the formal political powers would accept in America.

Furthermore, even where the Commission fails and encounters resistance it doesn't give up trying to find new avenues, exhibiting an opportunistic wait and see

attitude which lets me predict that even in other policy areas the EU in the long run will end up more centralized and liberalized. Thus, Coleman notes that the Commission always comes back and finds a different solution when trying to reach the goal of further market integration when the first policy proposals fail:

> But you do see examples where [the Commission first failed]. The ports services are a very interesting example, I think it is the only area where the Commission has made two legislative attempts to liberalize and failed. Just hasn't been able to generate the political momentum to overcome the resistance of those who have a stake in the present protectionist system. So does fail here, too, this approach. Nonetheless the Commission tends to come back then, not necessarily with another legislative proposal but some other way of trying to tackle the problem because it feels nonetheless that it has sufficient political support to keep trying. […] Of course, what drives the Eurosceptics mad is this kind of one way clockwork of the treaty mechanism (interview with Coleman 2010).

Indeed, according to Helmut von Sydow the creation of a public procurement regime was only a question of priorities. He notes that they always felt, based on Article 7 of the Treaty of Rome, the non-discrimination article, and the other articles dealing with the free movement of services and goods, that public procurement needed to be liberalized and that they had the authority to do so. Yet, despite the fact that the basic principle of non-discrimination was already anchored early on at the genesis of the EU, "the prohibition to discriminate remains a dead letter as long as public tenders are made behind closed doors, as long there is no transparency" and thus necessitates the *active* creation of specific directives, such as the very first coordinating directives 71/305 and 77/62 (interview with von Sydow 2009).[67] However, as noted in the previous chapter,

[67] "Wir, deswegen erwaehnte ich Cassis de Dijon, festgestellt haben, dass alle Handelshemnisse direkt durch Artikel jetzt 28, und 29 verboten sind. Von daher hat sich, glaube ich, intellektuell nie die Frage gestellt, ist das gerechtfertigt, brauchen wir das. Die europaeische Gemeinschaft is angetreten, um Diskriminierungen zu beseitigen, um Handelshemnise zu beseitigen, aber das Grundsatzgebot, damals war es noch Artikel 7, es gibt keine Diskriminierungen. Auf den Artikel brauchen wir nie wieder einzugehen, weil spaeter im Rest des Vertrages alles fuer Waren-, Dienstleistungsfreiheit usw., im Einzelnen bestimmt ist und weil unsere Vorschriften inzwischen weiter ausgelegt.werden. Das sind nicht nur Diskriminierungsverbote, sondern von nichtgerechtfertigten Hemnisen, jedesmal ein Gueterausgleich. Von

there was a general assessment that these early directives were insufficient. Indeed, the White Paper and the Cecchini report gave a new sense of urgency and sophistication to the creation of a positive procurement market. While as von Sydow points out, they already had a rudimentary economic calculation of the potential costs of a restricted procurement market, the Cecchini report has largely improved upon it.[68] Yet, even the rudimentary calculation based on the argument that while private commerce purchased one-third of its goods from abroad, public entities only purchased only between 0.5 and 1% of their goods from outside of their country and thus the public entities must not be acting economically rational, highlights some very important differences between the US and the EU. First, even *before* the Cecchini-Report, the Commission was trying to use numbers to impress the opening and deepening of an EU-wide public procurement regime, while the absence of numbers or anybody pushing for it in the US is glaring. Second, this argument and calculation based on the behavior of private businesspeople is in many regards the opposite of what has been made in the US. Recall that in the US the justification for the market participant exemption boils down to the notion that public entities can discriminate against other sister states when buying or selling goods or services for themselves because private people can do so. Here, however, the argument is

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daher haben wir immer gesagt, oeffentliche Auftraege muessen liberalisiert werden. Es war hoechstens eine Frage der Prioritaeten war; an was gehen wir als erstes und was nicht. [...]Die Koordinierungsrichtlinien haben wir praktisch nur gemacht weil das Diskriminierungsverbot ein toter Buchstabe bleibt solange die oeffentlichen Auftraeg hinter verschlossenen Tueren vergeben werden, solange keine Transparenz herrscht."

[68]"Und das andere, sehr simple, fast demagogische Argument war, im Privatbereich, beim Handelsverkehr, Privatleute kaufen 1/3 im Ausland, oeffentliche Auftrage sind nur 0.5 bis 1%, also ist doch ist es doch wahrscheinlich das die oeffentliche Hand noch nicht oekonomisch einkaeuft, nicht nach rationalen Kriterien so wie es ein Privatmann machen wuerde. Und deswegen ist es moeglich im Bereich oeffentlicher Auftraege, da koennen sie wieder das Volumen nehmen und koennen sagen, wenn anstatt 1% 20 oder 30% im Ausland gekauft werden, dann komm das und das dabei heraus. Das waren die ersten beiden Grundzahlen mit denen wir gearbeitet haben. Dann hat Cecchini das in einer langen Arbeit mit einer grossen Equipe, lange Arbeit, ein halbes Jahr, vertieft."

that states need to (be made to) act more like private business people, because the actions of private businesspeople show that there is a great potential for cost savings. Of course, what emerges here is a difference in assumption as regards the respective starting position, so few is bought from another state in the EU, while in the US the assumption is that free competition across states usually exists. However, it is absurd to assume that this different assumption alone can explain the difference between the two polities, because this would suggest that the more a country trades internally, the more it should develop barriers to internal trade.

The Commission, indeed, discussed long and hard on how to advance a single market and to convince any potential doubters from the need to tackle public procurement. According to Sebastion Birch, the Cecchini report was a key element in realizing Cockfield's bureaucratic understanding that a true internal market can only be called a single market if it includes public procurement:

> We talked about it a great deal in the first couple of years we were there, but it was quite clear that if we were going to convince a lot of member states including the one my Commissioner had the most reason [to be] suspicious of,[69] it was going to need proper, it's going to need be given a proper framework and that was where Cecchini and the cost of non-Europe and so on came in and bore out in its conclusions that indeed public procurement was one of the, the biggest single things that needed doing. […] Delors and Cockfield were an extraordinary combination in that no two people could possibly be more different […] I don't want to put Delors's vision down, but he was much more general, much more political than Cockfield. Don't forget nobody ever voted Cockfield into anything as a politician. He was a bureaucrat, who then became an appointed member of the House of Lords and was not a politician in that sense [of] a man of political vision, he was a man who was able to put political policies into practice very, very systematically. And he was probably the only member of the Commission that he was a member of that has ever read the Treaty of Rome three times from beginning to end. To him, you couldn't possible have an internal market, a single market without public procurement. The whole logic would crumble (interview with Birch 2009).

[69] Birch refers here to Margaret Thatcher and the UK government.

Michele Petite concurs with Birch's assessment of the importance and intent of the Cecchini report "to strike the mind with very high figures on the cost of non-Europe", admitting that on occasions the report tended "to overvalue the cost argument" (interview with Petite 2009). Moreover, public procurement quickly developed into a key policy area for the overall single market project and the discussion surrounding it because "it was in fact the only major policy were clear numbers could be provided" (interview with von Sydow 2009). As von Sydow put it: "How are you truly able to calculate the rationalization effects in the car or other industries?" (interview with von Sydow 2009).[70] In short, making public procurement a banner policy area was a tool to convince everyone about the potential economic saving effects of a true single market, including other policy areas where the estimated numbers might have been harder to come by.

Besides striking potential objectors with high figures, the Commission also actively changed strategy by adapting and switching arguments in promoting the creation of a true single market. Indeed, when it was well-known that great disparities existed in a given policy area in the US or it didn't seem practicable to make successfully a case for harmonization in the EU, the EU Commission instead of arguing for harmonization of this policy area rather argued that such disparities in the US are a proof that it doesn't hinder the opening of the market. Thus, the Commission only highlighted the existing disparities in America when it fitted its mission to further the single market. Accordingly one EU official recalls that

> I do remember that we did, we did, indeed, have arguments, my memory is not as good as Michele's, [that] the argument, well, the Americans have lived with very

[70] "Im Weissbuch haben wir alle Themen angesprochen. Und dann wurde schnell gesagt, das [public procurement] is ein Hauptthema, weil es ein dicker Brocken ist. In Wirklichkeit war es der einzige Brocken wo man mit Zhalen kommen kontte. Wie wollen sie die Rationalisierungseffekte bei der Automobilindustrie oder anderswo in Ziffern fassen"?

> large disparities between states without having to harmonize was raised and I think and my recall is that it was an enforcement context and it was to do with whether you could nevertheless police it without having physical barriers at, on roads, at borders. Whether it could be done, as we were arguing, by stop checks, by looking at the turnover of traders near borders to see whether even if every single person within 100 miles actually was a confirmed and registered alcoholic they could still sell quite as much booze or whatever was the context in which we were looking at that because I think we have accepted that there was it was not going to be a fruitful argument, look at how harmonized what state legislation is as between states, let alone neighboring states, because we would shoot ourselves in the foot, because we knew that it wasn't (interview with Birch 2009).

In short, the EU officials involved were aware that this was "ultimate[ly] a political negotiation [where] you shift your ground according to where your argument is the strongest", admitting that "we *only* used the American example of strong differences between rights in the enforcement argument, because there aren't physical barriers on the roads between the states on the whole rather than the harmonization argument" (interview with Birch 2009; my emphasis). Michele Petite, moreover, recalls that they were studying the US at that time in regards to the country's varying sales tax, realizing then that while harmonization of VAT in the EU was neither a feasible argument to be made, given the US situation, nor an easy practicable solution, in the light of different positions of member states in the EU that at least a case could be made for a polity-wide minimum rate:

> The VAT issue was probably the most thorny one within the internal market debate. […] On VAT member states were opposed to any move, because you had to do with finance ministers, highly, whose only question was there will be evasion, which is a good issue, but focused solely, probably overfocused on that. […]And at the time we had been studying the situation in the US with the sales tax in the US to check in real terms, in you know, on the ground what kind divest purchases are made when there are big differences in sales tax from state to state. And at the time the widest was between the State of Washington and Oregon. There was zero [in Oregon] and something like 9 or 10%, a high sales tax in Washington. And there was mission there sent there to study the effects of these differences. The result being that beyond 50 kilometers, people simple don't go; or hardly any. Switch is really very minimal and finally the end product was that after all we not harmonized the rates but everybody should have a minimum rate

> of 15%. So you would in fact, you would reduce the gap between two states. That was sort of the lesson from the US at the time (interview with Petite 2009).

These examples show clearly that when the Commission has been aware of state rights and differences in the US, the Commission chose apparently only to employ them when it was useful to forward the market integration agenda. As regards public procurement specifically, the Cecchini report, as noted earlier, dedicated an eight-page section alone to the state- and local-level American public procurement regime stating that "[s]ome 20 states retain statutes allowing purchasers to give preferential treatment to in-State suppliers" and that "[p]reference policies are generally more stringent a lower levels of government" (WS Atkins 1988, 304). Yet, although this might have been valuable ammunition for anyone opposed to a liberalized EU-wide public procurement regime, "[i]t possible just shows that on the whole people don't read these reports and therefore not enough people who might have made good capital out of that actually exploited it" (Interview with Birch). Indeed, while recognizing that "we were actually less conscious of the potential pitfalls of such comparisons", an EU officials observed that "we endlessly discussed [the Cecchini report] with those who were producing it" and "thought we were really well-briefed on what the examples were we should be making use of in terms in the ways the US and other economies were organized" (Interview with Birch, 2009).

It is especially in contrast with the US and in regards to the reaction and involvement of big business when the political entrepreneurship of the EU Commission emerges. As Alter and Meunier-Aitsahalia (1994) have already argued in connection with the path-breaking *Cassis de Dijon* decision, it wasn't the European Court of Justice (ECJ) and the perceived legal audacity of the decision, but rather "the political use and

counteruse that was made of the rule", which made the case famous (Alter and Meunier-Aitsahalia 1994, 541). Indeed, according to the two authors the ECJ's decision actually "softened the Court's position regarding nontariff barriers" (Alter and Meunier-Aitsahalia 1994, 540). The Commission, however, "extracted from the decision those aspects useful for developing a new approach to harmonization policy, to satisfy its own political agenda of completing the internal market and furthering European integration" (Alter and Meunier-Aitsahalia 1994, 541). Thus, similar here, the Commission took the initiative to create reports to buttress its cost savings arguments and bring business alongside it.

It could, of course, be argued that if it wasn't the courts *per se* that the creation of polity-wide public procurement in the EU was first and foremost the result of the interest and lobbying of big business. There is something to be said for this, especially in the light of the absence of similar big business organizations pushing for it in the US. Certainly the courts and big business played an important supportive role in the process of transforming public procurement from its Cinderella-style origins to a major policy area, yet it was largely in reaction to policy initiatives taken by the EU Commission.

First, there appears to be hardly any doubt that the very first steps towards an EU public procurement regime in the late 1960s and 1970s resulted from the action of European-level bureaucrats. Big business had not yet coalesced around Europe-wide policy issues. Overall there was a "lack of big business participation in the early years of the Community" with the result that "the mobilization and political activities of big business [was] a novel phenomenon for European multinationals" in the early 1980s (Cowles 1994, 195). Indeed, "the foundation for the European Common Market was laid and developed without the input or support of big business" and most big business

"policy statements were *in response to* Commission proposals and legislation" (Cowles 1994, 42 and 114, Cowles' emphasis). Hence, an European official confirms that

> in the 60s I doubt whether [public procurement] was driven by the industrial side. I would think hard men in many ways of the Coal and Steel Community and the others who have been recruited in Brussels, often bright young people who were going systematically through, looking at everything they needed to do create a common market. And because of the breath of the Treaty of Rome there was a possibility to address this issue and it was still nearly required because of the way the economies were not integrated with important public sectors in very close relationship with their national suppliers. So I would think it would be the technocrats, if you were (interview with Coleman 2009).

And indeed the first call for liberalizing public procurement apparently emerged from the Commission paper commonly called the "Colonna Report" (COM(70) 100 final)[71] and not from business, which largely remained anemic. While the 1970 report therefore argued "for a stronger European industrial policy" and "the creation of a single European market thereby eliminating NTBs and opening up public procurement", "there is little evidence that large European firms followed the developments closely" (Cowles 1994, 122–23).

Secondly, while the situation and the involvement of multinational corporations in the building of a common market changed in the 1980s, the Commission nevertheless remained at the heart of it. Thus, even Maria Cowles, whose first major research project, also largely based on first-hand interviews, focused on establishing the claim that big business hugely mattered in the creation of the single European market, provides, somewhat unwittingly, strong evidence that it was the Commission who was the linchpin and catalyst of the single market project in general and public procurement in particular. Thus, while she contends that "[t]he structural power of organized European big business

[71] The report was named after the former Internal Market and Services and the then Industry Commissioner Guido Colonna di Paliano.

[…] was the primary force behind the establishment of the Single Market program" and that "major industrialists were a driving force behind the Single Market Program", mobilizing for "the first time in the early 1980s to assume a political role in Community policymaking", Cowles also notes that the impact of Lord Cockfield's and his team's White Paper's was not immediately apparent to businesses and member governments. In fact, business even asked Lord Cockfield to dial down and he refused. His response to business was to take it or leave it. Thus, Cowles writes that

> Unlike Commissioner Narjes, his predecessor, Cockfield and his associates managed to impose coherence on the single market concept. […] Cockfield was determined that the heads of state or government would act on the White Paper. First, he sent the document out only 10 days before the summit to give the Council member enough time to become "enthused" by the document, but to deny their officials ample opportunity to recognize the degree of national sovereignty that would be delegated to EC institutions under the plan. Second, Cockfield carefully listed in the White Paper the European Council's earlier declarations supporting the creation of an Internal Market in order to hold the heads of state and government accountable for their words and to back up the document legally. […] The immediate impact of the Cockfield White Paper was not readily apparent to big business, the Commission, or even the member governments. As an official of the ERT [European Round Table] secretariat noted, "The White Paper was born to the smallest fanfare, like a lead balloon. No one was interested. I can remember thinking 'what a dull document'… Yet [in time we realized that it was] revolutionary." Several ERT members believed that the White Paper was too ambitious and, therefore, that the member governments would never implement it. They approached the Commission to ask Delors and Cockfield to focus on specific legislation within the White Paper. Cockfield refused. In the Commissioner's view, the integrity of the program could not be compromised. […] The Commission's message to the industrialists was the same as to the Member States – "take it or leave it". Recognizing Delors and Cockfield's solid commitment to the program, a number of ERT members actively began to promote the White Paper. Their promotional activities were directed at their respective governments as well as at their national business associations (Cowles 1994, 243–45).

In short, what this excerpt demonstrates is that big business followed the Commission's lead by helping convince their own governments to agree to the goal laid out in the White Paper. Big business usually tended to react to the Commission's

initiatives. It was the European Commission which "began meeting with chief executive officers of leading firms to promote European-level solutions to the economic malaise" (Cowles 1994, 43). Indeed, Cowles admits that even in the "official transference arena", concerning policies involving the transference of powers, competence and/or funding from the Member States to EC institutions, or changes to the formal structures and/or procedures of the Community", exactly the arena where member states and intergovernmentalist explanations should be the strongest that "[t]he European Commission, for its part, often is a facilitator in the policy process, though it may also serve as an agenda-setter in certain situations" and that it "played an important agenda-setting role in the negotiations leading to the Single European Act, for example" (Cowles 1994, 59). In fact, the first coming together of big business was the result of Commission activity. US companies specifically felt threatened by Commission policy proposals on multinational enterprises and the fact that they did not have a member state to speak up for them. Thus, recognizing "the call for greater union activity and European collective bargaining agreements was not being made by the trade unions – *but the Commission itself*", "prompted American MNEs to pay attention to the European Community" and to organize "the first ad-hoc MNE groups […] at the EC-level" (Cowles 1994, 130 and 133; my emphasis).

This is not to say that business didn't play a major role. Certainly the entry of the UK in the EU and with it the Confederation of British Industry (CBI) was a noteworthy factor in the shaping of the EU's future industrial policy. Maria Cowles accordingly observes that the arrival of the UK in the EC in 1973 not only "changed the status of MNEs in Community policymaking", but that "the CBI Europe Committee worked

diligently to champion European industrial policy both in London and in Brussels" and that "[o]ne approach, of crucial importance to certain sectors of industry, was to open up public procurement contracts among EEC member states" (Cowles 1994, 133–35). One of the key members of the CBI Europe Committee and "most ardent proponent of this approach" was Boz de Ferranti, president of Ferranti Ltd., a British electronics firm (Cowles 1994, 135). As Cowles remarks in a footnote:

> His company produced one of the world's first computers, selling ten in the UK market. Ferranti soon discovered the difficulty in selling his computer outside the UK market. Ferranti's business was challenged by IBM which succeeded in selling over 100 computers in its home market, the United States. For De Ferranti, the opening up of Europe's public procurement markets was vital if his company was to effectively compete against the American companies. Ferranti would later be appointed as head of the Industry group of the EC Economic and Social Committee where the continued to promote the opening of public procurement markets. In 1979, he was elected to the European Parliament where he championed his belief in a common European market through the creation of the Kangaroo Club. The club's publication, Kangaroo News, was later funded largely by multinational corporations – the first contribution coming from ICI" (Cowles 1994, 135).

Yet, the UK's entry happened after the Colonna report and after the very first directive dealing with public procurement (70/32/EEC). Moreover, other trans-European business organizations, such as UNICE (Union of Industrial and Employers' Confederations of Europe),[72] founded in 1958 "to track the political consequences of the community created by the Treaty of Rome", "did not address technical barriers or public purchasing – two key areas of the Commission's industrial program, and presumable two key areas of interest to European business" (Business Europe 2010; Cowles 1994, 137). Actually, realizing the relative impotence of UNICE vis-à-vis their own industries and governments, Étienne Davignon, European Commissioner for Industry from 1977 to 1985, changed tactics "[i]n order to persuade Member State and Community officials of

[72] UNICE changed its name to BUSINESSEUROPE in 2007.

the need for Community action in the various industrial sectors" (Cowles 1994, 142-43). He took the lead by, for the first time, "*bypass[ing] the more traditional forms of business representation in favor of individual European companies,* and by also *"bypass[ing] Member States,* [he] would often bring his ideas to the heads of firms first who would later seek to influence their national governments on the merits of Davignon's proposals" (Cowles 1994, 143; emphasis in original). Cowles, however, also circumscribes Davignon's contribution to the setting the stage for an internal market and more particularly a polity-wide public procurement regime by observing that "[i]f Davignon's work in industrial matters had a particular shortcoming, it was the lack of attention devoted to "internal market" matters such as standardization and non-tariff barriers" (Cowles 1994, 145). In her eyes it was the European Roundtable of Industrialists, which was the key promoter of an European internal market. She contends that "the ERT largely was responsible for setting the agenda of and for the Single Market Program – thus, relaunching the Community in the 1980s" (Cowles 1994, 200).

Yet, her own evidence shows business not only reacting to Commission's initiatives but the Commission's involvement in creating its own supportive environment by suggesting the creation of the ERT in the first place. Thus, as mentioned above, Cowles notes Lord Cockfield's refusal of big business's request to dial down his team's proposals made in the White Paper and the fact that "[*i]n the aftermath* of the Cockfield White Paper in 1985, multinational firms as well as other groups in the European business community were concerned with UNICE's capacity to respond quickly and effectively to the growing amount of EC regulatory legislation (Cowles 1994, 178; my emphasis). Furthermore, it was Davignon, together with Volvo's Pehr Gyllenhammar

who formed the ERT, borrowing the name from the US Business Roundtable (Cowles 1994, 213-14). It was, indeed, the Commission that suggested, initiated and gave aid to this new trans-European business organization, including providing its own building as a first meeting place. The ERT's agenda was worked out from the inside of the "deserted offices of the Berlaymont over a series of Saturdays" in the presence of Étienne Davignon and other Commission officials (Cowles 1994, 214). Thus, not only did Davignon find "in Gyllenhammar the individual to take on the task of organizing such a group",[73] but Gyllenhammar "followed up on Davignon's suggestion" and "enlisted the assistance of the Commission" in drawing up "a first list of potential industry members […] in 1982" (Cowles 1994, 212–13). The idea was to get together a group of "progressive business leaders "who had a reputation beyond management, who had weight in public opinion, who had political influence (Cowles 1994, 213). In turn, the ERT staff then got prime access to Commission projects by having "direct links with all the Commission directorates with whom [their] projects fell" and by directly receiving from Commission staff "the "state of play" on" all relevant policy issues (Cowles 1994, 225). In addition, Davignon "promoted the ERT's activities with national officials" (Cowles 1994, 225). Thus, it shouldn't come as a surprise "therefore, when the proposals of the French government's industrial initiative in September 1983 largely reflected the ideas discussed in the original ERT memorandum", which included a passage on the opening of public procurement markets (Cowles 1994, 231). The ERT hence seemed to have worked here as a transmission belt for the EU Commission. The ERT helped the Commission "[l]ater, when Member States appeared to hesitate in their support for the Cockfield White Paper and Single European Act" by using "negative incentives or "sticks

[73] In fact, by choosing the Swede Gyllenhammer, Davignon chose an EU 'outsider' at the time.

– namely the threats to disinvest from Europe if progress on the Single Market program was not forthcoming", to change the mind of member governments (Cowles 1994, 275). In later year the Commission continued "to recruit ERT members to appear publicly with Commissioners at news conferences and/or to serve on high-level task forces", which lent "legitimacy to the Commission's programs and leadership capabilities" (Cowles 1994, 258–59). And Davignon himself became an influential, official member of the ERT for a decade and a half after leaving the Commission in 1985.

The situation in the US contrasts sharply with the European Union where, while business has played an important supportive role in the creation and transformation of an EU-wide public procurement regime, the Commission has been its initiator and main promoter. In fact, it appears that the Commission has created its own permissive and supportive environment by not only commissioning economic impact studies to convince any skeptics of the importance of liberalizing public procurement but also by fostering the formation of new business interlocutors and winning over new, influential actors through access and dialogue.

A similar federal-level agent with a mandate to create a single market and deepen its integration is absent in the American institutional context. Thus, no general, sustained push for integrating public procurement by eliminating preferential treatment policies either by judicial fiat or congressional preemption has been made. Nobody has created a study figuring out what the cost of non-America is in the public procurement sector and then use it to convince state governments and business organizations. Therefore, it appears that the absence of an institutional feature in the United States focusing on the entirety of the common market strongly contributed to the differences. Indeed, McCue et

al. hint also at a general neglect and disinterest in public procurement in the US. They contend that "no one really cares about this very critical government function" (McCue et al. 2007, 253). Indeed, they try to explicate "[h]ow could any area of expenditure be so large and so forgotten" by observing that "[p]art of the answer may lie in the fact that it is buried by lack of interest and other priorities confronting managers, and has therefore stayed out of sight" (McCue et al. 2007, 253). The EU Commission, on the other hand, has shown great interest in creating a single, complete public procurement market based on a neo-classical concept of market economy. As Bovis has pointed out throughout his articles and books, the European public procurement regime "displays strong neo-classical influences," influences embracing "the merit of efficiency in the relevant market and the presence of competition, mainly price competition" (Bovis 2005, 109). In short, "[t]he connection between public procurement regulation and the neo-classical approach to economic integration in the common market is reflected in the criterion for awarding public contracts based on the lowest offer " and the Commission's skepticism "of any attempts to apply so-called "qualitative" factors in the award process" (Bovis 2005, 109 and 111).

As a matter of fact, while the EU Commission with its White Paper and the subsequent Cecchini Report has clearly laid out the economic impact which trade barriers in public procurement have for the overall European economy, a similar study in the US is absent; McClue et al.'s study presently being the best estimate available. State procurement officers and specialists have repeatedly noted their concern about the continuing practice of in-state preferences, but have toned down their official resistance. Thus, while the latest (2009) Survey of State Government Purchasing Practices

commission by the National Association of State Procurement Officials (NASPO) expresses its concern that "[t]he use and breath of preference policies seem to be increasing", the organization's previous official position against these preferences has been revoked. Yet, the former president of NASPO and chief procurement officer of Alaska, Vern Jones, noted that "without doubt if you would poll the members they would overwhelmingly not be supportive of in-state preferences. I can tell you that" (interview with Vern Jones 2009). But American state legislators as well as the National Conference of State Legislatures (NCSL) tend to express their resistance to any federal interference into state public procurement and frequently utter a preference for in-state preference in the absence of any complete economic impact study such preferences might have. Accordingly, the NCSL states as one of its four major concerns that "the federal government resist the temptation to preempt state laws" and specifically demands in regards to public procurement that the "USTR consult with state legislatures about state procurement practices" and that the "USTR should only be able to bind a state to an international procurement agreement following formal consent from the state legislature", because "[s]tate procurement policy and practices often are set in state law and are sometimes designed to serve social or economic purposes beyond the mere provision of goods and services for state government use" (NCSL 2009a and b). The NCSL calls any other approach by the federal government as "unacceptable" and troubling (NCSL 2009b). And when the question of cost of possible preference bills are being raised in legislative debates, the answer often is that the assumed impact is either minimal or overall beneficial for the in-state companies. Thus, following Connecticut Senator Debicella's inquiry whether there was "ever a public hearing on this topic [of

creating an advantage for in-state businesses when competing with certain out-of-state companies for state contracts]", the reply by fellow Senator Williams was "no", but "[t]his is a fairly benign tool that we can use that will at the same time provide some benefit, real potential benefit to Connecticut companies". In response Senator Debicella noted that "obviously, I won't even ask the question because we didn't have a public hearing on this, we have no data on this whatsoever, the number of instances that this would have actually been triggered in the last year". And Connecticut Senator Lebeau, chairman of the Commerce Committee, rising in defense of Public Act 154 admits that "[w]e don't have the knowledge" and that "[w]e don't know how many companies this would have affected", because "[t]hat would have been an enormous study to do, by the way, to figure out how many contracts could have possibly been impacted by this in the past, say, year". Yet, he contends while "there's going to be a lot of instances where this [bill] is going to put Connecticut companies in play, "it's benign" and "that there's very little harm to come from the bill, but it can do a lot of good" (Transcript Connecticut Senate, May 2, 2008).

Given this known attitude and position of legislators and legislatures and the absence of any detailed impact studies, public procurement officers are reluctant to publicly state their misgivings because

> It's not that, well, it's not that you are worried about, you know, am I going to get fired if I do this, it is just, professional don't take a position in an organization that they are a member of by virtue of their position. They don't take a position in that organization contrary to their own state's official position (interview with Vern Jones 2009).

Hence, in the US, in contrast to the EU, where the Commission has taken the lead, there is no one actually pushing for a polity-wide procurement regime. Moreover, while public procurement officers are reluctant to take the lead, national business organization

are also not taking up the slack as hoped for by procurement officers.[74] Indeed, you would expect that given the usual analytical perception that "[t]he US MNEs tend to share one binding philosophy of market liberalization unlike their European counterparts that hold different levels of consensus toward liberalization", that there would be strong support to open up the public procurement market in the US by eliminating any remaining non-tariff barriers (Cowles 1994, 315). Yet, in the US, in the absence of a polity-wide organization advancing market integration, big businesses don't even tend to see public procurement as a national issue or argue that in engaging this issue they would have to prefer members from one member state making up their organization over another. Thus, as one unidentified U.S. Chamber of Commerce official put it to me, the Chamber doesn't "get into states", because this would mean "we would chose winners and losers" and "we would have then to choose one [state member] chamber over the other" (interview December 2, 2009). Consequently official comments like these from the U.S. Chamber of Commerce, the National Association of Manufacturers and the U.S. Business Roundtable are quite common:

> We don't really have a formal position on that. (Joe Crea, Business Roundtable, 2009)

[74] "I don't know of any organized group, you know, like chamber of commerce or any other business associations nor procurement groups that are actively pushing it. There is one group called "National Institute of Governmental Purchasing", NIGP, I believe they have, they may have a policy, but they are not there lobbying. The reason well, take my example. I was president of NAPSO and I was chairman of the Western States Contracting Alliance, WESCA, for years. I am the head of this national purchasing organization and the regional purchasing organization, which all its members probably or the majority at least believe that preferences are not good for business. Yet, am I going to go out to lobby Congress to overturn legislation that has been past in my state? How long would I you know, how long would I be allowed to do that [chuckles] by my employer here in the state who is on record as saying we like these preferences? It's not going to happen. I think it would have to be, it would probably have to be some, from business groups, from the chambers, or like some associations, business associations, but obviously these preferences haven't risen to the importance to them, for them to spent money and time doing it. Maybe they are just accustomed, resigned to their existence. I don't know. I don't know any organized opposition out there" (interview with Vern Jones 2009).

> The Chamber, to my knowledge, has never commented on this issue. I believe many of the states do follow to some extent the Federal Acquisition Regulations as a model, but there are many differences across state lines. This has caused some companies to wish that there was a standard set of regulations across all states, but I am not aware of any significant push in the recent past to make this happen. Would be very difficult to make this happen anyway, many states rights issues. Companies that focus only on one state also would not want those regulations to change to be consistent across all states necessarily. Can be barriers to entry. (Chris Braddock, U.S. Chamber of Commerce, 2009)

> The NAM has not to my knowledge focused on these issues of State and Local procurement. Obviously we support transparent, fair, and competitive bidding in any sort of procurement. But as a national organization we focus on national issues. State manufacturing organizations are more likely to focus on state and local procurement rules and procedures. But, as you pointed out, the in-state companies may have a bias toward protecting their home turf. (Shaun Donelly, National Association of Manufacturers, 2009)

As a result, what became quickly evident in the interviews, in addition to the decisive role of the Commission, is the different way of thinking about the market in the US and the EU. The conception of the market turned out to be much more parochial in the US than in the EU. Creating a common market in public procurement in the EU was seen as involving the entire system, the entire polity, while in the US state rights and state memberships in national business organizations were emphasized. In short, it appeared that in some ways there was and remains an absence of a national vision in the US. Moreover, as recent studies appear to confirm, businesses and average citizens in the EU are much more likely to turn to the federal-level institutions to resolve policy issues and express a greater level of trust in them, despite a growing Euro-skeptic literature worrying about the future of the EU,[75] than in the United States. Thus, what we potentially see here in the EU then is, while not yet necessarily transference of allegiance, at least a much stronger acceptance by big business of a strong central government

[75] In fact, one of the problems of the Euro-skeptic literature is that it remains largely non-comparative, reaching dismal conclusions without noticing that other functioning democratic polities might even experience lower levels of support by citizens.

shaping industrial and market-integrating policies. Hence what might look at first glimpse as a major paradox that "European-based MNEs "tend to retain a stronger national identity" to their home governments than do American firms" due to "the historic relationship between firms and governments beginning with the early history of European industrialization", might actually help to explicate why Europeans are more willing to work with the Commission (Cowles 1994, 17–18). European businesses are used to a strong bureaucratic state, given that it emerged alongside or even preceded the multidivisional firm and that had a very active role in the industrialization and economic growth of Europe, while the reverse is true for the US (Vogel 1978). Thus, the European Union and particularly the European Commission playing the active role of market integrator is nothing new and in many ways simply an extension of 19the and early 20th century policies to a larger geographic area.

European officials hence repeatedly highlighted the importance of imagining the EU as a whole, noting that "[e]verybody was persuaded that to put all the industries in the Community in competition that would increase the gain" and that this "is the system in which anybody will earn money, if somebody is at a lower level than the other, they have the chance to ameliorate" (interview with Boncompagni 2009). This way of thinking diverges from the more parochial, protectionist way of perceiving the public procurement market in the US. An American procurement specialist accordingly noted that the EU and US difference for him is "partially a cultural issue", because "within the US [you] take care of your own, your own state or your own county. We want the money here, we will lobby strongly for that and even though it seems if pure competition and complete free enterprise system across the states would be more cost effective, more efficient"

(interview with Matthews 2010). The desire not only to perceive but also to turn the US market into an amalgam of local markets became clear in an exchange with the author of Oregon's new 10% permissive agricultural preference bill, Kathleen West:

> West: I don't really know what to call [it] myself, but if you really want a sense of place that's not the value that you, you don't value just the cheapest good, no matter that it may destroy the local economy, it may destroy your sense of place. So I would rather pay more for goods and services if I know that I had a strong, resilient local economy. I have a good environment and I have a sense of place. I don't want carrots from Georgia, I want carrots from Oregon.
>
> Hoffmann: But wouldn't this also be shifting the costs if we buy more local, wouldn't this affect a farmer somewhere else in the US and wouldn't he lose revenue?
>
> W.: Yeah, that's true, but you know what that's, they need to do the same thing.
> H.: But then we would end up with each state having more and more in-state preferences and we would become more local, and have more barriers among the states.
>
> W.: Great. I would love that. I would love that. I don't think that goods need to be shipped everywhere. If I could get my community to consume or to eat 50% of the food that is consumed here, that would be ideal for me (personal interview 2010).

This demonstrates again that in the absence of an influential agent dedicated to polity-wide market integration more local conceptions of market organization might win out. A focus on the more local also finds its expression in the general attitude of the American citizenry towards government in general and federal-level government in particular. A Spring 2010 by the Pew Research Center noted "[t]he public's hostility toward government" and that "[r]ather than an activist government to deal with the nation's top problems, the public now wants government reformed and growing numbers want its power curtailed". In short, "there is less of an appetite for government solutions to the nation's problems – including more government control over the economy" (Pew Research 2010, 1). While the numbers have gone down for all levels of government

(federal, state, local) as regards whether government has a positive impact or not, demonstrating an overall, system-wide weariness with government, American citizens continue to rate more local levels of government better (Table 1).

Table 1: US: Positive Impact of Government on Daily Life in %

	1997	**2010**
Federal	50	38
State	62	42
Local	64	51

What is striking, however, is not the apparent present-day decline of Americans' trust in the federal government but its consistency over the decades. Only once since 1972 have more than 50% of the American population trusted in their federal government, right after September 11. The only other time the American federal government enjoyed high levels of trust (47%) among the American population was at the beginning of the first Gulf War in 1991. For most of the time, however, trust levels hovered in the upper 20 and 30 percents (Pew Research 2010, 13–16). Presently only 22% (!) of the American population say that they "can trust the government in Washington almost always or most of the time (Pew Research 2010, 2). The Pew Research study further notes that there is "no single factor that drives general public distrust in government" (Pew Research 2010, 4). Moreover, when it comes to the American federal government solving economic issues, especially those which might touch on (perceived) state and local issues, Americans are especially loath. Thus, the Pew Research study reports that "the public is wary of too much government involvement

with the economy" and that "most American (58%) say that "the government has gone too far in regulating business and interfering with the free enterprise system", a percentage similar to October 1997 during the booming Clinton years (Pew Research 2010, 9). In addition a "[f]ully 74% think that the federal government does only a fair or poor job running its programs" and a substantial majority (58%) "say[s] that the federal government is interfering too much in state and local matters" already (Pew Research 2010, 7-8). Indeed, for political commentators, such as E.J. Dionne, this kind of "profound mistrust of power in Washington, D.C.", has a long and established tradition going all the way back to the Anti-Federalists opposing the Constitution itself and "is not amenable to "facts" – not because it is irrational, but because the facts are beside the point" and thus "[f]or the anti-statists, opposing government power is a matter of principle" (Dionne 2010, A25). But it is not only the general population, but also American business leaders who are traditionally distrustful of government. Hence, according to David Vogel, "[t]he most characteristic, distinctive and persistent belief of American corporate executives is an underlying suspicion and mistrust of government", and this "distinguishes the American business community not only from every other bourgeoisie, but also from every other legitimate organization of political interests" (Vogel 1978, 45). He notes further that "[f]or virtually all American businessmen […] a critical authoritative concept in terms of which they make sense of the world is the notion of governmental involvement as inimical to a sound economy and incompatible with a free society" (Vogel 1978, 46). Thus, for Vogel, "[w]hat is so striking about American business ideology is the remarkable consistency of business attitudes toward government over the last one hundred and twenty-five years" (Vogel 1978, 46).

The general attitude towards federal-level government in the US remarkably differs from the European Union where, while "trust in the EU has fallen from 48% in autumn 2009 to 42% in spring 2010", "far more people continue to trust the EU than their own parliament (31%; +1) or their own government (29%; unchanged)" (Eurobarometer 73, 15). More specifically, while the Commission's trust levels consistently are lower than the EP's, the trust levels are comparatively high when compared with the US, ranging usually in the mid and upper 40s since 1999 (Eurobarometer 71, 114). Thus, while in the US more citizens tend to trust their local and state governments than the federal government, the reverse is true in the EU. Here a majority of citizens trusts the federal-level institutions more than their member state governments and legislatures. Moreover, the 42% level of trust in the EU in Spring 2010 is 20 percent points higher than the trust expressed by American citizens in their federal government at the same time. More significantly, however is the fact that in the European Union, "Europeans want more decision-making at the EU level" (Eurobarometer 71, 147). In spring 2009, "an absolute majority of respondents believe that more decisions in a number of areas should be taken at the European level" (Eurobarometer 71, 147). Indeed, "support for taking more decisions at European level has risen over the years and in all the areas discussed" (Eurobarometer 71, 147). Support for more involvement of the EU ranges from a high 81% for fighting terrorism to a low of 60% fighting unemployment. 70 to 72% want greater EU involvement and decision-making regarding health issues and ensuring economic growth (Eurobarometer 71, 148). This represents a striking contrast to the 58% of American who already say that the US government has gone too far in regulating markets. In fact, the high level of support for EU decision-making is not

temporary and even increased in several important areas. Thus, while a majority of EU citizens still prefers member state governments to decide in policy areas where the taking into account of local considerations are very obvious, such as education, cultural policy, rules for media and policy, "it is important to note that the number of policies in the EU domain (i.e. a Union responsibility) has always exceeded that in the national domain (i.e. a national responsibility) from 1992 to 2006 (Caporaso and Kim 2009, 26). In fact, as Caporaso and Kim also have noted, "the majority of Europeans favor joint decision-making in the policy areas that were traditionally regarded as the core of national sovereignty", such as foreign policy, currency, immigration, defense, and political asylum (Caporaso and Kim 2009, 26).

The diverging attitudes in the EU and the US towards federal government in general and specifically as regards intervention in the market, even if it potentially means a liberalization of the markets, emerge therefore to be important part of the puzzle why the EU has been more successful in liberalizing public procurement. The more positive attitudes towards the federal-level creates, all things being equal, a more permissive environment for the EU Commission to enact its pro-market integration agenda.

Conclusion

As this and the previous chapter have shown, a closer look at the respective public procurement regimes of the United States and the European Union leads to very surprising and unexpected results. While in both entities actors are aware that preferential treatments for in-state suppliers are a form of stark discrimination and "one of the most obvious and anachronistic obstacles to the completion of the single market", the European legal framework in public procurement clearly shapes up qualitatively

differently from the American regime (Asenjo 2007). But it is not in the United States where we end up with a liberal procurement regime. Starting with the first specific directives in the 1970s, the European Union has completely preempted public procurement establishing an EU-wide public procurement regime based on non-discrimination, transparency and economic efficiency. This liberal procurement regime, despite notable shortcomings on the implementation and enforcement side, contrasts starkly with America's protectionist procurement regime where states retain the right to freely discriminate against out-of-state bidders and where no federal preemption has taken place so far to overcome these barriers to achieve a genuine internal market. Indeed, around the same time as the EU was starting to implement its first procurement-related directives with the intent to eliminate non-tariff barriers in public procurement, the US Supreme Court in a string of court cases, starting with *Hughes v. Alexandria Scrap Corp*. in 1976, establishes the market participant doctrine allowing for states to continue preferential, discriminatory treatment practices on the basis of states being conceived as acting as private traders when buying goods and services for their own needs. To justify the US Supreme Court's decision and the US states' practices, a number of arguments have been made to explicate the American protectionist procurement regime. These arguments based on the notions that states should have the right to reap what they sow, that states are laboratories of experimentation and that therefore protecting state autonomy in public procurement is beneficial for the entire polity and that the trade distortion effects of this rule are minimal in comparison to regulations or taxation should be, as this paper argued, as compelling in the EU context. However they don't appear to have played a significant role and even from the US perspective, the

justifications don't necessarily make always a lot of sense. Also the argument that general congressional reticence towards preemption measures as well as the inherent veto points in the institutional make-up of the US Congress can per se explain why there is no preemption of public procurement in the United States overlooks that federal preemptions in the US have increased over the last couple of decades and similar, if not more, veto points exist in the European Union.

It appears therefore that the difference in outcomes is mainly due to the unique role of the European Commission, which has identified public procurement in the 1980s as a major sector to liberalize to fulfill and evaluate the goal of a complete single market, and which follows a neo-classical economic approach of market integration. Not only has the Commission promoted market integration but also worked on creating its own supportive environment by helping to establish and develop the European Roundtable. Moreover, the European Commission is embedded in an overall more permissive environment regarding the role of government in market interventions. Trust levels for the Europe Union are higher in average than for member state governments and parliament, while the reverse is true for federal-level institutions in the US.

The absence of a similar federal-level actor in the United States, on the other hand, looms large. This also shows that government intervention and regulation does not automatically mean a more restricted market. Indeed, as previously argued by Gamble in the British context, strong, central government policies can lead to a more open market outcome (Gamble 1988). This doesn't mean at all that the federal-level institutions in the EU are stronger than those in the US, but it demonstrates that a federal-level advocate, taking into account the entire polity, and having a relatively circumscribed mandate

focusing on market-building can make a difference. Thus, in this case, the United States, the land of the unregulated public procurement market at the federal level does not end up to be also the home of the free, open, unrestricted public procurement market. Or to say it the words of Brian Clem, Oregon House Representative and sponsor of HB2763 creating in 2010 the new permissible 10% in-state preference for all agricultural goods:

> "That's very interesting. They [the EU] have a more perfect union then than we do ironically, at least economically a more perfect union" (personal interview 2010).

CHAPTER V

UNTANGLING TRADE BARRIERS: SERVICES IN THE EU AND THE US

> "[T]he separate states of the United States, for example, not only control admission into most professions, but often also into such diverse occupations as cosmetology, barbering, acupuncture, and lightning-rod salesmen. These controls are frequently used to keep out practitioners from other states."
> Mancur Olsen in *The Rise and Decline of Nations,* 1982, 143

> "The directive established an EU "internal market in services through the removal of legal and administrative barriers to the development of services activities." This means in practice that EU member states cannot impose extra requirements for foreign EU service providers, whether plumbers, hairdressers or IT experts, compared with home providers of these services".
> Clive Archer in *The European Union,* 2008, p. 72

By shunning comparison due to respective *sui generis* concerns, both the literature on American-state building and that on European market integration have overlooked the potential common characteristics between an uncommonly centralized international organization and an uncommonly decentralized state. This has led scholars to overlook that the European Union has already gone further than the United States in centralizing authority and eliminating interstate barriers in the economically important arena of services. Thus, the recent literature on the 2006 EU Service Directive, by mainly focusing on explaining why and how it falls shorts of the original *Bolkestein* draft[76], has failed to notice that from a comparative perspective the EU has succeeded in liberalizing the services sector more than the US in many important aspects.

[76] The draft received its name from the then-EU Internal Market Commissioner Frits Bolkestein. Before becoming EU Commissioner Bolkestein was a government member and politician for the Dutch *Volkspartij voor Vrijheid en Democratie* (People's Party for Freedom and Democracy), a party known for its strong free market ideology.

Most authors, indeed, either grumble that the European Services Directive we have "is better than no Directive at all" and/or attempt to explicate how and why the final directive ended up to fall short of the original Bolkestein proposal (Barnard 2008, 324).[77] This is indeed the goal of Chang, Hanf and Pelkmans who concentrate their research on explaining "why and how the EU enjoys only the current, *unambitious level of integration* in the services sector" (Chang et al. 2010, 98; my emphasis). More recently, the European press, such as the *Financial Times*, laments in its headlines the "EU states' slow progress on services directive" (Tait 2010). However, what the authors commenting on the EU Service Directive ignore is that from a comparative perspective the EU, by ending up with a services directive and other closely related directives, such as the Directive on the recognition of professional qualification (Directive 2005/36/EC), actually already establishes a more open and competitive internal market than the US, especially in regards to the delivery of temporary services. The term 'temporary services' refers to service providers who only occasionally provide services across borders either remotely via the internet or by temporarily operating in a member state in which they are not established. In other words it denotes the absence of a stable and continuous participation in the economic life of the host state by a service provider which is established in another state. The two quotes at the beginning of this chapter encapsulate nicely how different in principle the freedom of provision of services shapes up today in the United States and the European Union.

This chapter and the next will focus on services not only because of the sector's huge economic relevance to any modern market economy, representing the largest

[77] Schioppa thus talks about a "relative failure", especially for Central Eastern European governments, and bewails that "the EU as a whole has lost, as the host-country rule now prevails" with the amended services directive (Schioppa 2007, 741)

economic sector in both the EU and the US with over 70% of GDP,[78] but also because of the fact that the EU Service Directive has been the most well-known and controversial measure coming out of Brussels in a very long time, leading to "an unprecedented extent of politicization" (Schmidt 2009, 847). Indeed, it has been described as the only European directive recognized by a majority of European citizens (Chamla 2010, 1).[79]

In analyzing the freedom to provide services, especially temporarily, across state-borders in the EU and the US, I will contend that also in this economic sector the EU is more indicative of a liberalized, complete internal market than the United States, where federal preemption and a serious attempt to eliminate cross-state discrimination in services and other economic sectors presently is absent. While the actual integration of flows on the ground are still generally less across European states than American ones, the many political rules are more—and more liberally— integrated in Europe.

As can be expected from an economic sector that comprises over 70% of GDP, business activities that constitute a service are varied, ranging all the way from amusement parks, museums, schools, financial services, security services, to waste management, health services, transport, advertising and crafts. The rules in place are largely the same for professions, which require years of graduate training, such as nurses, medical doctors, and architects, as well as for those occupations, usually conceived as

[78] According to the CIA World Factbook, services in the EU comprise 72.9% of GDP (2009 est.) and 76.7% in the USA (2009. Est.). Cf. also Gekiere 2006.

[79] "Quand vous demandez à un citoyen de vous citer une directive européenne connue, pour sûr, il vous répondra «Directive Bolkestein!» ."

non-professions, which do not require a post-secondary education and/or only on the job training, such as carpenters, file clerks, and cooks. [80]

To facilitate discussion and to illustrate empirically the differences in the adoption of rules that open exchange to competition (market liberalization) and the existence of a single set of coherent rules for exchange (market centralization) in the EU and US, I will concentrate the research exemplarily on one occupation (hairdressers).

The profession of hairdresser, while perhaps appearing at first glance an insignificant, somewhat off the cuff choice and not a cause célèbre like the Polish

[80] One small exception is lawyers. What differentiate the liberalization of interstate legal practice in the EU from other services is that the legal profession was one of the earliest sectors being liberalized by sectoral directives and that the EU has decided to not fold the provision of legal services into the overall services directive. Moreover, what distinguishes lawyers is that in this case American legal professionals, at least some, have already been aware for quite some time that the EU has developed a more liberal regime, having, among others, argued that "the time has come for a reexamination of present state rules by state authorities and courts [in the US] to permit greater liberalization to some degree along the lines of the European Union model" (Goebel 2000, 309; cf. Goebel 1991 – 1992, 2004; Lonbay 2005; Spedding 1987; Turina 2005). The analytical end result, consequently, is the same with the EU having "created some quite dramatic rules allowing free movement of lawyers" (Lonbay 2005, 610). This conclusion is shared by Turina (2005) and Goebel (2000). The former notes that "the liberal approach adopted by the EU, with respect to temporary interstate transactional practice appears to be more in consonance with modern commercial needs than the approach currently existing in the United States (Turina 2005, 235). And the latter agrees by observing that "[s]ince the mid-1970s, the European Union (EU) or, more precisely, its core element, the European Community (EC), has recognized and protected more liberal rights for lawyers to engage in interstate practice than the United States. […] The picture is in sharp contrast with the much more limited legal rules governing interstate law practice within the United States. The rules of admission to the bar and rights of practice, including any tolerance of interstate practice, are set by the states. These state rules have traditionally been founded upon a dual concern for effective representation of clients, a type of consumer protection interest, and for the efficient administration of court litigation, a civil and criminal justice interest. Arguably, however, rules ostensibly set and enforced with these concerns in some instances mask a desire to protect the local legal profession against interstate competition" (Goebbel 2000, 307-8). Moreover, given that the US Supreme "Court has in large measure accorded great discretion to the states in setting professional qualification standards and delineating the right of legal practice", what is missing is a federal-level agent making the push for congressional preemption (Goebbel 2000, 308). Indeed, while in the US "by and large local lawyers have been able to take advantage of the opportunity presented by federalism to place high walls around their own preserve", the "high degree of liberalization [in the EU] has occurred without any evidence of significant functional problems or risks to clients and without any serious opposition from national bar associations – despite differences in substantive laws and procedural rules far greater among the Member states than they are among the states of the United States" (Goebel 2000, 344).

plumber[81], actually appears to be one of the most common examples cited in political (House of Lords 2005, Rapport d'information for the French Senate by Badré et al. 2004-2005), administrative (Handwerkskammer Karlsruhe 2009; MoKomm 2010), journalistic (BBC 2006; Collet 2005; Klein 2006; LeMonde 2006; Tait 2010; Thollon and Rolin 2006) and academic (Chamla 2010, 7; Chang et al. 2010, 105; Hohn 2006, 219; Ilies 2007, 10; Saint-Paul 2007, 153) discussions surrounding the EU services directive. Damien Brousserolle, Professor at the University of Strasbourg, even talks of hairdressing as the "cas canonique" of the EU service directive (Brousserolle 2010, 10).

This chapter here will therefore describe market liberalization and centralization with respect to hairdressers, whose freedom to provide temporary services and to establish themselves in another member state in the EU is anchored, as is the case for the majority of other services in the EU, largely in the now famous Directive on services in the internal market (Directive 2006/123/EC) and the lesser known Directive on the qualification of professional qualifications (Directive 2005/36/EC). In the United States, on the other hand, market access for services providers remains entirely in the hand of the individual sister states. Out-of-state hairdressers are confronted with serious obstacles, such as (re)taking exams, including passing law exams, before being allowed to cut hair across state borders for even just a single day.

[81] The Polish plumber played a key role in the rejection of the EU Constitutional Treaty in France in 2005. As Martin Arnold has noted in the Financial Times: "This mythical, rarely seen figure has become the symbol of everything that is wrong with the constitution for French people, worried about an invasion of low-paid workers from new EU member states stealing their jobs and destroying their social system" (Arnold 2005). And Barnard points out that others have "argued that the Polish plumber embodied a serious challenged to citizenship, both national and European, because he was present on French soil but not subject to French regulation and operated under a more beneficial regime" (Barnard 2008, 330). More generally, in the words of Nicolaïdis, "the 'Polish plumber' has come to serve as the emblem for the denial of recognition in the EU" (Nicolaïdis 2007, 682).

The main focus of the analysis will be on the temporary provision of services rather than more permanent rights of establishment. Access to temporary provision of services is more revelatory of a real single market, given that a state could always say, "If you come in and meet our qualifications and standards and fill out the right papers, you can establish a business" without really changing its system. Granting an out-of-state practitioner temporary status is more importantly allowing him or her to provide services *without* first having to meet qualification standards by passing exams again and filling out a number of forms to gain market access. Temporary services provision seems especially important for market integration of a number of less highly educated service jobs. We might indeed expect such service providers to want to "try out' their job in another country before making a longer-term decision to move, and exams and bureaucratic processes seem very likely to significantly deter them from undertaking such explorations.

European Regime: Free to Cut, Color, and Curl

With the enactment of the services directive (2006/123/EC) and the contemporary qualifications directive (2005/36/EC) hairdressers today are free to provide temporary services across state borders in the 27 member states of the EU and the three states forming part of the European Economic Area.[82] The legal framework for this freedom is somewhat complex. If hairdressers are considered a "regulated profession" in a member then both directives apply. If not, only the service directive applies. For instance if a hairdresser from another EU member state wants to provide his or her haircutting services over the weekend or a couple of times throughout the year in Germany, he or she

[82] Iceland, Lichtenstein and Norway

only needs to notify the competent authority one time annually that he or she plans to do so. In the case of Germany this declaration can easily be done via the internet. This requirement, however, does not derive from the service directive, but from the qualifications directive. Thus, the important distinction which needs to be made here is that in some states, such as Germany, hairdressers represent a regulated profession and in others not. In the case of a regulated profession both the qualifications and services directives apply.

In the EU jargon, a regulated profession is a profession subject to regulations laid down in separate provisions, setting out qualification requirements and conditions for the pursuit of this profession. In other words, a regulated profession is a profession which by law or regulation requires authorization, registration or the equivalent in a member state. This authorization or registration is often connected with the requirement of a particular, specified education and training. Each EU member state determines which profession will be added to the list of regulated professions. The same profession may belong to the regulated professions in one country while it is not a regulated profession in other ones. In Germany for example the regulated crafts professions are listed in Annex A of the German crafts ordinance (Anlage A zur Handwerksverordnung) and include professions, such as plumber, glazier, carpenter, baker, butcher, dental technician, optician and hairdresser. An EU member state is free to add or subtract any profession to or from its list of regulated profession at any time in the future.[83] From the moment that a state adds a profession to its list of regulated professions, the rules laid out in the qualifications

[83] The Commission maintains an on-line database containing all professions regulated in the member states. This database can be search by type of profession or by professions regulated in a specific member state: http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?fuseaction=home.home

directive apply in regards to the freedom of providing services in addition to the services directive.

In regards to non-regulated professions and the provision of temporary services, a service provider can provide cross-state border services without any further requirements. No notification of any competent authority or any other barrier applies. The principle here is, if you are established in your home country, you can go freely under free movement of service to any other EU member state. The service directive, however, allows for a derogation for qualifications for regulated professions. This is where then the qualification directive comes into play. In very simple terms, the service directive states that member states cannot maintain impediments to the free movement of services, except when there is a specific derogation. The services directive includes a derogation for the qualification directive, which was also already present in the services directive's original draft. This derogation is not a derogation on professions, i.e. excluding entire professional fields, but it is a derogation on what the qualification directive allows. It means that a state can maintain a certain minimum of control over qualifications, even under free movement of services, as will be explained below.

The two directives are therefore closely linked. They focus, however, on different aspects regarding the freedom to provide services. The 2005 qualification directive is mostly concentrating on the recognition of diplomas or certain levels of expertise in a given professional field. The service directive, on the other hand, is, in very general terms, covering everything that is not covered by the qualification directive. As an EU official has pointed out, "the services directive [came] after the qualifications directive and […] was trying to cover and to simplify all these other aspects that haven't been

covered by the qualifications directive" (EU official, personal interview 2010). In other words, the qualification directive only focuses on the professional qualifications of a service provider and the educational attainment requirements a host country might impose while the service directive attempts to eliminate any other potential non-trade barriers to the delivery of services across state borders. Therefore a state that doesn't regulate the profession of hairdressers itself, such as Denmark, Poland, Spain and the UK, cannot apply the qualification directive to any hairdresser coming from another EU member state. The host country might, however, still require a service provider to charge a fixed fee or to have a minimum of two assistants. Such regulations, which pose different barriers to the free provision of cross-border services than educational attainment, would then be tackled by the services directive.

In addition, it is important to note that the EU services and qualification directives also distinguish between the temporary provision of services and establishment. This distinction is significant because only certain parts of the services directive and the qualifications directives apply to one or the other. Thus, while in the case of establishment certain national requirements, such as registration in a national professional registrar or to have an establishment in the host country, might upon examination by the Commission be deemed non-discriminatory and proportionate and can thus be imposed, the same requirements will be considered detrimental to the freedom to provide services on a temporary basis. For instance in the case of the qualification directive, when it comes to the establishment of regulated professions, be it an artificial inseminator, harbor pilot, milk inspector or a hairdresser, the host country retains the right to deny professional recognition and thus the pursuit of that profession when the service provider

is not able to "attest a level of professional qualification at least equivalent to the level immediately prior to that which is required in the host Member State, as described in Article 11" (Directive 2005/36/EC: Article 13, 1b). Article 11 of the qualification directive lays out the five different levels of qualifications. Of course, in comparison to the US, it is noteworthy to point out that the permission for employing stricter criteria for establishment are still tilted to greater liberalization in that it also allows for practitioners to provide services who not only attest to the educational level that is usually required from the host county but also one level below. This attestation, however, does not apply in the same manner for the temporary provision of services. Indeed, the qualifications directives clearly states in Article 5 that in regards to the free provision of services "Member States shall not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State" as long as the service provider is legally established in another member state and his or her profession or the education leading to the profession is regulated or he or she has worked in the profession for at least two years during the preceding ten years (Directive 2005/36/EC, Article 5, 1).

In short, establishment in the EU context refers to an economic activity by a service provider for an indefinite period of time and through a stable infrastructure from where the business of providing services is actually carried out. This contrasts with the definition for the free provision of services where the emphasis is on the temporary element of the provisions of services. Temporary provision of services is characterized by the absence of a stable and continuous participation in the economic life of the host state by a service provider established in another member state.

However, the lines between the two are not always absolutely clear. As the Commission itself points out "[t]he fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purpose of performing the services in question" (Commission 2010).

The cross-polity analysis undertaken here mostly concentrates on the temporary delivery of services across state borders. The conditions for the provision of temporary services are especially important for free market integration because they are so directly linked to cross border economic interaction. Once a service provider gets to the point of establishing, he has clearly chosen to invest and locate somewhere else at which point he is subject to the regulations of the host state. And, of course, these regulations and demands vary quite a bit whether we look across the US or the European Union. Nevertheless, once again, even in regards to establishment does the EU provide a general framework requiring not only the streamlining of authorization procedures, such as a single point of contact,[84] but also black-lists national requirements particularly restrictive to the freedom of establishment and stipulates a rigorous review and elimination of any

[84] The service directive requires the set up of Points of Single Contacts, which are one-stop shops for service providers to complete formalities and procedures online at a distance. The Points of Single Contact (PSCs) aim to assist European service sector companies in navigating through sometimes very complex legal procedures. The Points of Single Contact additionally simplify the administrative processes by acting as a case manager for each company's activities. Nevertheless, the service of the points of single contact is optional. Entrepreneurs may always address themselves directly to the relevant authorities, if they prefer. The idea behind a single contact point is to have a place where SMEs can easily obtain information, submit applications and collect decisions or other replies without having to deal with a multitude of authorities at different administrative levels, as has been the case so far. They are meant to become the single intermediaries between businesses and public administrations. Furthermore, the PSCs will make it possible to complete procedures at a distance, by using 'e-government applications'. The Commission's website provides a link to all Points of Single Contact in all 27 member states and the 3 members of the European Economic Area: http://ec.europa.eu/internal_market/eu-go/index_en.htm

other national requirements with the exception that it can be proven to the Commission that the remaining requirements are non-discriminatory, justified by an overriding reason of public interest and proportionate (Directive 2006/123/EC, Articles 14 and 15).[85] Yet it is especially the open market rules for the temporary provisions of services, which allow small service providers to test the waters before expanding or moving into a new state. Prior to establishing many people, especially those who are not part of the cosmopolitan elite or own major businesses, may presumably need to experiment first if they want to live somewhere else and whether they can even find work there. As an EU official noted, big companies don't necessarily need as much relaxed rules, given that "they are well positioned and have not difficulties to comply with all the rules". Indeed, as the same official further expounded, "we live here in Brussels and so not really at the border and nevertheless I have [now since the service directive] more and more recourse to German service providers, because they offer services or goods that are of interest to me, and I think that this is now a more common phenomenon and apparently is also attractive for the people to come over", but to have this happen even more frequently "some things need more time and mentalities and interests will change" (personal interview, December 2010). In short, it is especially the temporary element, which not only enables providers to try out delivering services in another state, but also customers to experiment with receiving such services.

[85] Prohibited requirements include, among others, the requirement that managers or shareholders are resident within the territory, a prohibition of having an establishment in more than one member state or making a provider choose between principal or secondary establishments or to choose between the form of an establishment such as agency, branch or subsidiarity. Requirements to be evaluated include, among others, an obligation on the provider to supply other specific services jointly with his service and fixed minimum and/or maximum tariffs.

In sum, today any service provider in the European Union is presumed to be able to easily provide services across borders without any administrative or technical barriers. The service directive does, however, allow under special and circumscribed circumstances the imposition of additional national regulations on incoming service providers. Article 16 of the Services Directive provides that Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirement unless it is justified for reasons of: 1) public policy, 2) public security, 3) public health or 4) the protection of the environment (Directive 2006/123/EC, Article 16.3). The Services Directive yet makes it very clear that requirements which may potentially be justified by one of the four above mentioned overriding reasons relating to the public interest may in any case be imposed only if they are non-discriminatory as regards nationality or place of establishment and proportionate, i.e. they are suitable to attain the public interest pursued, do not go beyond what is necessary and cannot be replaced by less restrictive means (Commission 2010). Furthermore, the Commission is required to be notified about any requirement imposed based on public interest concerns and retains the right to reject them.

The other major exception of course is the case of regulated professions, but even here the restrictions, which the qualifications directive allows to impose, are minimal in comparison to the United States. The presumption in the EU again is to ease the free movement of service as much as possible and stop any disproportionate or unjustified host state regulations. This means that citizens of the member states, who are legally established to pursue a profession or activity in one state, have the right to provide services in another state in the same profession or activity.

Hence, as noted above, in the case of temporary and occasional provision of services across state borders, the host state, based on the qualifications directive, can *at the most* ask the service provider from a state where the profession is not regulated to prove that they have pursued that profession in the home member state for at least two years during the 10 years preceding the provision of services. This requirement of two-year professional experience, however, becomes null and void when the education and training leading to the profession or activity was regulated in the home country.

Additionally for the provision of services for the first time, an EU member state may require a declaration to be made to the competent authority in written form, including the details of any insurance cover or other means of personal or collective protection with regard to professional liability. This declaration shall be renewed when there has been some substantial change in the information provided or once a year – if the service provider intends to provide temporary or occasional services in that member state during that year. To facilitate service provision, member states are obliged to make the declaration available via internet. But the directive is clear that the "service provider may supply the declaration by any means", thus eliminating any concerns that one might have that a service provider might not be able to or not have access to a computer.[86] Moreover, this declaration has to be free. To lever a fee is perceived akin to barrier for the provision of services in the EU. Last but not least a member state may require that the declaration be accompanied by the following documents: a proof of the nationality of the service

[86] This concern, for instance, was uttered by the president of the National Association of Barbers Board of America, who alluded to the idea that a system based on internet notification as in Europe would not be very successful in the US, because most barbers are from the low income strata and not "the sharpest knife in the drawer". He notes: "Do you know why they [hairdressers] go to vocational school? Because they are not the sharpest knife in the drawer. And if you talk about going on the internet, we have many of them that walk into the barber board, hundreds, that pay their license because they don't have a credit card, they don't have a checkbook, they are living from mouth to mouth or hand to mouth and many of them will never get out of it" (personal interview 2010).

provider, an attestation certifying that the holder is legally established in a member state for the purpose of pursuing the activities concerned and that he is not prohibited from practicing, even temporarily, at the moment of delivering the attestation, proof of two years of professional experience during the previous ten years – in the case of a regulated profession, that is not regulated in the home member state and in the case of a profession in the security sector evidence of no criminal convictions. It needs to be kept in mind, once more, that these requirements by a host country are only permissible when the host country is regulating the profession itself. It can for instance not require a prior declaration for professions, which the host country itself has not listed in the official list of regulated professions. Once the declaration is made, the service provider can start working immediately on the territory of the host state. He does not have to wait first for the green light to be given by the host state.[87]

So what does this mean in practice? Given that the service directive allows for four categories of justifications it is imaginable that member states might invoke public security concerns or health concerns to impose new or to keep existing national requirements. In fact, when contacted why hairdressers are still listed as a regulated

[87] The qualification directive includes a derogation for professions that involves a potential threat to public health or safety. In such a case, the host state may verify the service provider's qualification, which could delay when he or she can start to work. Yet, a service provider cannot be delayed indefinitely. Indeed, in the absence of a reaction of the competent authority within the second month of the receipt of completed documentation, the service may be provided (Directive 2005/36/EC, Article 7.4). Additionally, the health and safety derogation does not apply to regulated professions, which are covered additionally by sectoral directives in which the minimum training conditions were harmonized at Community level: doctors (Directive 93/16/EEC), nurses (Directives 77/452/EEC and 77/453/EEC), dental practitioners (Directives 78/686/EEC and 78/687/EEC), veterinary surgeons (Directives 78/1026/EEC and 78/1027/EEC), midwives (Directives 80/154/EEC and 80/155/EEC), pharmacists (Directives 85/432/EEC and 85/433/EEC) and architects (Directive 85/384/EEC). This means that in principle the competent authority of the host state may not check the training and may not ask for documentation specifying the content of the training taken.

profession in Germany, while this is not the case in some other EU member states[88] and after reducing the regulated professions from 94 to 41 with the reform of the German crafts law in 2004, the response by German authorities was that

> Hairdressing remains a regulated profession, because it is considered to be part of risk prone professions that is professions, which, when exercised improperly, pose health risks to or even threaten the life of customers. These regulated professions should therefore only be exercised by persons who actually "understand their trade" and who can prove this by having passed the exam for the master's craft certificate (my translation).[89]

So it is not a stretch to imagine that a member state might express concerns over different hygiene standards for hairdressers in different countries. As we will see later on, this is the case in the US; certain states at least claim to fear that hygiene standards in other states constitute a risk to public health. And indeed, even in the EU, a Commission official observed that on occasion "entire member states are trying to extent the concept of health and security to justify things that are kind of border line". For instance a member state "will try to justify the possibility to ask for a test and to [put] restrict[ions] on many professions" because of health issues or hygiene standards. But "to be able to impose this test [the member state] would have to notify the Commission that for hairdressers according to the risk for health and security for the recipient they want to maintain the possibility" and then it "will be my colleague who will say yes or no" as regards to the proportionality of the requested requirement (personal interview 2010). In

[88] Hairdressers are presently regulated professions in 13 of the 30 countries composing the European Economic Area: Austria, Belgium, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Portugal and Slovakia (EU Regulated Professions Database 2011).

[89] "Das Friseurwesen ist deshalb zulassungspflichtig, weil es sich in diesem wie bei den anderen sogenannten gefahrgeneigten Berufen um solche handelt, in denen bei unsachgemäßer Ausübung Gefahren für die Gesundheit oder ggf das Leben der Kunden drohen. Diese zulassungspflichtigen Berufe sollen deshalb nur von Personen ausgeübt werden, die tatsächlich ihr "Handwerk verstehen" und dies durch die bestandene Meisterprüfung nachweisen können" (Wilhelm Paul, Ministerium für Wirtschaft, Verkehr, Landwirtschaft und Weinbau Rheinland-Pfalz, personal correspondence 2010).

the case of hairdressers, EU officials working on the services directive have clearly indicated that such a requirement would be considered disproportionate by the Commission. Indeed, while a member state might argue that there are substantial differences in training and would like to impose a theoretical or practical exam on the incoming service provider, such a requirement for hairdressers "would be very difficult for member states to justify that this is proportionate" (personal interview 2010). In fact, according to a Commission official, "it's quite difficult to say that a hairdresser, who is coming, had only 1200 hours [instead of 1500 or 1800] and will create problems. This is hard to justify" (personal interview 2010).

The same would apply if a host member state would require a criminal background check before allowing a hairdresser to provide temporary cross border services. For example, it could be imagined that a state which doesn't regulate the profession and therefore can't even ask for a simple declaration still would like to have only hairdressers come over the border with clean criminal records. The host country would have to justify the criminal record check under the service directive arguing that such a record check is justifiable under the public order exemption. The Commission in turn then would assess the request. However, as an EU official from the DG Internal Market & Services clearly emphasized to me, such a request for hairdressers would be absolutely "disproportional" (personal interview 2010). And a colleague from the same DG remarked that "[i]t's already the case in some sectors and it will be more and more the case that we will make infringement saying [for example], we do not consider it justified that you ask about a criminal record for hairdressers" (personal interview 2010).

These examples clearly make evident not only the Commission's statutory involvement in the implementation of the service directive but also the active involvement of its staff in making sure that any of these requirements, which member states might still see as "logical" and justified reasons, are debunked as unjustifiable and simply represent non-tariff trade barriers. This will be further elaborated in the next chapter. In the meantime, it is important to note that the service directive has reversed the burden of proof. It is not the obligation of a service provider to demonstrate to a court or the Commission that a particular requirement is not justified according to the European Union treaties, but the obligation of the member states to prove to the Commission that the maintaining or introduction of a requirement is indeed not only justifiable by one of the four exemptions but also proportionate. Moreover, the member state needs to demonstrate that the goal which the requirement tries to accomplish cannot be accomplished by any lesser intrusive means. And as the examples above have already shown, the Commission is not favorably dispositioned to such requests.

American Regime: No Single Market for the Temporary Provision of Services

In the United States, the fifty states retain the right to regulate the access to professions. This is not so different at first glance from the member states in the European Union, where each state retains the freedom to decide which profession is regulated or not and to decide for its own state what qualifications need to be obtained. Yet, as Mancur Olsen already noted in the early 1980s, the regulations in the US are largely maintained as non-tariff barriers to trade, "to keep out practitioners from other states", no matter whether they practice "cosmetology, barbering, acupuncture" or any

other profession (Olsen 1982, 143). Moreover, as we will see in this chapter and the next, America sister states regulations are actually much more similar than many regulations across EU member-states—making the arguments for state-level regulation all the more clearly about a simple version of protectionism rather than substantive concerns about meaningfully different practices or norms. Whereas it might at least seem to make sense for Germans to be concerned about unregulated British hairdressers entering their market, the attitudes we see in the US — where Ohioans insist that Pennsylvanian hairdressers could only practice in Ohio if they undertake the full course of Ohio training, even though it varies only in trivial ways from Pennsylvanian requirements — seem very directly grounded in a straightforward rejection of single-market principles.

The difference between the European Union and the United States of American becomes especially stark when temporary cross-border service provision and the overall framework for ensuring the existence of a complete internal market is examined. While the EU system allows for a certain measure of flexibility, it guarantees at the same time through federal-level regulation that the free access to each other member state is provided and non-tariff barriers are either eliminated or be proven to be justified and proportionate by a third party, the Commission. In short, the EU's approach is to retain a certain measure of flexibility by meeting the overarching goal of a single market. The EU is therefore an example where federal-level intervention in the market increases freedom to trade instead of hampering free economic exchange. In the US, on the other hand, non-tariff barriers to the provision of services persist with similar arguments having been debunked by the Commission in the European context. Indeed, in the absence of a federal-level agent making the trade liberalization argument, as the next chapter will

show, the existing non-tariff barriers are not always perceived clearly as such in the United States. Restrictions for services provision in general and for "the barbering profession, the oldest profession in the world, other than prostitution" in particular remain in place (personal interview with the President of the National Association of Barber Boards of American 2010).

So what exactly is the situation in the United States today? The United States is clearly characterized by a highly fragmented system when it comes to the provision of services for regulated professions. Each state retains its own rules and grants permission to market access. Zimmerman for instance observes that the states' licensing authority in the US has led to "[d]iscriminatory licensing requirements [protecting] individuals engaged in a specific profession in a state against competition by their counterparts in other states" (Zimmerman 2003, 6). In another place, in writing for the *Certified Public Accountant Journal On-line* he further notes that not only "[t]he regulation of various professions by the individual states has resulted in nonharmonious licensing standards, impeding individuals licensed by one state from practicing in sister states", but that "[t]his problem has become more serious in the practice of public accountancy because of the increased need for accountants to travel to many states to serve clients with multistate locations" (Zimmerman 2004). Accountants, obviously, are not the only ones affected by the prohibition to provide temporary cross-border services without being first licensed in the host state. This affects any licensed profession, including hairdressers and cosmetologists.

In most US states, there is a legal distinction between barbers and cosmetologists, but all fifty states require them and most other personal appearance workers to be

licensed. In most states, access to the market is governed by the state's health department and/or a Board of Cosmetology or Barber Board. In several states, despite being considered different professions, the Board of Cosmetology and Barber Board are administratively combined.

Licensing requirements vary greatly from state to state and between hairdressers and cosmetologists. In general, a person must, however, have graduated from a state-licensed barber or cosmetology school. In some states trainees can take apprenticeships, which can serve as a substitution for graduation from a licensed school. While usually requiring students to pass a written test and demonstrate an ability to perform basic barbering or cosmetology services, not all states require applicants to pass a practical examination. Some states require graduation from high school, while others require as little as an eighth-grade education, to become licensed in the state.

Most importantly hairdressers are not legally allowed to provide services across state borders, even for a day and even if having been licensed in a sister state. Any provider needs to first make sure that he or she is also licensed in the state that he or she would like to give a haircut or wash hair. As the president of the National Association of Barbers Boards of America (NABBA) and member of Ohio's Barber Board, Howard Warner, put it, "I don't know of any state where you can walk in and not" get approval by the local state board of licensing before offering any services (personal interview 2010). A similar response was provided by the Texas Department. of Licensing and Regulation (TDLR). To practice cosmetology or barbering in the State of Texas a service provider first needs to ensure that he or she is licensed by the Texan authorities. As a TDLR staff member remarked, "You need to be licensed through the state in order to cut hair, to do

nails, to do facials [...] even if this is just one day or just on the weekend" (personal interview, November 2010). She went further on to explain that "we get people from all over the states [such as Oklahoma or New Mexico] who come here or even other countries who already have their licenses, but this is Texas law" and "in order to work in this state in that type of field it is required that you have a license from this state" (personal interview 2010).

Thus, it is not surprising that Texas makes sure to strictly enforce its rules. As a KSAT 12 News Reporter titled his report of an incident in San Antonio in September 2010: "Illegal Haircut Operation Found At Flea Market: State Issues Violations to Men Cutting Hair At Mission Flea Market" (Mylar 2010). Susan Stanford, spokeswomen of the TDLR is quoted saying that "He will not get off with a warning, there's too many violations, and unlicensed activity we take very seriously" (Mylar 2010). The financial repercussions can be severe ranging from $500 to $3000 (Mylar 2010).

Yet, this is not only the situation in Texas, but the general situation in the United States. Similar responses were given for instance by the Oregon Health and Licensing Agency (OHLA) and the Barber Board of Ohio (BBO). When asked whether licensed hairdressers from another state can legally temporarily practice in the state without having first been licensed by the host state, the former simply replied "no" while the latter emphatically stated that "[t]hey cannot just go out and start barbering! The barber laws were set up to serve and protect the public. […] It is not legal, no, no, no" (personal correspondence and interview 2010).

The only way to be able to access another state's market is to first acquire the host state's license. However, this acquisition and the rules vary largely from state to state and

not all states have reciprocity with each other. There is no general policy which eases transborder provision of services on which service providers in the US can rely on. No complete list of rules and requirements for all states exists. [90] Service providers are obliged to always check with the specific state whether and how they can gain access to the local market.[91] This in itself can represent a significant hurdle for a service provider for instance living in a tri-state area.

In most cases a practitioner cannot even find out in advance whether a state has reciprocity with another state or not. Reciprocity is usually not publicly displayed and is decided on a case-by-case basis. As again a representative from the TDLR responds when asked whether Texas has reciprocity with all 49 other states,

> Not all. Not all. That's the reason why we specifically ask from which state you are coming from. Oklahoma, obviously yes, you see that. Let me give you an example one that we do not, *there is a list that only we have, that we can see*, so we ask you specifically where you are coming from – Florida for example, no reciprocity, [also no reciprocity for] Illinois, Iowa (personal interview 2010; my emphasis).

The situation is largely similar in Oregon with the exception that OHLA does not maintain a specific list:

> OHLA does not have a specific list. When the agency gets a request for reciprocity, our staff reviews the type of license the applicant currently holds in their home state and compares the standards required there against the Oregon standards for the requested license here (personal correspondence 2010).

The common reason given why reciprocity is not granted automatically to licensed practitioners from other states, as is the case in the EU, is that the host state has

[90] BeautyTech, however, maintains a website, with information for many states and professions in the fields of personal appearance: http://www.beautytech.com/reciprocity/recip_a.htm

[91] Even professionals in the field of regulations are not sure usually which state has reciprocity with which state. Comments, such as "I am not sure exactly which states have reciprocity with other states but there are as many as 35 or 36", were typical (personal correspondence 2010).

different training hour requirements than the state from which the practitioner is hailing from and that this would endanger the safety of the public. Common responses from the authorities were

> If a particular state license is not accepted through reciprocity, the reason for this would be that the states training process, or exam process is not the equivalent of the Texas requirement for the same license. […] Because a lot of their courses and what they take do not match with what we take here, what is required. So the requirements are very different. For example we like for an operator to have 1500 hours of study. They may not. They may only have 600. It can differ. Very different, it wouldn't match ours. So that means they probably would have to take courses here to meet our requirements (personal correspondence with TDLR 2010).
>
> because we need to ensure they are qualified to practice (personal correspondence with OHLA 2010).

The greatest concern usually is that because of the different training hours, service providers from other states simply don't know basic hygiene and sanitation rules:

> Licensure exists to ensure practitioners are qualified to protect the health and safety of the public. […] To prevent the spread of contagious disease and protect the health and safety of the public" (personal correspondence with OHLA, November 2010).
> "If you went to school in Pennsylvania or in Mexico or India or China or wherever, and you only had a 1000 hours, it would not be fair in Ohio to Ohio Barbers to give this person a license, because they have 1000 hours, they don't know anything about our sanitation nor health rules or our laws and rules. So we require them to go to school for a particular period of time and now if you come in here from Pennsylvania and you have 20 years barbering experience or ten year or five years and you had the 1250, the Barber Board evaluates that person and says yes you can barber in our state. We will give you a test and you can barber in our state. We don't hold them up (personal interview with BBO 2010).

As especially the latter statement shows, non-tariff barriers to services provision and protectionist attitudes abound in the United States. Pennsylvania, one of Ohio's neighboring states, here is considered to be in the same league as Mexico, China and India, major developing countries far removed from Ohio. It is argued that Pennsylvania residents might simply not be aware of basic sanitation rules as their good neighbors to

the east. Indeed, Pennsylvania's actual 1250 hours of training are considered inadequate for understanding sanitation rules and how to cut hair in the Buckeye state, which requires 1800 hours of barber training. But then with 20 years of experience as a barber in Pennsylvania, the Ohio Barber Board, "handl[ing] each case individually", might allow you to take a test to become licensed without extra courses (personal interview 2010). Of course this raises, among others, the question how a practitioner even after 20 years of practicing in the Keystone state actually would know the sanitation rules in Ohio. Can a Pennsylvania barber who always stayed in his state be assumed to have acquired Ohio's sanitation knowledge through osmosis with time? Moreover if requiring a test, even if maybe not anymore any extra training, after 20 years of experience in a neighboring state is not holding up market access and is protectionist, what is?

Now it needs to be kept in mind that these qualification requirements vary much more widely in the European Union, where one-third of the countries regulate access to the barber profession, such as Germany at one extreme with the requirement of five years of training before being allowed to practice independently, and others which do not regulate access at all (cf. House of Lords, Sixth report). In the United States the diversity is much smaller with all states regulating hairdressers. The training hours for a barber vary somewhat substantially from 1000 hours in Washington State to 1800 hours in Ohio and Wisconsin, but not close to the divide in Europe, which has made the provision of services across borders possible. Yet, in the United States, sister states deny regularly access to licensed professionals from other states by not granting any reciprocity. The Georgia State Board of Barbers for instance "does not endorse licenses from Alabama, California, Washington, D.C, Hawaii, Nevada, Washington or Oklahoma" and "for all

other states, endorsement will be granted or denied on an individual basis in accordance with the law" (Beautytech 2010). Oregon "does not offer reciprocity to Florida for their "special licenses," which do not require any practical examinations whatsoever (personal correspondence with OHLA 2010). The same goes for Ohio, which does not grant reciprocity to licensed practitioners from Florida if they did not take a practical examination (personal interview 2010). And Arizona as of January 1, 2007, has only reciprocity with 27 sister states (Arizona Board of Barbers 2011). Furthermore, hairdressers who got licensed in their home state via an apprenticeship, which usually requires several hundred hours more than going to a licensed barber school (for example Alaska 1650 versus 2000 hours; Maine 1500 versus 2500 hours; Beautytech 2010), also have a much harder time to work in another state without going completely back to school. As Howard Warner observes,

> We don't recognize an apprenticeship [in Ohio]. They do 500 hours [in New York] and then go into a shop and start working. And in Georgia, let's say you are a barber student in Georgia, they tell you, you got two ways to do it, you can go and do an apprenticeship or you can go to a licensed barber school. If you go to the barber school, then you can reciprocity into other state. If you do an apprenticeship, nobody is going to recognize you, so you are stuck in the state of Georgia on apprenticeship (personal interview 2010).

In short, in cases where there is no reciprocity, licensed professions from other states have to take extra courses to make up for the perceived lack of knowledge. But even where reciprocity exists, this does not mean automatic access to the local market. The granting of reciprocity in general only applies to admitting that the training hours are equivalent. States, as the quote from the member of the BBO has already indicated, still might require applicants to pass a written and practical test. Moreover, in many cases, states still impose additional restrictions, such as criminal background checks, law exams and a minimum amount of years of licensed experience, besides requiring the passing of

a practical and/or a theoretical exam. In other words, reciprocity only means that the host states consider the amount of training equivalent to the one acquired by the practitioner in his home state. The host state, however, is free to impose additional conditions for market access.

As the TDLR points out, "part of the reason for licensing is for regulation and for criminal background checks" (personal correspondence 2010). Alabama and Idaho only grant reciprocity for cosmetologists after proving that in addition to the minimum training hours a practitioner from another state has at least respectively "five years of licensed experience" or "practiced for at least three (3) years immediately prior to making application" (Beautytech 2010). OHLA additionally notes that "reciprocity between states appears to have become more restrictive". The official reason given for this is that "[p]articularly in light of recent concerns related to potential fraud (false qualifications, test cheating, etc.) we want to ensure practitioners are who they say they are and can perform services on the public safely and effectively" (personal correspondence 2010). Increased non-tariff barriers are definitely the case in the Beaver State, where "for applicants through reciprocity, we recently established a requirement for out-of-state applicants licensed in other states to take and pass the Oregon Laws & Rules examination as well as an examination for each field of practice (barbering, esthetics, hair design, nail technology) in which they are applying" (personal correspondence 2010).[92] It needs to be repeated that these are requirements for licensed practitioners from sister states with which reciprocity actually exists.

[92] Arkansas also requires for out-of-state licensed practitioner whose written and practical exams are recognized via reciprocity to still pass the Arkansas state law exam. Cf. official reciprocity form available at: http://www.healthy.arkansas.gov/programsServices/hsLicensingRegulation/Cosmetology/Documents/reciprocity/ReciprocityRequirements.pdf

The arguments typically made here in the United States, i.e. the ensuring of public health and safety, to maintain the regulatory barriers for hairdressers have been countered in the European Union. Thus, while derogations exist in the services directive for public safety and health, they are considered in the case of hairdressers to be either ludicrous or disproportionate. To recall, the European Commission has pointed out that a) other member states have also an interest in not endangering their public, so if professionals are licensed in one state, they should have free access in the other state to deliver temporarily services and b) that this hinders economic competition and therefore has an economic cost for the entire polity. Indeed, in the US there seems to be a lack of awareness in regards of potential costs for service providers.

While in the European Union no costs are charged for service providers making an official declaration with the competent authority in a state where the profession is regulated, in the US the costs can be substantial when applying for a license while already being licensed in another state. These costs, of course, vary whether reciprocity or not exists. If no reciprocity exists, then in most cases an applicant needs to pay for additional training hours in addition to any fees charged by the regulatory authority. In cases where no reciprocity exist, but no additional hours are required, an applicant usually still has to pass an exam or two. This involves travel costs to specific exam sites on specific dates. In 2010 Arizona for example only offered exams in two cities, Tuscon and Phoenix, on a rotating basis on only eleven occasions throughout the year (Arizona Board of Barbers 2010). This complicates market access for out-of-state practitioners considerably. In states like Oregon exams, as described above, are even required for those applicants with which Oregon has reciprocity. In short, even in cases where reciprocity

exists, the costs are far from being non-negligible. A simple filing fee, for instance, for the recognition of reciprocity in Arizona costs a barber $175.00 (Arizona Barber Board 2011). And of course a service provider has to repeat all these steps and pay again if he decides to deliver services in a third sister state. The absurdity of it all can be perceived when we imagine a service provider licensed already in 49 states and having been practicing non-stop for several decades still being required to pass an exam and pay corresponding costs before being allowed to work just for a day in the 50th US state.

Given that states, such as Oregon, still require exams even in cases where reciprocity exists, an applicant cannot be sure that he or she won't face additional costs, besides filing fees, travel expenses for taking the exams, etc., due to failing the test, even if having practiced the profession for years in another state. It is difficult to figure out what the actual costs are overall for the US economy, given that data is not readily available. Nobody in the United States appears to have collected data as regards the potential overall economic effects the heterogeneity of rules might have on the services sector in general and in the personal appearance sector in particular.

A very small indication for the potential cost factor for the economy is the number of reciprocity applications which have been denied because of not being able to pass the required exams in Oregon. Below, Table 2, shows that in the latest biennial 20% of licensed service providers in the personal appearance business from out-of-state have been denied a license. This number does not include those service providers who did not profit from reciprocity in the first place.

Table 2: Oregon Personal Appearance Business Reciprocity Applications: 2009 – 2011 Biennium

Reciprocity Applications	
Certificate Type	Applications Received
Barbering	40
Esthetics	237
Hair Design	373
Nail Tech	144
Total Apps	794

Reciprocity Certificates		
Certificate Type	Certificates Issued	% of Applicants who qualified and obtained certification
Barbering	34	85.00%
Esthetics	200	84.39%
Hair Design	297	79.62%
Nail Tech	105	72.92%
Total Certificates	636	80.10%

OHLA requires that all reciprocity applicants take and pass the state prepared examinations before obtaining certification (Source OHLA, personal communication 2010)

Similar in Ohio, Howard Warner talks about a 10% refusal rate for reciprocity applications. He states that "we probably get 50 requests [per year] and we probably refuse 5" (personal interview 2010). But again these numbers only include practitioners who actually ask for reciprocity. It is not clear, how many are not included, because they are informed that they cannot apply for reciprocity. Moreover, Warner, who presently serves as the president of the NABBA representing over 300,000 barbers, is not aware of any national-level, polity-wide data.

While these numbers of refusal provide some qualitative indications, hard quantitative data, to say the least, is hard to come by. Myra Irizarry, Government Affairs Manager for the Professional Beauty Association (PBA), the nation's largest business organization of salon professionals representing salons and spas, distributors,

manufacturers and licensed professionals, was also not aware of anybody having gathered such data and replied that “I apologize, I do not have any data in regards to these questions” (personal correspondence 2010). Public authorities, moreover, usually do not perceive the existing fees and the heterogeneous rules across the internal market of the United States as non-tariff trade barriers and an obstacle to market access. Indeed, comments went so far to point out that this research here is on the wrong track:

> Our regulation at the state level is for public safety purposes, not for the economic protection of those already licensed to do business in the state. The costs of licensing in Oregon are meant to recover the costs of providing the regulatory service level necessary to ensure public safety, and no more. Each state sets its own standards for licensing. I am concerned that your dissertation may go off track if you don't understand that the licensing cost is not a tariff, and why the US model is different from the EU's (personal correspondence with OHLA 2010).

And Howard Warner, president of NABBA, when asked about the overall economic impact the present heterogeneity of rules might present, replied “I don’t think there even is one truthfully” (personal interview 2010). Yet, when digging a little bit deeper, some awareness of the potential costs does exist. Warner himself recalls a situation where

> I had an experience just recently where it took 45 days to help somebody in Florida. I was so upset that I got a hold of my friend down there, and then they pushed the button and got it done. But it was sad, because they were dealing with the people that were doing the national testing and they wanted, the man graduated 25 years ago from an Ohio barber school and they wanted a transcript from that barber school, which had been out of business for 20 years. And they would not yield to that (personal interview 2010).

Thus, while not recognizing that the present system in the United States has any economic repercussions, Warner himself got frustrated in this particular case where it took 45 days for a licensed professional from his state, who has been practicing for 25 years, to gain market access in a sister state. What is more, the issue was only being resolved after the 45 days because Warner had a friend in the Florida system. Not every

applicant will be so lucky in similar circumstances. While not providing any data either, the Division of Professional Licensure of the state of Massachusetts at least honestly admits on its website that "the current reciprocity system can be a time consuming process that reduces professional mobility and delays an otherwise qualified applicant's ability to practice where needed" (Massachusetts 2010). In short, contrary to the system in place today in the EU, it is impossible to legally test the waters before moving to another state in the US. No mutual recognition in any form applies, be it a 'state of origin principle' or a vaguer obligation of American sister states to respect the right of providers to deliver services.

Conclusion

A closer comparison of market rules in the European Union and the United States for services leads once more results that even many US or EU experts may find surprising. Similar to the dynamics present in the public procurement case, the European Union ends up with a more liberal internal market regime in services than the United States, especially in regards to the provision of temporary services.

As this chapter has made evident, in contrast to the European Union, in the United States today no comparable federal-level rules and general framework exist for guaranteeing temporary market access for temporary services providers of regulated professions from sister states. In other words, the European Union has adopted a single set of coherent rules for exchange in the services and also adopted rules that open exchange to competition where the United States so far has not. Non-tariff barriers to the provision of services proliferate in the United States.

In the United States a service provider, such as a hairdresser, would have to go through the courts to demonstrate how specific regulations to another state's market actually pose an access barrier and might not be permissible under the commerce clause or the privileges and immunities clause. Of course, such an approach is expensive for individual companies and especially for small service providers; an argument which was used, as the next chapter will note, by the EU Commission to create the positive services regime in Europe.

In short, providers from regulated professions cannot freely cross state borders in the United States and offer their services on a temporary basis in another sister state. They need first to be licensed in the host state, too. This licensing, even in the case where reciprocity might exist, can be very costly by still requiring from the service providers, among other things, to pass several exams and pay substantial licensing fees before cutting somebody's hair for one single day.

While many US states have entered into reciprocity agreements, these agreements vary from state to state, from profession to profession and are not universally applied across the entire polity, giving the American internal market the impression of a large patchwork quilt. Protagonists in the US either take the present situation for granted or deny the presence of any non-tariff barriers with economic consequences due to the heterogeneity of regulatory systems. Nobody, as the next chapter will argue in more detail, in the US has acted as an agent making the case for services liberalization by calculating the potential costs for the American internal market, which undeniably exist. Actors, when not denying that barriers exist in the US, either largely don't tend to realize or desire the possibility to actually create services liberalization polity-wide, invoking

state rights, or hint strongly at the absence of a federal level actor that could push reform through.

CHAPTER VI

UNTANGLING TRADE BARRIERS: EXPLAINING THE DIVERGENCE IN THE SERVICES SECTOR

"If you went to school in Pennsylvania or in Mexico or India or China or wherever, and you only had a 1000 hours [of training], it would not be fair in Ohio to Ohio Barbers to give this person a license, because […] they don't know anything about our sanitation nor health rules or our laws and rules."
Member of the Ohio Barber Board, interview 2010

"[I]f you take regulation of the professions, doctors, kinesitherapists, was pretty easy, because in a way the massive argument was, what do you expect, […] are the German citizens different from the French citizens across the border to the point that they need an expertise to be dealt with? So […] you end up with the sole argument that we want to be sure that the people are well-trained; okay that's pretty easy. There is no other reason for discrimination."
Former Director General of the Legal Service of the European Commission, interview 2009

This chapter will continue the argument that the difference in outcome of market centralization and liberalization between the United States and the European Union is mainly due to the unique institutional role of the European Commission, which incorporates in its institutional DNA a neo-classical economic approach of market integration, as well as a different ideological mind-set towards federal-level intervention in markets of the populations in the two polities. As the entry quotes already illustrate, the European Commission has pushed and actively shaped the present rules for the free provision of services by, among other things, taking apart similar arguments proffered in the US context to maintain non-tariff barriers to services provision.

Overall, the European Commission has succeeded in going further than what member states asked for at the beginning of the liberalization of services. In fact, the Commission has, despite the protests the original *Bolkestein* draft of the service directive

has sparked in certain sectors of the European population and, especially among the EU's two largest member states, France and Germany, succeeded in keeping the principle of origins,[93] if not in name, but largely in spirit and practice alive for the provision of services. Moreover, while business in Europe, especially in the UK, was largely supportive of the Commission's proposals, it did not strongly mobilize in favor of it. The lackluster behavior of organized business and the reluctance for further liberalization in the services sector by the EU's two most influential member states undermines structuralist-materialist explanations to market integration. Explanations based on transaction costs fall short, too, given that mobility rates are much higher in the United States than in the European Union and that therefore greater pressure to facilitate trade should have at the very least brought about a similar outcome by now in the US. Likewise, institutional explanations focusing on the vested interests of member states and resources at the federal level cannot account for why in the European Union, in contrast to the United States, arguments, such as subsidiarity as a rhetorical cover for protectionist business interests, were not successfully mobilized.

Moreover, despite the protest and the lukewarm response of business to further services liberalization, the European Commission, as this chapter will show, appears to remain embedded, comparatively, in an overall more permissive environment regarding

[93] The 'country of origin principle' is an extension of mutual recognition. According to the principle, service providers would be required to respect solely the rules and regulations of their country of establishment without being subject to host state's rules. In short, it is the home state which is responsible for the regulation and not the host country where the service will be provided. It is important to note, once again, that 'country of origin principle' was only proposed for the delivery of temporary services, i.e. applicable only in the case of cross-border provision of services without establishment, not for services provider planning to establish themselves in another member state. In the later case, as described earlier, host country rules were and are still applicable. In addition, the draft also already foresaw a number of derogation of which the qualification directive was one.

the role of government in market interventions, even if the consequences mean additional market liberalization.

All in all, in the US, not only the absence of leadership or any concerted effort to liberalize services, but also a reluctance by actors to turn towards federal level solutions and to perceive the entire polity as one single market feature prominently in the continuation of non-tariff trade barriers in America. Thus, the European Commission with its overarching political objective of a single market emerges here once again as the major policy entrepreneur, succeeding in shaving off trade barriers for services, such as hairdressers. In the US in contrast the freedom for hairdressers to temporarily provide services across state borders remains tangled up in 50 different state regulatory knots.

European Regime: Commission Pushing the Liberal Market Envelope

So how did we get there? How did the European Union end up with a law that not only requires member states to screen their legislation to check whether all requirements are necessary and proportionate and, if not, remove it, but also the setting up of a "Point of Single Contact (PSC) through which it is possible to identify and complete all necessary authorization processes at all levels of government from the comfort of an entrepreneur's own home/office" (Barnard 2008, 323)? While the freedom to provide services rest, as described in the previous chapter, on multiple legislative instruments, this chapter will mostly focus on the service directive. Indeed, while the directive on the recognition of professional qualifications was largely ignored by the media and academics, the services directive evoked passionate and sometimes fierce reactions from all political quarters. As one EU official commented to me:

> Yeah, it was very frightening that when it was this debate on the service directive, people were not aware that the qualification directive existed and that it covered many important things. Because when you ask the average citizen what they want from a professional from another country when he comes to your place, [they would answer] we want to be sure that he is a good professional. So that is mostly the qualification directive and [it] is not the fact that the legal form is this or the shareholding structure [has to be] that way. For the average citizen the important, the most important aspect again you can imagine is the diploma. But, I cannot explain why, there was absolutely no discussion around the qualification directive, but everything happened with the service directive, also the idea of social dumping, but the social aspect like the salary of the employees it has never been in the service directive. It never was in fact. But there was this wave to make polemics and to have politicians on this. So the service directive was used for something else (personal interview 2010).

And another EU official noted that the oversight to take into account the derogation for qualifications, which might have alleviated at least some concerns not linked to worries about social dumping, can be summarized in "two simple words: ignorance and polemics!" (personal interview 2010). A view shared largely by Pascal Lamy, former EU Commissioner for Trade, who commented at the time of the debate over the Bolkestein draft that '"plumber-phobia" had been "cunningly manipulated" in a way that reminded him of "simply xenophobia"' (cited in Arnold 2005). This high level of polemics finds its expression in the depictions of the secondary literature as well. Several authors describe the service directive as "one of the most disputed initiatives of secondary legislation in EC history" (Griller 2008, 381), "the legislative hot potato of the early twenty-first century" (Barnard 2008, 323), a "trial" and a "story full of personal and political drama, false accusations and genuine resentment, aggressive grandstanding and painstaking attempts at amicable settlement" (Nicolaïdis and Schmidt 2007, 717). Another researcher agrees by highlighting that the "hyperbolic rhetoric consumed reasoned analysis of the directive's provisions and consequences" (Leslie 2009, 3). In short, the service directive was either perceived as "a wrecking ball" and a "Trojan horse

for increased liberalism in the eyes of opponents", or as "a white knight that would rescue Europe from its inflexible labour market" (Chang et al. 2010, 97; Fritz 2004, 3; cf. Arnold 2005).

Given the high degree of conflict and especially the fact that "[u]ntil then, internal market policies had gone mainly unnoticed", a complete failure of the service directive would have been easily imaginable (Schmidt 2009, 847). Consequently, it is even more remarkable that the service directive, albeit in a slightly amended form, survived. Indeed, while most commentators so far on the service directive have pointed towards the differences between the original Bolkestein draft and the final version of the directive, i.e. the backpedaling to some degree of the Commission, what gets overlooked is that a) in comparison to the US, the EU is much more legally integrated in the service arena and that b) while the term 'country of origin', at the center of most of the controversy, has been removed, the principle and the spirit remains not only in the directive but more importantly alive in the eyes of those having drafted and now implementing the directive. *Plus ça change, plus c'est la même chose.*

Despite the huge outcry later on against the *Bolkestein* draft and the country of origin principle, services liberalization started out largely as a low dispute area. In fact, in the very early stages the service directive was not very much debated or controversial and there was wide consensus that services needed to be opened up more.[94] As Chang et al. observe, "[t]he drafting of the 2004 Commission proposal was done with little fanfare" and only later on "took on greater political significance" (Chang et al. 2010, 98). The aspiration to create a single market in services in the European Union, however, has long

[94] The next couple of paragraphs follow closely the description of Bruno de Witte (2007) on "*How did Services get to Bolkestein and Why*?"

antecedents and goes all the way back to the 1957 Treaty of Rome. Besides the four fundamental freedoms of goods, people, capital and services, the Treaty of Rome also already included in Article 52 the freedom of establishment (today Article 49). Even the principle of mutual recognition, which later with the Cassis de Dijon case and the Commission policy entrepreneurship led to a new phase of market integration, as described in the previous chapter on procurement, was already anchored in Article 57 (today Article 53) for the recognition of diplomas, an important part of facilitating the provision of services across state borders. Furthermore, in 1974 the European Court of Justice recognized in two important cases, Reyners Case 2/74 and Van Binsbergen, Case 33/74, respectively the direct effect of today's articles 49 and 56 on the freedom of establishment and on the freedom to provide services.

These decisions connote that citizens of EU member states are entitled to be treated as nationals and that they can require competent national jurisdictions to apply articles 49 and 56 of the EC Treaty. Discriminations on the grounds of nationality are thus prohibited, and member states are obliged to modify national rules that restrict these two freedoms. Restrictions to be eliminated do include those national rules which are indistinctly applicable to domestic and foreign operators if they hinder or render their exercise less attractive, with delays and additional costs. Yet, these decisions only established a reactionary, instead of proactive, regime where the ECJ and the Commission are responsible for ensuring the implementation and the respect of the rules in the EU. Thus, while the Commission has the power to open infringement procedures against those member states who do not comply with their obligations, it does not create a positive services regime with legal clarity. Regulation and practices hindering the free

flow of services continued to abound in the member states. Such a system is especially expensive for small and medium service providers who do not have the time and resources to go to the courts or call upon the Commission to launch an infringement procedure against a member state and a specific regulation or practice. In its argument for the present-day service directive, the Commission in fact strongly argued that "infringements, especially for private citizens and SMEs, can be very slow, heavy-handed mechanisms" and "companies can go bankrupt before an infringement case even gets to the European Court of Justice". Hence, the Commission argued that "new structures will be needed to create legal certainty, establish clear guidelines as to where mutual recognition applies, and improve administrative co-operation across frontiers" (Memo/01/5). Furthermore, the Commission noted that while infringements "are an essential part of the Commission's role as guardian of the Treaties, and will still be necessary in particular cases in order to ensure that the Internal Market rights of citizens and business are fully respected", they are "not alone sufficient to meet the strategic objective of creating a well-functioning Internal Market for services", where "the range and scale of the problems identified cannot be addressed by infringements alone" (Commission 2004 FAQ). Infringement cases only tend to concentrate on very narrow misapplications of EU law and do not eliminate barriers to trade in a more systematic way. Thus, while a member state might comply with an ECJ decision, the member state is not obliged to and usually doesn't screen its legislation to ascertain that similar barriers don't exist in other fields.

In short, while decisions of the European Court of Justice in the 1970s established a negative regime of asking member states to stop discriminating, it didn't point to what

needed to be done to facilitate services trade and to ensure a general, broad elimination of discriminatory practices. This is somewhat similar to what the situation is in the United States today, where an individual service provider might try to go through the court system to argue against potential discrimination based on the privileges and immunity clause. Yet, the burden of proof in the US today is, as it was at that time in the EU, on the individual service provider to demonstrate that a rule or practice is discriminatory.[95] The burden of proof is not on the state to prove that the rule in place is absolutely necessary for some important justification, a justification which needs to be deemed reasonable and proportionate by a third actor.

Indeed, overall, not much really changed with the Van Binsbergen and Reyners decisions. Non-tariff barriers to services remained and market integration was uneven, with free movement of capital and goods taking the lead while the freedom of services limped behind (Chang et al. 2010, 97-98). Lord Cockfield and his cabinet and the Delors Commission in general tried to create a single market in the 1980s; the term single market being itself a creation of the Single European Act resulting from the Cecchini report and the White Paper. As von Sydow, long time Commission official and member of Commissioner's Bangemann cabinet, noted, the term single market was "created by us", the Commission. The idea behind it was to go beyond the original treaties which only talked about a reduction of barriers to trade but did not clearly spell out or evoke a sense of an area without any barriers to trade at all.[96] Thus, the term "single market"

[95] But even then, the EU Commission's right to launch infringement procedures against member states on its own differentiates the US from the EU, where in the former no such institution exist to actively check for any non-tariff barriers to trade.

[96] "Das haben wir erst 1987 eingefuegt als Definition des Binnenmarktes, vorher stand im Vertrag nur Abschaffung der Hemmnisse gegen den Warenverkehr, Dienstleistungsverkehr, Personenverkehr, und

represented a conceptual enhancement, allowing the Commission later on to use it to argue against any remaining barriers and to make clear that there is no barriers still to be had. Yet, while freedom of services was already mentioned in the White Paper and in the Cecchini report and even noted as being as important as trade in goods for the return to prosperity of the European economy[97], services ended up to not being given as much attention as the opening up of goods and public procurement in the 1980s. The focus at the time was mostly on the continuation of the already existing practice of creating sectoral directives for specific professions in the services arena; one of the earliest being, as being described in the next chapter, the freedom to provide services for lawyers across state borders. As Schmidt observes, "[t]hough services had been included in the internal market programme of 1992, only very few sector-specific directives resulted (such as insurance services) from a very long and cumbersome process" (Schmidt 2009, 847). De Witte slightly disagrees noting that "there was a fairly large number of services directives in the 1990's", but the overall effect on service liberalization was still minimal (De Witte 2007: 5; cf. Craig 2002, 30). Especially Directive 96/71/EC concerning the posting of workers in the framework of the provision of services**,** which is technically concerned with the free movement of workers in the EU and is "formally a services directive in terms of its legal basis" was perceived not to "*facilitate* the free movement of services (as its legal basis requires) but hinder it", given that "this directive forces [firms] to comply

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Kapitalverkehr. Die Definition des Ziel eines Binnenmarktes ohne interne Grenzen, das ist '87 in der Einheitlichen Europaeischen Akte aufgrund des Weissbuchs nachgeschoben" (personal interview 2009).

[97] In paragraph 95 of the White Paper, Lord Cockfield's team wrote that "it is no exaggeration to see the establishment of a common market in services as one of the main preconditions for a return to economic prosperity. Trade in services is as important for an economy as trade in goods" (COM (85) 310 final).

with two different sets of labour law rules (those of their country of establishment and those of the country where they post workers)" (De Witte 2007, 5; emphasis in original).

Indeed, except in certain professions such as doctors and lawyers, into the 2000s the free movement of services, either by free provision of services across frontiers or freedom of establishment in another member state, remained largely to be instituted only as non-discrimination on the grounds of nationality. In practice these principles were still coming into conflict with national regulations with which those providing services had to comply and which differed significantly from one country to another. As stated by De Witte, "[t]here was a strong suspicion [within the European Commission] that the European Court of Justice, in its case-law, only dealt with the proverbial tip of the iceberg and that most impediments to trade in services remained hidden under the surface" (De Witte 2007, 6). The Commission frequently was unable to identify all of these "humanly and economically obnoxious impediments" to services trade "because the individual persons or firms suffering from those restrictions failed to take legal action, and because national courts, when confronted with such cases, failed to enforce the Treaty and/or to refer preliminary questions to the European Court of Justice" (De Witte 2007, 5). That the sectoral approach to service liberalization as part of the 1992 Single Market Program wasn't sufficient also found its expression in an increase in ECJ court cases in the in the late 1990s and early 2000s, when in the five year period from 2000 to 2005 the ECJ decided on "3.5 times as many cases" related to services than during the previous five year period (140 cases versus 40 cases) (Hatzopoulos and Do 2006, 923). While it is not clear, whether this increase in cases is "fortuitous" or whether it either "indicates a growing awareness of long-existing restrictions to services trade" or maybe a

reflection of an actual increase of trade impediments in member states' regulations, the important thing is that, in the eyes of the Commission, the latter two explanations "can serve as arguments for replacing the judicial approach with a comprehensive legislative approach covering all barriers to services trade" (De Witte 2007, 6). The opportunity for the Commission to embark upon further services liberalization arrived at the start of the new millennium.

At the special European Council summit in Lisbon in March 2000, the heads of governments and states launched the Lisbon agenda, setting a *"**new strategic goal** for the next decade: to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"* (Presidency Conclusions 2000; emphasis in original). This new agenda, by noting that "[t]he services sector is underdeveloped, particularly in the areas of telecommunications and the Internet", called upon the Commission to come up with "a strategy for the removal of barriers to services" (Presidency Conclusions 2000). Yet, the Lisbon agenda itself was the direct result of the continuous prodding of member states by the European Commission. As Hywel Ceri Jones notes, the Lisbon agenda can be carefully traced back, through the series of previous European summits, directly to former Commission President Jacques Delors' 1993 *White Paper on Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* (COM(93)700) (Jones 2005, 2). The 1993 White Paper served as "the launching point for the structural reform agenda which was needed to turn around the massive unemployment crisis which had been undermining the very fabric of European society" (Jones 2005, 2). It helped to provide "[a] new collective sense of urgency […] at the highest level to drive

an across-the-board agenda of systematic change and help[ed to] create the conditions for a more competitive and cohesive Europe on the global stage" (Jones 2005, 2). In fact, for Jones, the Commission and especially Jacques Delors were the crucial actors:

> President Delors had the courage, conviction and vision to take the lead on these issues. His White Paper sought to put in place a combination of policies for the structural reform of the labour market and stability-oriented macroeconomic policies designed to stimulate economic growth. […] Armed with charts to illustrate the demographic challenges that lay ahead, Jacques Delors challenged the European Council to get its act together and commit itself to introducing radical reforms required both within individual Member States and at European level. Within the Commission, through sheer graft and his personal leadership and drive, President Delors had obliged the different Directorates-General to collaborate actively in building the White Paper and in setting out a long-term, inter-sectoral vision of the problems and possible solution. I was privileged to be a member of the core team he set up to coordinate this process within the Commission (Jones 2005, 2–3).

In other words, the 2000 Lisbon Summit was only the moment when the European heads of state had finally "agreed […] to take ownership of the project" previously proposed by the Commission (Jones 2005, 8). Jones further notes that, "[a]lthough Europeans are undoubtedly sympathetic to Lisbon's overall objectives, they have not been engaged in the process and the press is correspondingly disinterested" (Jones 2005, 8). Consequently, [t]he lack of public debate means that there is no bottom-up pressure for the achievement of Lisbon's goals" (Jones 2005, 8). This puts the Commission squarely at the center of the run-up to the Lisbon agenda and the subsequent market reforms in the services sector.

Moreover, while giving the Commission a new official opening to tackle services liberalization in a new, much more far-reaching way, the call issued by the member states at the Lisbon summit, as De Witte clearly points out, was only an extension of the existing sectoral policy the member states have been accustomed to so far. The EU member states only "asked for the continuation of the sector-specific approach to internal

market legislation", focusing in particular on three areas: electronic commerce; the services of general economic interest (gas, electricity, postal services and transport); and financial services" (De Witte 2007, 2). It didn't represent a sea change. There was "no trace at all of the idea of a general directive on services" (De Witte 2007, 2). The member states did not ask for or foresee a horizontal approach to services liberalization, which would encompass all remaining services sector in one broad directive. They also did not demand and anticipate the transformation of mutual recognition into the 'country of origin' principle. Indeed, the idea of a directive which supplements the classic sectoral approach to services policy with a more comprehensive across the board approach, seen as "more closely reflect[ing] the way the real economy now works", did not appear in any previous EU documents, such as the Commission's *Strategy for Europe's Internal Market* in 1999 (De Witte 2007, 2; Memo/01/05). It was the Bolkestein draft directive on services which was going to change that.

By combining a horizontal approach and transforming, or better, extending the mutual recognition principle to services, the Commission undertook a 'radical shift' in market integration, what some commentators called a "bold directive", "the most radical directive ever to address the single market for services", "a 'legal revolution', or put it in softer terms, a major discontinuity in internal market law" (De Witte 2007, 1; Nicolaïdis and Schmidt 2007, 722). Undeniably, the Commission went further in the understanding of mutual recognition and the freedom of markets than other EU institutions, such as the European Court of Justice. Nicolaïdis and Schmidt note that "the European Court of Justice (ECJ) balked at applying [mutual recognition] to services" (Nicolaïdis and Schmidt 2007, 719). And De Witte agrees by observing that

> This 'regulatory competition part of the Bolkestein draft was more problematic, because, unlike the administrative simplification part, it represented a substantive shift compared to the ECJ's case law, and compared to the Commission's own approach in drafting internal market legislation. The case law of the European Court of Justice does not challenge, as a matter of principle, the application of the host country's laws and regulations. The principle of mutual recognition, as adopted by the Court, simply meant that the host state must take into account the laws and regulations to which the service provider is subject in its home state, so as not to create unjustified double burdens. This is not the same thing as imposing, as a matter of principle, the application of the laws of the country of origin (De Witte 2007, 8).

While both elements, 'country of origin principle' and horizontal legislative approach, have been applied before, it was especially the combination of the two, which turned out to be radical in the case of services liberalization (cf. Leslie 2009, 5). The horizontal approach had for instance already been employed in the public procurement directives as well as in the earliest general system directives on the recognition of qualifications, the precursors to the 2005 qualifications directive (cf. De Witte 2007, 4). The 'country of origin principle', on the other hand, was to a certain degree already employed in the Directive 89/552/EEC 'Television without Frontiers' and the Directive 2000/31/EC on Electronic Commerce (cf. De Witte 2007, 8; Leslie 2009, 5). But in these cases, the effect of the 'country of origin principle' was mitigated by the fact that "it was counterbalanced by an amount of harmonization which reduced the discrepancy between the laws of the home and host countries" (De Witte 2007, 8). This time, however, instead of focusing on a specific sector, the Commission was proposing a draft which would apply to a large range of services "without an attempt at listing those services (unlike what happens in the context of GATS)" (De Witte 2007, 8). The service directive would thus apply to all services activities and sectors that are not expressly excluded from its scope of application. The Commission calculated that this would encompass approximately 50 percent of GDP and 86% of the EU firm population (COM(2004)2

final: 6). Moreover, the Commission proposed in the case of temporary delivery of services "the much more radical idea that these services providers should in principle be *regulated by the state of origin* and not by the host state (Article 16 of the draft)" (De Witte 2007, 7; emphasis in original). The Commission this time did not include in the draft any harmonization propositions related to non-market concerns, such as cultural diversity in regards to broadcasting services. The only exceptions allowed for were derogations for public policy, public security, public health. These were, however, much more restrictive than "the general interest grounds for restriction recognized by the ECJ in its 'mandatory requirements' case-law, and could be seen to *replace* the Treaty-based grounds of derogation recognized by the ECJ" (De Witte 2007: 9; emphasis in original). This leads De Witte to conclude that the Commission here tilted the regulatory balance "away towards deregulation with only a little amount of re-regulation" and that non-market values were not seen anymore "as positive objects for Community regulation, as they used to be in the earlier sector-specific approach", but "were thus exclusively seen as grounds of derogation, to be rolled back as far as possible" (De Witte 2007: 8 – 9).

To reiterate, the Commission with its draft proposal went further than the other major actors in the European Union by pushing liberalization of markets as far as possible. Indeed,

> [t]his important *regulatory shift* […] formed a distinct example of Commission entrepreneurship, since it has been advocated neither by the other EU institutions nor by major interest groups. It was the Commission's own invention […] (De Witte 2007, 9; emphasis in original).

My own interviews confirm De Witte's assessment that the regulatory shift was largely the Commission's own invention. Commission officials don't see the regulatory shift as any "original idea" *per se*, but simply as an extension of principles already tested

in other directives and an attempt to box in member states as much as possible in their potential to maintain non-tariff barriers to services. In short, the interviews showed that the 'country of origin principle'

> was drafted by the European Commission and my colleagues at the time. I was not there at the time, but it was my unit. When the people did this, it was people who work on the field of services, because there was already the e-commerce directive that was dealing with this question and enshrining the country of origin principle (personal interview 2010).

The Commission staff transferred an idea born and applied in the e-commerce, and other similar directives, to the directive on services. The Commission, in sum, took initiative here, not by completely pulling something new out of thin air, but making creative use of an already established principle somewhere else. Commission officials in the interviews went out of their way to emphasize that the 'country of origin principle' for them was "only a kind of codification of the jurisprudence of the court" and actually not very creative at all (personal interview 2010). As a Commission colleague put it, "it's not very original" (personal interview 2010). For the Commission officials, the 'country of origin principle' was simply an arch, a continuation of previous developments. Thus, an official contended that "it started with goods and Cassis de Dijon; it's mutual recognition, mutual recognition and country of origin are very similar" (personal interview 2010). Yet the same official, when asked again about where the principle came from, hinted that the principle was not completely the same as mutual recognition, noting that the intent of it was

> to impose member states to own up. If member states had applied mutual recognition the way they should have, mutual recognition is that they must double-check what is already checked in another member state. So if the member states had done it, then there wouldn't have been the need for the principle of origins. The principle of origins was kind of reversing the proof" (personal interview 2010).

Thus, similar to the situation when the Commission decided after the 1979 Cassis de Dijon decision that mutual recognition was the valid legal situation (cf. Alter and Meunier-Aitsahalia 1994), the Commission here again simply took the 'country of origin principle' as given and presented it as well-established. Von Sydow, former Commission official and member of Commissioner Bangemann's cabinet,[98] traces a direct line of the Commission activity of creating a philosophy of mutual recognition and country of origin by simple fiat. As he notes

> In the philosophy of Cassis de Dijon, in the philosophy, we first originally assumed, all people first assumed that the host country rules would always apply. I Germany, I was importer, may determine what technical rules can be imposed. But with Cassis de Dijon *we changed it into the country of origin principle*. If the goods have been legally manufactured and marketed in France, then it must therefore also be the country of origin principle. […] The Cassis de Dijon and the country of origin principle have been interpreted by the Commission as being the legal situation. The term 'mutual recognition' is not mentioned in the Cassis de Dijon decision. A year and a half later an interpreting communication was sent around stating that the decision also said that as long there is no harmonization, we have to do mutual recognition instead of harmonization. […] *In this case the Commission has been extremely important, because it was the Commission that has pushed and pretended that this is the valid legal situation*. […] Then we tried to put it into to place in the area of taxation, valued added tax, but then we also transferred it to services. […] Host country principle for those such as lawyers or doctors who want to permanently establish themselves in France. But *somebody who only wants to cut hair once a week or who only creates architectural drawings, in these cases it is more than sufficient to be regulated only by the home country. We developed this to a philosophy via the Cassis de Dijon from several court decisions*" (personal interview 2010; own translation; my emphasis).[99]

[98] Bangemann was Internal Market Commissioner between 1989 and 1995 and then Commissioner for Industrial affairs, Information & Telecommunications Technologies from 1995 to 1999.

[99] In der Philosphie Cassis de Dijon, in der Philosophie gingen wir urspruenglich davon aus, gingen alle Leute davon aus, das immer das Bestimmungsland die Regeln aufstellt. Ich Deutschland ich war Einfuehrer kann festlegen wie die technischen Reglen sind. Ueber Cassis de Dijon haben wir das umgeaendert ins Ursprungslandprinzip. Wenn die Ware im Urlandssprungland Frankreich rechtmaessig hergestellt und in Verkehr gebracht worden ist, dann muss auch also Ursprungslandprinzip. [...] Cassis de Dijon und Ursprungslandprinzip, dass ist also Rechtssprechung interpretiert durch die Kommission. Cassis de Dijon, im Urteil steht das Wort gegenseitige Anerkennung gar nicht drin. Das Urteil war anfangs gar nicht, anderthalb Jahre spaeter eine interpretirierende Mitteilung gehaben und gesagt haben, das Urteil sagt ja auch, solange nicht harmonisiert ist, muss statt Harmonisierung machen wir gegenseitige Anerkennung. [...]In diesem Falle ist die Kommission sehr wichtig gewesen, weil sie das sehr gepuscht hat und so getan

This shows that the Commission was in the position to raise the stakes and had not only done so in the case of Cassis de Dijon but again in the case of services liberalization and the 'country of origin principle'. Thus, while the "Heads of States assert the teleological credo of the need to complete the single market", it is then the Commission that "takes the politicians at their word, in fact 'upping the ante' by proposing a radical generalization of the Court's approach in pursuit of the completion of the single market for services" (Nicolaïdis and Schmidt 2007, 721).

Moreover, Michel Petite, former Director General of the Legal Service of the European Commission and member of Lord Cockfield's cabinet in the 1980s, admits that in the case of services "the non-discrimination argument was pushed very far" (personal interview 2009). The 'country of origin principle' is based on leading restrictive arguments based on the difference between goods and services ad absurdum. Gérard Cornilleau, a deputy director of the French Economic Observatory (Observatoire français des conjonctures économiques, OFCE), for instance explained in an interview with *Le Monde* that it is different whether a customer buys a piece of clothing, which quality he can assess beforehand, and a haircut, which quality can only be assessed afterwards.[100]

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hat als ob es Rechtslage ist. [...]Das haben wir dann bei im Steuerbereich, Mehrwertsteuer usw. hinzukriegen, aber das haben wir dann auch auf Dienstleistungenuebertragen. Es gab einige Urteile, die Cassis de Dijon, die haben das zur einer Philosophie verbracht. Bestimmungslandprinzip jemand fuer ewig nach Frankreich als Rechtsanwalt oder als Arzt muss sich dort, muss die dortigen Regeln befolgen. Aber jemand der nur fuer einmal pro Woche Haare schneidet, oder Architektenzeichnungen anfertigt, da reicht es ja dass er Zuhause zugelassen ist. Das haben wir zur einer Philosophie entwickenlt aus verschiedenen ueber Cassis de Dijon aus verschiedenen Rechtsurteile" (personal interview 2010).

[100] "Gérard Cornilleau : Il y a à cela une raison très simple, c'est qu'autant il est assez facile, quand il s'agit d'un bien, par exemple un vêtement, de vérifier sa qualité avant de l'acheter, de vérifier qu'il correspond bien à ce que le consommateur souhaite avant de l'acheter, pour les services, ce n'est pas le cas. Vous ne savez que votre coiffeur est bon qu'après qu'il vous a coupé les cheveux. Il y a donc une asymétrie des informations à propos des services entre productur et consommateur qui justifie une meilleure réglementation des services que des biens" (LeMonde 2006)

But in the eyes of Michele Petite, this difference is not only minimal but can also to a certain extent be put ad absurdum:

> The counterfactual to this, if you take regulation of the professions, doctors, kinesitherapists, was pretty easy, because in a way the massive argument was, what do you expect, in a way, are the German citizens different from the French citizens across the border to the point that they need an expertise to be dealt with? So you take it by the absurd in a way and you end up with the sole argument but we want to be sure that the people are well-trained; okay that's pretty easy. There is no other reason for discrimination (personal interview 2009).

In short, the Commission emphasized that it can be safely assumed that hair in France is not to be expected to be much different from hair in Belgium or Germany: Thus, a hairdresser which is trained and/or regulated or had at least a couple of years experience in the profession should be able to provide services temporarily across state borders without any further ado. Any remaining regulation to hinder such service provisions can generally be assumed as discrimination. The Commission's strong liberal market stance found its echo in the debates surrounding the services draft in the British parliament. Not surprisingly the British parliament and government greatly welcomed the Bolkestein draft. The 6th report to the British House of Lords states that "[t]he United Kingdom Government takes the Commission's view that as much of the essential legislation that protects citizens and consumers is already harmonised at European Union level, the Country of Origin Principle is a realistic legal basis for delivering free movement of services on a temporary basis" (6th report, Section 87). The House of Lords agreed, affirming that "[w]e believe that the Country of Origin Principle is a realistic legal base for temporary service provision in any Member State" and that "[w]e are not convinced that health and safety should be exempted from the Country of Origin Principle", especially given that "the economic benefits from applying the Country of Origin Principle temporary service provision as set out in the Commission's draft

Directive are greater than the threat to UK health and safety standards". It is particularly small and medium enterprises that "will benefit from the application of the Country of Origin Principle which will enable them to effectively test the water in another Member State on a temporary basis, without having to fully commit to permanent establishment" (6th report, Sections 106–7 and 112).

Yet, not only did the British government and parliament welcome the new services liberalization and echoed the Commission's argument that the benefits are the greatest for small and medium enterprises, but also the Commission's point that opening up services to hairdressers or architects does not endanger the general population:

> 151. In general the UK Government takes a relaxed or consumer-focused approach to the issue of quality assurance. […] the UK Government are content to allow consumers to determine quality. So for instance, in the United Kingdom it is not necessary to have a relevant qualification to set up in business as a hairdresser. The UK's approach to quality assurance in this case would be that if in fact the hairdresser knows little of hairdressing, it is likely that their haircuts will be of poor quality and the salon is unlikely to prosper.
>
> 152. By contrast in Germany, a hairdresser must, in order to call themselves a Friseur (hairdresser), have had an extensive training. Therefore, it is relatively unlikely that a poor haircut will be sold, but the price may be higher (this effect may apply particularly in professions where training requirements severely restrict entry). There is of course no necessary link between the higher price and better quality of the haircut, and the UK Government are content to let the consumer decide which hairdresser to patronise. The Institute for Chartered Surveyors made a similar point with regard to the service provision of architects: "A more liberalised market such as already exists in the UK and Ireland will not lead to a lowering of standards or put the public interest at risk. It is clear, for example, that buildings in the UK and Ireland are no less safe than those designed, constructed and maintained elsewhere in the EU (RICS) (6th report).

This open and strong support for services liberalization was not an isolated case. At the onset the Commission was acting in a relative permissive environment, not least because services liberalization was "one of the few potential 'hard law' elements" in the

Lisbon agenda (De Witte 2007, 2). Yet, the Commission started out carefully and somewhat surreptitiously in pushing its market liberalization agenda and introducing the combination of the two elements, which later on were regarded as a radical shift in market integration: the horizontal approach and the extension of the mutual recognition principal. The two elements were introduced more and more prominently over a series of documents. Nonetheless the intent to approach services liberalization in only this radical way was a foregone conclusion, emerging for the very first time in the internal market strategy paper for services published December 29, 2000 as a response to the European Council's call earlier that year at the Lisbon summit. Observers, however, might be excused for not noticing it right away, given that the horizontal approach was only mentioned as a possibility and the extension of mutual recognition to services not at all in the main part of the document. Under the headline "A targeted harmonization to tackle the remaining barriers" the Commission first gave the impression that harmonization will largely be limited to the usual sector-specific approach, before proceeding to suggest that "[i]f the barriers identified are horizontal in nature (common to several sectors or having consequential effect on the provision of other service activities), a horizontal legislative instrument and specific harmonisation measures will be needed" (COM(2000) 888, 11). In the Annex of the document, however, the Commission "was rather more sanguine" (De Witte 2007: 3). Here the Commission asserts that "[f]or barriers which are horizontal in nature, an instrument *will* be proposed containing […] [t]argeted harmonisation of requirements affecting several sectors" as well as "[a] mechanism to ensure that the Internal Market can be used by all European service providers as their domestic market,

notably through the efficient application of the principle of mutual recognition" (COM (2000) 888, 15; my emphasis).

To say the least, Commission clearly put the cart before the horse by proposing already the remedy before identifying officially the barriers to services trade and what solutions this might necessitate. De Witte put it best by observing that this "indicates that *the Commission had a pre-conceived view of the matter*: even before it had accomplished the comprehensive analysis of existing barriers (to be undertaken in 2001), it already indicated what would be one of its main consequences: the proposal of global legal instrument to deal with those barriers" (De Witte 2007, 3; my emphasis). Given the Commission's clear premeditation, it is unsurprising that the comprehensive analysis leading to an update of the market strategy paper in 2003 (COM(2003) 238) came to the conclusion "that a general legal instrument was indeed necessary to sweep away the cross-sector barriers to trade in services" (De Witte 2007, 3).

When the Commission finally submitted its draft proposal (COM(2004) 2), which now openly included a horizontal approach to services liberalization combined with the 'country of origin principle', on January 13, 2004, it was still at first largely welcomed. The draft was published "after it had received approving nods from the Council and the Parliament and from a number of interest groups" (De Witte 2007, 3). This was consistent with the support given by all the major actors to the Commission over the four previous years in regards to service liberalization. Thus, the Commission received "'full support' of all the relevant actors of the EU (the Council, European Parliament, Economic and Social Committee, and Committee of Regions" for the 2000 internal market strategy paper for services, already suggesting, as pointed out above, a horizontal

approach to services liberalization (Chang et al. 2010, 98). As De Witte concurs, "[t]he idea of a 'new deal for services' had received the backing of the other European institutions, most importantly of the European Council", when the European Council included services as "one of the few potential 'hard elements'" in its Lisbon agenda (De Witte 2007, 2). The support for the horizontal approach in the words of Chang et al. was "unanimous" and "consistent" throughout the years following the Lisbon summit (Chang et al. 2010, 98 and 103). Nicolaïdis and Schmidt agree that "a horizontal approach was in fact consensual across EU institutions and member states" and that after "consult[ing] with national ministries over a period of two years", the "national bureaucrats seemed to be more or less on [Bolkestein's] wavelength" (Nicolaïdis and Schmidt 2007, 722). The European Parliament in 2003 even urged "that the Competitiveness Council reaffirm Member States' commitment to the country of origin and mutual recognition principles, as the essential basis for completing the internal market in goods and series [...] welcome[ing] the proposals for a horizontal instrument" (European Parliament Resolution, January 13, 2003; cf. Chang et al. 2010, 99). This latter statement by the European Parliament indicates that even the EP was generally in favor of the horizontal approach and the accompanying 'country of origin principle'.

Why all of a sudden then the perception that the Bolkestein draft "had a chance of a "snow ball in the fire" of getting through" as expressed by Bolkestein's successor, Charles McCreevy (cited in Kubosva 2006; cf. Mallinder 2006)? Protests against the draft started less than five months after its initial publication. On June 4, 2004, trade unions in Belgium demonstrated against the draft (cf. Fritz 2004, 4). The protests, "attended by about 5,000 people", were supported by "a broad coalition of left-wing

political parties and non-governmental organisations (NGOs), with the lead taken by the two largest trade union confederations - the Confederation of Christian Trade Unions (Confédération des Syndicats Chrétiens/Algemeen Christelijk Vakverbond, CSC/ACV) and the Belgian General Federation of Labour (Fédération Générale du Travail de Belgique/Algemeen Belgisch Vakverbond, FGTB/ABVV" (European Industrial Relations Observatory 2004). Trade unions in Finland similarly expressed their concerns about the draft directive at that time (European Industrial Relations Observatory 2004). At the heart of the protests was the notion that the 'country of origin principle' was an "usurpation of identity" of mutual recognition, i.e. the stripping down of mutual recognition "to its bare bones" (Nicolaïdis and Schmidt 2007, 717). The fear among protestors on the left was that the principle would "result in service employers locating themselves in countries with the lowest fiscal, social and environmental requirements and subsequently extending from this base their activities throughout the whole of the EU" (European Industrial Relations Observatory 2004). This position was, among others, echoed by Marco Rizzo, Member of the European Parliament for the Party of Italian Communists (Partito dei Comunisti Italiani, PdCI), who considered the draft proposal "a fatal blow to the quality of life in the European Union" (Rizzo 2004). According to him and many others on the political left, "the danger lies in the by no means remote possibility of its providing a legal incentive for private companies to re-locate in countries with the most permissive fiscal, social and environmental requirements" with the consequence that "the new principle, once it became European law, would exert a strong downwards pressure on countries whose standards at present guarantee and protect the general interest" (Rizzo 2004).

The Commission was completely taken by surprise "by the vehemence of the opposition to the proposal" (European Industrial Relations Observatory 2004). The surprise is somewhat understandable, given that only months before the support for the service directive was broad and the Bolkestein directive included important derogations, last but not least in regards to qualifications and the posted workers directive. The Commission's proposal clearly states that "[f]or the sake of consistency with that directive [Directive 96/71/EC concerning the posting of workers in the framework of the provision of services], Article 17 of this proposal for a Directive contains a derogation from the country of origin principle where these rules are concerned" (COM (2004) 2, 13) In short, the services directive was not going to eliminate the rules established with the previous Posted Workers Directive. The same rules for posted workers, in contrast to self-employed workers, would still apply. Thus, a services company sending workers to another EU member state would still need to fully comply with that host state's employment laws, including minimum wage laws. The Commission stated "emphatically that the proposal will not: allow social dumping by bringing in 'cheap' workers (European Industrial Relations Observatory 2004).

Yet, the resistance against the services directive took on its own dynamics and the largely permissive environment for the Commission seemed to vanish. Chang et al. provide three possible and interrelated explanations for this shift from an environment of broad support to the emergence of sudden resistance in 2004. They distinguish between explanations relating to Eastern enlargement, ideas and domestic politics and institutions.

First, the publication of the draft directive did indeed coincide with the EU's largest enlargement to this day. The trade union protests in Belgium took place only a

month after the official admission of the new and generally largely poorer Eastern European countries. In the minds of Nicolaïdis and Schmidt "[t]here is little doubt that the EU's biggest enlargement since its inception conditioned the reactions to the services proposal" (Nicholaidis and Schmidt 2007, 724). Trade unions feared that with the admission of so many poorer and less regulated member states, the services directive would clearly lead to the undermining of Western welfare states. The fact that there was a derogation for the posted workers directive was largely overlooked. Moreover, for three countries (Denmark, Germany and Sweden) were the host state control principle established in the posted workers directive was largely meaningless, the problem was not the service directive, but these countries' unwillingness to enact minimum wage legislation.[101] As Chang et al. correctly note, "[i]t was totally lost on EP legislators and many others that this impact has nothing to do with Bolkestein" and that "[t]hese effects […] were solely due to the combination of enlargement and the absence of minimum wages in those countries" (Chang et al. 2010, 104–5).

Second, Chang et al. highlights the role that ideology, in particular the demonization of the services directive played. They observe that "the impact of globalization on national social models found in western European countries had already caused much concern among governments and citizenry" (Chang et. al. 2010, 104). Hence the debate surrounding the services directive ended up to "emphasize the neo-liberal tendencies of the EU" instead of "the merits of the proposal and likely effects on the economy and domestic labour" (Chang et al. 2010, 104). The anti-globalization mood

[101] As decided in Case C-346/06 *Dirk Rüffert v. Land Niedersachsen,* collective agreements as practiced in the three countries cannot be assumed to have automatically an universal application within the country. A clear declaration is necessary. Therefore, a specific rate of pay agreed on in a collective bargaining agreement cannot be considered to constitute a minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 which member States are entitled to impose, pursuant to that directive.

was exacerbated by external circumstances, such as the French referendum on the Constitutional Treaty and Eastern enlargement, which "made questions regarding the nature of the European economy and the European social model particularly relevant and prone to manipulation for short-term political purposes" (Chang et al. 2010, 104).

The authors further note the absence of a successful and complete cognitive shift in the EU in regards to the free movement of services. As Chang et al. remark "change in beliefs is far from automatic, and the ability of knowledge-based experts to form an epistemic community and influence policy makers makes policy shift more likely" (Chang et al. 2010, 103). This time around, as will be noted more in detail below, the Commission and other epistemic communities provided compelling economic evidence too little, too late, to convince all doubters within member states of the overall benefits of the services draft to maintain the broad consensus once the draft was out.

The third and favored explanation by Chang et al. involves the rapidly developing political situations in France and Germany. According to the authors, the domestic politics explanation for the sudden change in support of the services directive is the "most compelling" because "[w]hile explanations relating to ideas and eastern enlargement shed light on some of the long-term trends that were present during this time, only a domestic political explanation can account for the different reactions of the member states" (Chang et al. 2010, 106). Both Jacques Chirac and Gerhard Schröder faced important elections in the months after the publication of the Bolkestein draft. On France's national holiday, July 14th, only 6 months after the draft proposal's publication and two months after enlargement, Chirac announced that his government would hold a referendum in the following year on the Treaty establishing a Constitution for Europe (Le Monde 2005).

While expecting to win, the campaign quickly turned out to be very divisive with opponents to the Constitutional Treaty latching onto "the discomfort of voters regarding the 2004 enlargement, playing on the prospect of Polish plumbers taking away French jobs as Anglo-Saxon-style capitalism took over" (Chang et al. 2010, 105; cf. Nicolaïdis and Schmidt 2007). To salvage the campaign and to deflect criticism away from the Constitutional Treaty, Chirac diverted "attention towards the Services Directive, attacking it on similar grounds and claiming to be the defender of the French social model" (Chang et al. 2010, 105). By forcing new parliamentary elections by September 2005 through an orchestrated no confidence vote, Chancellor Schröder put himself in a similar situation and found a similar solution. While originally supporting the Bolkestein draft, Schröder changed tune when faced with the upcoming general election deciding his political future. To enhance his re-election chances, Schröder decided to move away from his centrist, economic policies, the so-called "Die Neue Mitte", and move towards the leftist base by now positioning "himself as the protector of Germany's social model and denounce[ing] the directive" (Chang et al. 2010, 105). The permissive environment for the Commission had clearly changed.

While certainly the domestic developments and volte-face taking place in the two countries making up the *moteur d'intégration*, have been central, the Commission, for its part, also did not completely succeed to rebuild the permissive environment and rather tended to hunker down instead of going on the offensive. According to Chang et al., "the Commission played a relatively muted role" after the draft's publication (Chang et al. 2010, 110). Partially this appears to be due to a change in the leadership at the top of the DG Internal Market and Services, when Bolkestein was replaced by McCreevy in

November 2004 with the new incoming Barroso Commission. Günter Verheugen, Commissioner for Enlargement and then for Enterprise and Industry, serving in both Prodi's and Barroso's Commission, accused his colleague of "not working hard enough to sell the proposal" (Mallinder 2006). Likewise Nicolaïdis and Schmidt observe that McCreevy "opted for a low profile" and that the "[c]entrality for the Lisbon agenda was thus not sufficiently underlined" (Nicolaïdis and Schmidt 2007, 728).

To complicate matters, the economic studies accompanying the draft proposal came out too little too late to completely turn the boat around. The Commission tried to justify "powerful legislative 'medicine' [...] by inflating expectations about its impact on growth and employment" (Leslie 2009, 3). Indeed, justifying "an ambitious […] acceleration of market integration" through economic benefit calculations is nothing new and has played an important role in the 1992 Single Market Program and the integration of the public procurement market, as described in the previous chapter (Leslie 2009, 6). What is more, "[t]here can be little doubt that a convincing economic case for a well-functioning and 'deep' internal market for services would have had a positive effect on the debate and decision making about the internal services market" (Chang et al. 2010, 100). Yet, the Commission's endeavor here to convince member states of the great economic benefits of a radical approach to service liberalization, while not falling on deaf ears, turned out to be much harder to make and was not made in advance of the directive. As Chang et al. note, "in economic integration studies, services were neglected for decades" (Chang et al. 2010, 100).[102] This is not only due to the greater difficulty of

[102] A strong call for paying more attention to services liberalization, if we want to truly understand the long term impact of a complete internal market, was already made by Jacques Pelkmans in 1992 when focusing on the "EC 92 as a challenge to economic analysis". And Chang et al. add that"[h]owever, empirical work

calculating the benefits for the vast services markets in contrast to smaller sectors, but also the fact that in the services arena economic analyst tools were not as well developed. Moreover, it is also easily imaginable that the Commission did simply not try as hard because it thought that it did not have to due to the broad original support.

The European Commission published on the same day as the Bolkestein draft the Extended Impact Assessment (EIA) for the proposed services directive (SEC(2004) 21). This document strove to make the economic case for the draft's radical departure from past practice in combining the 'country of origin principle' with its application across multiple services sectors. Yet, maybe unsurprising given the decades long neglect of the services internal market in economics, the impact analysis turned out to be "soft, qualitative and incomplete" (Chang et al. 2010, 100). Unfortunately certainly for the Commission at this point, "the state of economic analysis – both analytically and empirically – was simply too undeveloped to construct a convincing case" (Chang et al. 2010, 100). In short, "hard key figures […] were unavailable and many specific economic questions and expected frictions were neither understood nor addressed" (Chang et al. 2010, 101). The result was that because "the economic case seemed to be rather weak and general for protagonists and so unconvincing for those with vested interests that they could easily afford to ignore it" (Chang et al. 2010, 100). This, of course, in turn "rendered the subsequent drastic politicization of the debate so much easier and left demagogy and unashamed misuse of information gaps without a firm answer" (Chang et al. 2010, 101).

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on cross-border services provision in the EU remained scant and little progress had been made by 2004" (Chang et al. 2010, 112).

Because the information was not available, the Commission failed to put together its case. However, the relative low quality of the extended impact assessment from an economist view had also the positive effect of a wakeup call for empirical economists in Europe. Two additional studies were undertaken in the following months. One was commissioned by the EU Commission itself and the other was undertaken by a group of Dutch economists working for an independent government agency, the Netherlands Bureau for Economic Policy Analysis (Centraal Planbureau or CPB).

That a stronger and earlier economic argument might have helped to avoid the volte-face can be deduced from the Dutch case. While the Dutch, similar to France voted against the Constitutional Treaty, they nevertheless ended up steadfastly supporting the services directive. Chang et al. attribute this success to the economic epistemic community in the country, pitching the benefits of the services directive. They explain that "the CPB enjoys high stature and strongly influences government debates" and that "[o]nce it made its analysis the Services Directive did not become politically controversial the way that it had in other countries who lacked the authority of the CPB (such as France's *Conseil Economic et Social*)" (Chang et. al. 2010, 104).[103]

According to the Dutch economists, as a result of the services draft proposal, "commercial services may increase by 30-60 per cent, or when we express it as an increase of total intra-EU trade (i.e. including trade in goods) by 2 to 5 per cent" while "[f]or foreign direct investment in commercial services the EU proposal may lead to an increase by 20% to 35%." (Kox et al. 2005, 9). This would translate into a rise of GDP in

[103] However, another potential explanation for the difference in outcomes in the Netherlands and France might be attributed less to the influence of a strong epistemic community among economists and politicians in the Netherlands, but rather to the fact that the Dutch polity tends to be profoundly more pro-free market oriented than the French polity.

the EU of between "0.3-0.6 per cent upon faithful implementation" (Chang et al. 2010, 101). The Dutch study further concludes that it is "primarily the heterogeneity of national service regulations, rather than the intensity of national regulations that hampers bilateral trade and investment" and "[i]t is the heterogeneity that raises the (fixed) costs of providers of entering a new market" with "costs appear[ing] every time they want to enter a new market of an EU member state" (Kox et al. 2005, 25). In other words, it does not matter so much the degree of differences between regulations, i.e. some states having much stricter regulations than others, but simply the fact that there are different regulations between member states. This is especially interesting in the comparative light with the United States, where one might argue that the absence of services liberalization in America is merely due to the fact that maybe the regulatory differences are not as intense as they were in the EU and thus do not necessitate change. The Dutch economists, however, clearly point towards the heterogeneity of rules, i.e. the simple fact of having different sets of requirements, as the most costly for services freedom in an internal market.

As requested by the Commission, Copenhagen Economics produced a study in January 2005. A second study, prepared for the United Kingdom's Department of Trade and Industry (DTI) on the 'country of origin principle' followed in November of the same year. In these studies the Danish economics calculated that the proposed services directive would bring about a consumption "increase by approximately 0.6 percent, or €37 billion" and thus "yield[ing] significant economic gains to all Member States, European consumers, businesses and governments" (Copenhagen Economics 2005a, 7). The analysis furthermore predicts a total value added in the services sectors of €33 billion

and a net employment gain of up to 600 000 jobs across the EU (Copenhagen Economics 2005a, 8). Yet, the authors point out that given that the study only "includes approximately 2/3 of the economic activity covered by the Services Directive", it "may therefore underestimate [the services directive's] economics effects" (Copenhagen Economics 2005a, 7). In sum, the authors ascertain that not only "the economic benefits of the proposed Directive are considerable", but that also the provisions relating to the 'country of origin principle' are important piece of the puzzle accounting "**for around 10 % (€2-4 billion p.a. across the EU) of the total welfare gains from the Services Directive"** (Copenhagen Economics 2005b, 5; emphasis in original; cf. Badinger and Maydell 2009).[104] But these studies emerging several months after the Bolkestein draft did not succeed in changing the tone or content of the debate. As Chang et al. summarize, "[t]he economics literature demonstrate that the 2004 proposal offered substantial benefits, though such analyses came rather late in the debate and thus did not provide ammunition for the advocates of the Bolkestein directive during this period" (Chang et al. 2010, 110).

Moreover, the Commission was largely left alone in batting for the Bolkestein draft once opposition to it started to reframe the issue away from non-discrimination in the EU, "the absurdity of barriers" to services trade and the conveyance of "solidarity through open markets rather than harmonization" towards the undermining of the social welfare state (cf. Nicolaïdis and Schmidt 2007, 727–28; SEC(2004) 21) . While business, especially small and medium businesses, such as the Federation of Small Businesses in

[104] Of course, the flip side is that 90% of the economic welfare gains are not directly resulting from the 'country of origin principle'. Thus, as Chang et al., contend, the "true economic importance of the Services Directive was always to be found liberalization (including black lists of highly restrictive practices) of the right of establishment" (Chang et al. 2010, 107).

Britain, were strongly in favor of services liberalization (House of Lords Sixth Report: Section 90), they did not drive the integration process nor actively help the Commission to overcome any resistance to the services directive once push came to shove. The driving force overall was clearly the Commission and while business allowed for a passively permissive environment, once difficulty arose did not do much to help change minds or start a campaign which might have changed the outcome. Indeed, as Nicolaïdis and Schmidt comment, supporters of the directive not only "failed to mobilize on a par with its opponents", but "employers' associations did not emphasize their interest in liberalization" (Nicolaïdis and Schmidt 2007, 728). And Leslie observes that "German employers […] did nothing to support a move toward liberalisation of labour markets" (Leslie 2009, 10–11). McCreevy himself complained about the employers' association lack of involvement in defending services liberalization vis-à-vis the trade unions (Nicolaïdis and Schmidt 2007, 731; cf. Mallinder 2006). Chang et al. concur by noting that

> It is striking that the European services business did not come up with its own estimates of empirical studies. With a proposal so crucial for the sector and so controversial in many circles, one would have expected the deep expertise of business to be brought in. The reason is likely to be the fragmentation of the EU services business over numerous sectors, sub-sectors and highly specialized activities, without any umbrella organization capable of devising a powerful, well-researched response. Of course, this also had consequences for strategy and tactics in the political turmoil in 2005 and 2006: business seemed overwhelmed by the political and social storm and many specific services merely chose to seek derogations from MEPs, rather than engage in clarifying the expected opportunities in markets and other economic implications (Chang et al. 2010, 106).

Hence, with the lack of vocal business support defending the original draft and persuasive economic data entering late into the game and given the politicization of this

issue, especially in France and Germany, a compromise seemed ineluctable. The Commission ended up accepting "that the services market would have to be liberalized by less radical means and ma[king] clear that it would back a compromise rather than use its right to withdraw the proposal" (Nicolaïdis and Schmidt 2007, 730–31). In the end the Commission, however, was obliged to compromise not so much because of the actual content of the directive but because domestic-political motivations whipped up the opposition. Yet, while a compromise directive was worked out in the end, with the European Parliament playing a more active role than in the past regarding the depth of market integration, as noted below, the important fact remains that the European Union ends up with services liberalization and the United States does not, despite both polities being characterized by highly fragmented services sectors with business missing respective umbrella organizations.

The secondary literature agrees that the final services directive was a compromise largely negotiated within the European Parliament., between the two large parliamentary blocks, the European People's Party and the European Socialists. As a result of the Council being largely split on the services directive[105] as well as being "more reactive than proactive, with much posturing done by member states like France, but little coordinated action", the European Parliament came to enjoy "a substantial amount of autonomy" in the second draft of the services directive after the first draft turned out to be dead on arrival (Chang et al. 2010, 110). As Nicolaïdis and Schmidt agree, "the locus where political bargains were struck had changed from the Council to the EP" (Nicolaïdis

[105] Rumors circulated that due to the fact that East European MEPs voted again the initial compromise bargained in the EP, that they "were trying to organize a blocking minority in the Council, encouraged by the fact that the UK, Spain, Poland, the Czech Republic, the Netherlands and Hungary had spoken out for a more liberal solution" (Nicolaïdis and Schmidt 2007, 731).

and Schmidt 2007, 728). Ultimately the compromise ended up with bigger fanfare to calm vocal opposition than substantial change.

The final product, as Chang et al., argue was influenced by "the decision making process of the European Parliament itself", which led to a Social Democrat, the German Evelyn Gebhardt, to become the services directive's *rapporteur* (Chang et al. 2010, 110; cf. Lindberg 2008). By arguing that the 'country of origin principle' proposed by the Commission was going beyond mutual recognition, she and her colleagues aimed at and succeeded in abolishing the term. As Nicolaïdis and Schmidt contend, for Gebhardt mutual recognition "was above all an ongoing *process* of political negotiations where the burden of proof would still be on the home state to show the equivalence of its rules" instead of the host country eliminating any of its rules that might pose barriers to services provision (Nicolaïdis and Schmidt 2007, 729; emphasis in original). Given the abandonment of the 'country of origin principle' in favor of a vaguer obligation of member states to respect the right of providers to provide services,[106] Nicolaïdis and Schmidt talk about the passed directive as a "minimalist result" and that "the EP had to formally sacrificed mutual recognition at the altar of crude criticism" (Nicolaïdis and Schmidt 2007, 732).

Other major changes from the original draft to the final version include a more restricted scope of the directive as well as the adding of the environment as a justifiable reason for member states to maintain specific regulations. As regards the limitation of scope, exemptions to the services directive now include "health services, utilities, public

[106] The original Article 16 (1) phrasing "Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field" was replaced by "Member States shall respect the right of providers to provide services in a Member State other than that in which they are established" (COM(2004)2 and Directive (2006)123).

transport, social and security services, temporary workers, gambling and lotteries, waste, audiovisual services, electronic communication, and financial and legal services" (Schmidt 2009, 859; cf. Barnard 2008). These changes lead Badinger and Maywell to conclude that "the SD in its final version is likely to miss its aim of completing the internal market for services as it will enable EU service provider to exploit the economic potential of Europe's service sector fully", because not only does the final version of the service directive "fall far short of initial expectations", but also the "[n]on-anchoring of a home state law (country of origin) principle and simultaneously keeping up the present general system of prohibitions in the SD leaves Member States a sufficient degree of discretionary, that is restrictive, power" (Badiner and Maywell 2009, 714). In short, "removing the country of origin principle eliminates the heart of the SD" and that the "legal framework of the revised SD remains predominantly the same as under the current legal status quo" (Badiner and Maywell 2009, 711). And Robert Goebbels, Member of the European Parliament for the Luxembourg Socialist Workers Party (Lëtzebuerger Sozialistesch Arbechterpartei) involved in negotiating the compromise directive, rejoiced that "Bolkestein is really dead" (cited in Klein 2006; my translation).[107]

Yet, while the term 'country of origin' has been removed and the scope of the directive reduced, the changes overall are rather token.[108] Even Schmidt herself in a later

[107] "Bolkestein est vraiment mort" (cited in Klein 2006).

[108] Griller, however, in assessing the amended directive strongly disagrees, noting that
"In the final version, the country of origin was discarded. Not only was the heading of Article 16 changed into "Freedom to provide services", but the cited passage was also changed to the more or less banal restatement of primary law that the Member States "shall respect the right of providers to provide series in a Member State other than that in which they are established". Consequently, what would have been the most spectacular and substantive – although highly problematic – regulatory change the original proposal had foreseen, was deleted from the final version and consequently will not take place. […] [T]he debate on the Draft Directive not only led to the elimination of the principle but also to a messy list of exceptions as well as highly unclear wording regarding substantial obligations such as the freedom to provide services. It

article admits that "[b]y the back door, however, mutual recognition and home country control remain" (Schmidt 2009, 860). And Chang et al. note that the legal difference between the 2004 draft and the 2006 directive "is one of emphasis rather than something profoundly substantive" (Chang et al. 2010, 111). Indeed, "the 'reversal' of the country of origin principle looks less dramatic than many seem to have feared" (Chang et al. 2010, 109).[109] Moreover, Brunn observes that not only the 'country of origin principle' in the original draft was very radical, but also the list of grounds under which member states can enforce derogatory measures:

> This list of grounds […] is far more restrictive than the "rule of reason" grounds recognized by the ECJ. In that respect it can even be argued that the Directive transforms the present "proportionality" justification test for a host Member State restriction into a proper rule of conflict of law. *It sets aside the regulation in the host Member State also when it is compatible with the Treaty* (Brunn 2006, 24; my emphasis).

This estimation that not only the 'country of origin principle' was radical but also the application and assessment of the proportionality rule was shared by some of the vocal opponents to the original Bolkestein draft, who understood the potential reach of the proportionality justification test. Thus, Thomas Fritz from the Berlin Working Group on Environment and Development vociferates:

> And, as the crowning glory of its proposal for a directive, the Commission places the Member States under its tutelage. Not only must they abolish numerous requirements, they must also secure the assent of the Eurocrats before they take any new measure. […] The bans laid down in the Directive apply to every administrative level and, consequently, breach the principle of subsidiarity enshrined in Community (Fritz 2004, 3).

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has to be concluded that both in terms of legal clarity and substantive profess, the Directive is severely deficient" (Griller 2008, 392 and 420–21).

[109] Of course, a psychological effect might arise due to the fact that the clear statement of the country of country of origin has been eliminated from the final version. This elimination might lead some service providers to be less encouraged to test the waters abroad (cf. Chang et al. 2010, 110).

Yet, this has not changed in principle with the final version of the services directive. Only the environment has been added to the list. The Commission is still free to set aside regulation simply based on the proportionality argument, even when the regulation otherwise might be compatible with the EU treaties. The Commission is judge and executioner at the same time. The victory of opponents to the original draft is therefore rather pyrrhic and largely cosmetic, especially when other commentators and the Commission personal implementing the directive are to be believed.

In fact, when asked directly, Commission officials confirm the assessment. As one official pointed out to me:

> You will almost never find someone telling you that *the new principle of origins and the old are the same*. But when you read the service directive, the original draft and this one, if you take a real look, you will see difference is really small. But because there was always political marketing. I am French, I know it, because there was this thing on the French referendum and people kind of had to be reassured or even if it was not important, were given the message that everything must change, that everybody has been heard and that the text had been modified. But the truth is that the text had only be modified in some [small] aspect (personal interview2010; my emphasis).

The same official went on to explain that

> Nothing would be different and I will tell you why. Because the original proposition was saying that you could only impose rules if they were proportionate and that you could justify under public order, public safety, public health. That was the original proposition. What was modified except the name and there was a lot of public communication that everything was changed, the only thing that was changed, that we added [was] the environmental protection justification. […] As I said the difference between the old version and the new version except for the communication and the name is very, very limited. […] Many people don't want to say so but really legally when you take a look, the only difference is the addition of environmental protection which is very small because it is hard, it is quite difficult to justify (personal interview 2010).

In the end it does not matter so much whether the 'country of origin principle' really still exists exactly to the same degree as in the original draft, but only that the

Commission *thinks and acts* that it does. This is even more relevant, given that Nicolaïdis and Schmidt observe that the balance struck in regards to the automaticity of access for service providers based on non-discrimination "in its extreme interpretation could eventually be regarded as an injunction of recognition" (Nicolaïdis and Schmidt 2007, 730). As the quotes above and in the previous section have demonstrated, it is, unsurprisingly, the extreme interpretation, the continuation of the 'country of origin principle' and automatic access for temporary services provision that the Commission conceives and applies. The Commission has every intention to ensure trade liberalization as was promised in the original draft.

For instance a trade union representative has correctly noted, while first rejoicing over the removal of the 'country of origin principle', that it has not been replaced in the finished version by a host country principle:

> Regarding labor law, I feel that we can be at ease", reckons Nico Clement in charge of the services brief on behalf of the Independent Trade Union of Luxembourg (Onofhängege Gewerschaftsbond Lëtzebuerg – OGBL). For him it is a success, which, however, doesn't go far enough. "Anyway, we were not asking for such a horizontal directive." The union member notes that the country of origin principle has not been replaced by a host country principle. "In principle, Luxembourg may still impose hygiene rules, such as for hair salons, based on the public health exemption. But the country will have to justify such an act, and each rule may be challenged before the European courts (cited in Klein 2006; my translation).[110]

The muted optimism of the trade union representative that his country might still impose its own hygiene rules is actually wrongly placed. While theoretically the possibility exists for member states to impose their own hygiene rules, in practice any

[110] Du côté du droit du travail, j'ai l'impression que nous pouvons être tranquilles", estime Nico Clement, en charge du dossier à l'OGBL. Pour lui, c'est un succès, mais cela ne va pas assez loin. "De toute façon, nous n'étions pas demandeurs d'une telle directive horizontale." Le syndicaliste note que le principe du pays d'origine n'a pas été remplacé par un principe du pays de destination. "En principe, le Luxembourg peut encore imposer des règles d'hygiène, par exemple dans des salons de coiffure, au nom de la santé publique. Mais il devra s'en justifier, et chaque règle pourra être contestée devant les tribunaux européens." (cited in Klein 2006)

such rules would be considered disproportionate by the Commission as the previous section has demonstrated. Hence it becomes quickly clear that the changes ballyhooed due to public outcry were rather aesthetic to calm the opposition than substantial in actual practice. Consequently while the referendum in France, Eastern enlargement and the accompanying social dumping concerns played a very important role in the amending of the directive, they didn't matter as much as some observers seemed to believe.

Where does it leave us? The Commission has been the linchpin of the radical opening of services across the internal market. Neither the courts, nor the member states, nor business was pushing as far as the Commission in trying to open market liberalization. The Commission in the end was forced to compromise due to a change in the permissive environment, especially in the notable cases of France and Germany where internal politics, partially due to contemporaneous Eastern enlargement, forced a reversal of their respective supports of the original draft. Yet, despite being the most politicized directive coming out of Brussels in a very long time and the accompanying vocal resistance, particularly to the 'country of origin principle', services liberalization in the European Union remains very close to the Commission's original goal, the compromise being more superficial than very significant.

Indeed, the extraordinary thing about this story is how much influence the Commission has had in the end. Domestic-political timing and the coincidence of enlargement with the services directive made it extremely enticing for politicians to play up opposition to the services directive. These external circumstances put a certain limit on the European Commission's influence. Moreover, in this case the European Commission botched the presentation of arguments for the economic benefits of the

services directive by making a strong quantitative economic argument too little, too late and by giving the impression that Bolkestein's successor, McCreevy, was not going as strongly to bat for the original proposal. This, as has been pointed out, was only partially the fault of the Commission, given that services had been largely neglected by economists. Where a strong and independent economic analysis has been carried out, as in the case of the Netherlands, the economic efficiency argument appeared to have made a significant difference. No matter what the external constraints and the shortcomings of the Commission have been this particular case, the fact remains that not only a services directive has been passed, but that despite the amendments the changes are minimal, in particular in the eyes of those implementing it at the European level and most importantly in contrast to the United States.

American Regime: No Federal-Level Agent for Market Liberalization

While being riddled with numerous non-tariff barriers to the provision of services due to a patchwork of regulatory systems, several non-judicial options exist to facilitate market access in the United States, as has already been pointed out in the previous chapters.[111] Harmonious state regulatory standards for instance can either be created via a type of reciprocity statute, either directly by the legislature or by the legislature granting a "state regulatory body to sign an interstate administrative reciprocity agreement with counterparts in other states", or via an interstate or federal-state compact (Zimmerman 2004, 1).

[111] Of course, the judicial option, as described earlier, exists, too. However, it limits itself to a service provider going to the courts arguing that a specific regulation poses an access barrier and is not permissible under the privileges and immunities clause or the commerce clause. This, as has been argued in the European context, is particularly costly for small service providers and decisions are usually limited to very narrow circumstances instead of broadly comprising the entire services sector.

Reciprocity so far has been chosen as the most common solution to the problem of discriminatory practices in the US states. Yet, reciprocity agreements have the disadvantage that they "require such [common, universal] standards to be separately legislated" (Zimmerman 2004). Each state legislature would need to pass a similar law stipulating similar rules and regulations granting access for licensed professional from another state. As noted above, reciprocity agreements are not universally and consistently applied across the United States, giving today the impression of an America à la carte.

Compacts have the notable advantage that they are jointly negotiated by an x number of states, which can lead to bilateral, multilateral, sectional or national compacts.[112] Compacts have the additional advantage that they "could create a nonlegislative mechanism (in the form of a commission with the authority to promulgate regulations)" to create uniform standards (Zimmerman 2004, 1). While not all, "most compacts are submitted to Congress for its grant of consent" as stipulated in Article 1, section 10 of the United States Constitution (Zimmerman 2004). Besides the granting of consent, compacts can also directly involve Congress. Thus, the possibility of a polity-wide compact, including the direct involvement of Congress, to eliminate the remaining non-tariff barriers to the provision of services exists. However, compacts run in the end into the same hurdle as reciprocity agreements. Thus, while

> A regulatory compact can be national in scope, […] the prospects of persuading every state legislature to enact a draft compact are not good, based upon experience to date. Greater success might be achieved by the enactment of several regional interstate regulatory compacts on a given subject tailored to the particular needs of each region, with the possibility that future negotiations might lead to a

[112] As Zimmerman observes, "a compact may involve parts or all of two states or all 50 states, as well as the Commonwealth of Puerto Rico, the District of Columbia, United States territories, and Canadian provinces" (Zimmerman 2004, 1)

> merger of two or more regional compacts. […] In conclusion, the process of negotiating compacts to resolve complex issues is typically very time-consuming and on a number of occasions has not been successful. Prospects for enactment of a regulatory compact also will decrease should a statewide elected official, particularly the attorney general, object to a draft compact (Zimmerman 2004, 8).

Compacts also allow for the possibility of opt-out clauses. While opt-out clauses, such as Article VII, section 4 of the Interstate Insurance Product Regulation[113], usually help to facilitate the enactment of a compact, they are costly in that they undermine the original goal of such a compact, regulatory uniformity across the internal market (cf. Zimmerman 2004). In other words, because compacts are not automatically encompassing the entire polity and allow for the possibility of substantial opt-outs, they lead frequently to a segmented internal market similar to what exists today with reciprocity agreements.

Another disadvantage of reciprocity and interstate compacts is that they have been sectoral in nature, i.e. they only have been created in the past to deal with one specific issue or profession. This is somewhat similar to the EU Commission's earlier approach to services liberalization.[114] Yet, in contrast to the United States, the European Commission has recognized the "horizontal nature of the barriers" where "[a]n analysis of the wide range of legal barriers reported shows that many of them are common to a large number of widely varying sectors of activity" (COM (2002) 441 final, 51). Thus, the European Commission has subsequentially fought for a horizontal approach, of which the services

[113] In July 2003 the current version of the model legislation was adopted. The Interstate Insurance Product Regulation Commission (IIPRC) was brought into existence once the threshold requirements of 26 states or 40% of premium volume nationwide were met. This happened in 2006. Today (2011) the compact includes 36 sister states representing over half of the premium volume. Source: IIPRC website at http://www.insurancecompact.org/history.htm

[114] Of course, the major difference still being that the EU's sectoral approach included all member states while interstate compacts or reciprocity agreements usually don't encompass all US states.

and qualification directives encompassing the majority of services professions are the direct result.

Moreover, in contrast to the US, the Commission has strongly argued that freedom of services is not the same as simple non-discrimination. Treating a service provider "as if he were established on its territory, and hence subject[ing] him fully to its legal system", reduces "the principle of the free movement of services to a simple obligation not to discriminate" (COM (2002) 441 final, 51-52). An interpretative move that emphasizes that non-discrimination is not enough to ensure a complete and competitive internal market has not taken place so far in the United States. Indeed, the US states don't perceive any barriers to trade as long as they require largely the same from their in-state and out-of-state state service providers. State authorities effectively get very defensive when confronted with the notion that having an already licensed professional from a sister state undergo again a number of licensing requirements represents a double burden. The somewhat defiant reply is that if the states wouldn't keep these requirements for out-of-state licensed providers, then the states could simply abolish any regulatory standards for professions. As Warner from the Ohio Board of Barbers for instance put it,

> So if we have somebody that we didn't run through a reciprocity process, then we might as well not have any rules, if anybody could just come in and start cutting hair (personal interview 2010)

Yet, again it is exactly this double burden that according to the EU Commission embodies a significant non-tariff trade barrier. As has been noted above, the Commission has led arguments similar to Warner's ad absurdum by observing that the hair of people for instance in the state of Ohio can safely be assumed to not be much different from the

hair of people in the neighboring state of Pennsylvania. Thus, a person deemed qualified in one state to cut hair can relatively safely be assumed to be qualified to cut hair in the other state, too, no matter the amount of training required by the home state. This should even more be the case in the US where the cultural and political differences are much smaller, leading comparatively to lesser differences in the actual training requirements.

Last but not least, given their centrifugal effects, reciprocity agreements and the closely related interstate compacts have been considered in the EU to be the work of the devil. As von Sydow, former EU official, commented,

> Reciprocity is of the devil, because the European treaties already establish in principle general reciprocity and therefore bilateral agreements may not be put in place (personal interview 2009; my translation).[115]

Consequently bilateral reciprocity agreements related to the fulfillment of the internal market in the EU would be seen as undermining the overarching goal of the EU of creating a complete internal market. And indeed as we see in the United States, the preference so far of reciprocity agreements has led to the maintenance of a segmented market, where it is difficult for service providers to simply test the water across state borders.

Another non-judicial option besides reciprocity agreements and interstate compacts, however, exists, which would potentially lead the US on a path of market liberalization comparable to the EU. Congress could preempt the states based on the commerce clause, the privileges and immunity clause as well as the supremacy clause. As Zimmerman states, "Congress, of course, may enact a complete or partial preemption

[115] "Reciprocity ist des Teufels weil der EG-Vertrag schon die allgemeine reciprocity festlegt und deswegen darf es keine bilateralen reciprocity Abkommen geben" (personal interview 2009).

statute based upon its constitutional power to regulate commerce among the several states" (Zimmerman 2004, 1).

This notion of congressional preemption, as already noted in the chapters on public procurement, is not far-fetched. In the last decades the United States has experienced an increase in congressional preemptions (Zimmerman 2005). As Zimmerman observes, "[t]he number of new regulatory interstate compacts has declined since 1965, attributable to *Congress exercising more frequently its power of preemption to remove regulatory authority* completely or partially from the states " (Zimmerman 2004: 5; my emphasis). This indicates that in the recent past the US Congress has intervened in regulatory policy areas and could do so again in the future.

Congress, though, is not likely to act given that nobody, similar to the European Commission, has been making the economic case for services liberalization. While costs are present, studies, as have been either written by the EU Commission itself, commissioned by it or prompted by its legislative initiative, have not been carried out in the US. Thus, there is a dearth of data and knowledge to persuade Congress to intervene and/or states and other stakeholders, such as the business community, to seek such preemption.

There is no equivalent single agent in the United States which monitors the internal market and argues for the elimination of remaining non-tariff trade barriers. The Commerce Department, which very superficially might be considered to play a similar role to the DG Internal Market, is not actively monitoring the US internal market and seeking out non-tariff barriers to trade to the same degree as the European Commission. Indeed, the absence of one single federal agent able to negotiate international trade

treaties on important economic issues for the entire US polity has repeatedly led to frustrations in the EU.[116] As an EU official dealing regularly with transatlantic trade relations has remarked,

> So to make a long story short, if we agreed anything with the US, we would have to do so with the private bodies [such as professional boards] with whom we are also in touch, but it would be non-binding and we would have to do with all [50] of them and we could not have one-stop shop, so like one agreement. And so if we agreed on something, we would have one solution for the whole of the EU, but it would not be the same on the other side (personal interview 2010).

Thus, the patchwork of different regulatory systems and with competences divided across all US states not only hampers internal trade between American sister states but also has important repercussions when trying to negotiate international trade agreements. Depending on the sector and an individual state's decision, regulatory competence of a specific profession does not necessarily remain in the hands of state authorities but can be delegated to professional bodies, complicating the situation on the American side even more.

Given the absence of a federal level agent, which focusing on the entirety of the American internal market actively seeks out the elimination of non-tariff barriers to the delivery of services, it is unlikely that changes will occur any time soon. The likelihood diminishes even more when taking into account that the present actors emphasize either state rights, are not able to perceive the role such an agent can play or are hostile vis-à-vis federal-level regulation.

In fact, the EU and the US are characterized by an important ideological difference in the nature of their actors' attitude towards market integration and

[116] Henry Kissinger's well-known quote, "who do I call if I want to call Europe?", here finds its equivalent in the US when dealing with trade issues where states retain competences and have not been preempted. Who do you call, indeed, in America, when trying to negotiate transatlantic services liberalization?

organization. Contrary to what someone might suspect based on the notion that the member states of the EU are officially independent nation-states, it is in the US were state rights are commonly evoked to maintain non-tariff barriers to trade while the EU is emblematic of a strong belief in market efficiency, especially among Commission personnel. The difference in ideology becomes clear when taking a look at the arguments that usually shape debates regarding market integration in the EU and the US. While in the EU cost savings and efficiency arguments are used as standard valid arguments, they do not feature prominently in the US, where, when asking actors, state rights and distrust of federal government receive a more prominent display. And EU official pithily noted,

> So in a number of issues we have problems because of state competence [in the US]. And I am also aware from my research on [the] US that of course your reasoning [in America] to address something at the federal level is a complete different reasoning than in the EU. Where in the EU, for example, efficiency and also saving of money are reasons; this is not the case, if I understand it correctly, in the US. The independence of states is much more important than here in the EU. […] on many issues we are much further advanced on federal, harmonization as we call it, than you are in the US (personal interview 2010).

Indeed, business in the United States has rather been reluctant traditionally to go for federal preemption, preferring interstate compacts or reciprocity agreements. Zimmerman observes that

> Economic interest groups seeking to discourage congressional exercise of its preemption powers are primarily responsible for the establishment of regulatory compacts. These groups argue that a compact obviates the need for national government regulation since formal interstate action has solved a major problem (Zimmerman 2004, 5).

The president of NABBA also suggests that ideologically Americans in general and business people, such as the barbers he represents, are not keen on federal level solutions, be they Congressional preemption or even some less intrusive form of national testing:

> If we took all the identity out of each state that is not, I think, what people want. They still, you know, it's like our schools, run by a school board and if they want to do snow days they can do it, but they don't want. In this country right now *it appears that there is too much federal government and the American people would like less*. And I think if we push on a national level for national testing, I think that probably would be entirely up to the barber administrators, but I think if you went right down to the barbers and ask them, *they would still like to see it controlled to where they go to barber school, they cut hair in their state* and everybody has to have the same requirement to do it (personal interview; my emphasis).

In the EU, on the other hand, while business was not putting itself way out asking for or defending loudly the specific Commission proposals, it was, however, widely seen as welcoming the Commission's approach to market liberalization in services.

Additionally, while "licensed cosmetologists [for example] have voiced that they would like to have their license recognized from one state to the next", organizations representing them don't perceive that the possibility of federal preemption exist, limiting themselves to demand more reciprocity between sister states (personal correspondence 2010). PBA's Government Affairs Manager for example explained that they have not undertaken any lobbying at the federal level, because they are unsure whether the option of preempting states in the regulatory domain exists. She notes that

> A national standard in federal law would remove the state's rights and ability to regulate their own licensing for cosmetologists in their state. The legality of this question would have to be researched. I am not sure this can be done without violating the state's ability to oversee their own licenses. […] No we have not contacted the U.S. Commerce Department or Congress because this is not a federal issue. We do help those that call in by researching their state and the state they are moving to so they understand the process and whether or not the state accepts their license (personal correspondence 2010).

Hence, PBA, while lamenting that "there is not a national standard for licensing requirements or even continuing education", it focuses its energy on "state to state acceptance of licenses" (personal correspondence 2010).

Even less surprising is that other national level organizations, representing mainly the state boards of cosmetology as well as barbers have not been advocating for congressional preemption. The underlying fear appears to be that such a measure might make them superfluous and that individual board members might lose out on influence and money. When asked if there is any other reason why states in general and state barber boards in particular are not favoring federal-level solutions, such as national testing, NABBA president and member of the Ohio Barber Board answered:

> Oh, I think they don't want to lose control. Like our board for example, we have three board members, two of them are barbers, they don't get paid very much for being on the board, but they do the testing and that's the way it has always been and if they didn't do the testing they would only meet six times a year. So we test every two weeks so that they get paid for about 18 days a year for doing this and they can see the results. If it were national testing, they would have to travel to the exam sites, and I am just not sure how this would all work and I think that might be one of the big reasons why the board, the boards would then not have near the authority that they had previously. […] I would say it is control. I don't think that the barbers in the state that they want to give up the control nor do they think that their constituents want that. I don't think that they feel that the licensed barbers want that (personal interview 2010).

Given the concern over state rights and the fear over losing significant local and personal control, it is not very surprising that the organizations' official position is to advocate for reciprocity between states instead for advocating for a polity-wide solution. Thus, the National-Interstate Council of State Boards of Cosmetology (NIC) together with the National Hairdressers and Cosmetologists Association, Inc. (NCA) adopted in September 1984 that

> The National Hairdressers and Cosmetologists Association, Inc., and the National-Interstate Council of State Boards of Cosmetology, Inc., commit to actively pursue the enactment of Legislation which will allow the cosmetologists, licensed in good standing in one state, to qualify for licensure to practice in another state without examinations (NIC 2010).

When contacting NIC directly about creating polity-wide market access for cosmetologists and hairdressers instead of reciprocity in varying degrees, the only reply was a referral to the official reciprocity statement and the notification that the NIC "is not a regulatory entity" and that "questions should be directed to the cosmetology licensing entities in each state" (personal correspondence 2010). Symptomatically for the US, to inquire about a solution for the entire market, one is referred to all 50 individual states.

While also working regularly on reciprocity in workshops at annual meetings (personal interview 2010), NABBA's official mission statement is even weaker by not outright calling for reciprocity but simply for the promotion of exchange of information between licensing boards:

> To promote the exchange of information between state barber boards and state agencies examining licensing and regulating the barber industry (NABBA 2011).

In short, the widespread position in the US is to make reciprocity easier, but not to have federal-level interference in the regulatory authority of the states, even if this might potentially mean greater market liberalization and creating a true commercial republic.

The fear that state regulatory authorities would lose all control is exaggerated when comparing the situation with the EU. The regulatory bodies did not disappear in the EU member states on account of the services directive. The general framework in the EU continues to allow for different training and qualification standards and the supervision of schools and applicants within a member state. But at the same time it facilitates cross-border trade for the temporary provisions of services. Nevertheless, as the earlier comments by the PBA's Government Affairs Manager and NABBA's president indicate, the only national option actors in the US can conceptualize, besides reciprocity, is a

national (private) test and not a federal-level governmental intervention or across-the-board policy.

Yet, a national standard, based on a national test, and not involving federal-level involvement, still runs into the problem, similar to reciprocity in general, of needing to be approved by every single state legislature or regulatory body in charge of any regulated profession. The likelihood of this happening soon or even at all is rather slim. Already today there is concern over national testing among barber boards in the United States. As NABBA's president somewhat contemptuously remarks:

> Yeah, there is national testing now and it is pathetic! It's too big. Big is not always better. The national testing, we test people for 40$ to get their license. The national testing right now is [between] 500 and 600 dollars. And you have to go through a multitude of dealings with people that have no concept of barbering (personal interview 2010).

He goes on to observe that

> No, they [state boards] are not [happy with national testing]. They are very much opposing it. And then the ones who don't show up [to the annual conference], you don't know how they feel, because we surveyed them and sometimes they answer and sometimes they don't. But it's almost like they are afraid to make a decision, because they don't have a board that comes to meet with us when we have national level conferences (personal interview 2010).

These comments by NABBA's president show several things. First, national testing is seen as "pathetic" and largely worthless. Second, the "too big" remark again alludes to an anti-federal attitude in the sense that the national level solutions would be too big and too far removed and that national testing people simply do not have a clue about barbering. Third, there is no clarity about the position of all sister states in the US, because not all even participate in and/or attend national-level organizations and conferences. Thus, even if for instance, the annual conference of the National Barber Boards would come to a decision comprising all attending members, it would still leave

out a significant number of states.[117] Fourth, what the official here does not realize or proffer is that a truly recognized national test, granting access to all sister states, would in the end cost much less than acquiring several licenses from several states as well as that the European approach of universal reciprocity, i.e. keeping the laws you have on the books in each state, but recognizing the value of each other's regulations for temporary market access, is another potential option.

In other words, at present there appears to be no conceptualization in the US of simply recognizing the equivalence of different state standards at least on a temporary basis until a service provider decides to permanently move to another state. Yet, that this might be possible, when pressure comes to be exerted or an agent makes corresponding demands, is demonstrated by a recent example from Oregon.

The State of Oregon not long ago changed its administrative rules for tattoo artists by granting them temporary market access within its borders. As noted above, states usually deny that the permission of temporary services can be granted because of health and safety concerns. Service providers therefore are simply not going to be able to provide services temporarily without being first licensed by the host state. Indeed, granting an out-of-state licensed practitioner temporary market access is considered akin to committing political suicide. As Howard Warner from the OBB observes,

> the barbers in Ohio would shoot me. You can't give somebody an Ohio license for that they have to work 1800 hours and they are walking in with 1200 (personal interview 2010).

[117] Currently 36 states, Guam and the District of Columbia are members of NIC (personal correspondence, November 2010). Thus, same as NABBA, the organization does not comprise every state and "is not a regulatory entity" (personal correspondence, 2010). Again the regulatory authority remains with each individual state.

Then again, when the potential costs of existing non-tariff barriers become recognized and corresponding pressure becomes exerted, licensing boards might gain the necessary insight to allow for the delivery of temporary services. While so far denying temporary market access for hairdressers, OHLA informed me that they "have recently established administrative rules allowing out-of-state tattoo artists to provide services at tattoo conventions on a temporary basis if they meet qualification standards" (personal correspondence 2010). Although tattoos have a more permanent effect on somebody's body than a simple haircut, OHLA was willing to change its rules and practice after having "received comment regarding restriction of free trade […] from the tattoo artist industry, to which we responded by establishing temporary allowances if qualified" (personal correspondence 2010). Apparently tattoo artists complained that they were not allowed to practice their art at a convention in Portland. According to the new rules (Oregon Administrative Rules 331-565-0080)[118], a tattoo artist can now demonstrate his talents up to 15 consecutive calendar days, at settings such as fairs, carnivals or bazaars after applying for a temporary facility permit and paying the corresponding fees. Thus, the temporary market access is not free, as in the EU, but it is a substantial progress in comparison to not allowing any temporary access at all without first acquiring a full license, involving exams and potentially a number of courses to be taken. The irony of letting tattoo artists but not barbers temporarily provide services across state borders, however, is lost on regulators and no plans are presently in the making for granting temporary market access to barbers or other regulated professions.

[118] Link to OHLA laws and rules for electrology, permanent color and tattoo arts: http://www.oregon.gov/OHLA/EPT/EPTlaws_rules.shtml

Nevertheless, the tattoo example in Oregon could become a starting point or model at large for the entire US, if somebody would argue for it in a more systematic way. But as the previous remarks have shown this is rather unlikely in the absence of a federal level agent. The tattoo example is a single incident in one segment of the personal appearance industry in the huge services sector occurring in one state. The licensing agency did not become active itself, as in Europe, condemning the potential costs restrictions on the temporary delivery of services have on the regulated industries. And Oregon does not presently plan to extent the temporary access to other sectors, let alone pushing for creating temporary market access for all sectors in all states at once. As OHLA's senior policy analyst noted, "licensing cost is not a tariff" and that is that (personal correspondence 2010).

However, it becomes clear that some awareness exists that the only way to create a complete internal market in the US comparable to the EU is to undertake a comprehensive, horizontal approach including all regulated professions. Indeed, the following comment by Howard Warner, NABBA's president, indicates the necessity of a central actor at the federal level, which takes the entire internal market into account and not one or two sectors or regions, to facilitate the creation and enactment of a polity-wide regime:

> Would they do it to nursing? And to pharmacy? And to engineering? They [need to] do it for every licensing in the United States. That's where it needs to come from. If you take all professional licenses because you are not going to single out, I don't know of anybody that is going to single out any one profession and try to do that. I appreciate that. But I am thinking bigger maybe. *If somebody went from a national level and said that all licensing boards in the United States, optometrists, pharmacists, everybody*. But I don't think, it's kind of like high universities, Ohio State University is 55,000 people, we are still on a quarter system. And, as I understand it, 75% of United States major universities are on semesters. Why are we on quarter? You know because the people that govern

> Ohio State University, the boards, what they say that it worked all these years, It's fine, that's what they want (personal interview; my emphasis).

What is missing, in short, is an agent similar to the European Commission that makes the case, economic and political, for overcoming the status quo by offering a solution that allows for a certain degree of flexibility while attempting to guarantee free market access across the board.

Where does it leave us? No systematic opening of the internal market for the delivery of temporary services has taken place so far in the United States. Initiatives to facilitate market access have been limited to single instances where service providers in a specific sector asked for temporary access and to attempts to increase reciprocity agreements or create a form of national testing. None of these approaches avoids an America à la carte, where market access varies for licensed professionals from other states. In the absence of an overarching positive regime, service providers in the US are largely left with the costly option of trying to go to the courts to argue that a specific regulatory rule is not conform with the commerce clause or the privileges and immunities clause.

While the possibility exists to overcome the present patchwork of regulatory systems, actors in the US either do not perceive the existing heterogeneity of regulatory systems as substantial non-tariff barriers to trade or believe either nothing can be done because they are resigned to it being a state rights issue or are ideologically skeptical that federal involvement, such as congressional preemption, could actually improve the present situation. To sum up, nobody in the US has challenged the existing paradigm. No agent has pushed for change, drawing attention to the shortcomings and calculating the

costs of the present system in its entirety as the Commission has done in the European Union.

Conclusion

By primarily focusing on explaining why the original *Bolkestein* draft was watered down over time, the recent literature on the 2006 Services Directive has failed to notice that from a comparative perspective the EU has already succeeded in liberalizing the services sector more than the US in many important aspects, notably in facilitating service providers to cross state borders to provide their services on a temporary basis and thus to test the waters for future economic expansions or moving into another state.

The difference in outcome appears again largely, while not exclusively, to be due to the unique role of the European Commission, which by "pressing for a rather radical form of recognition across the board" pushed market opening in services farther than the courts, most member states or business desired (Nicolaïdis and Schmidt 2007, 731).

Indeed, it was the Commission's major innovation, the combining of the horizontal approach to services with the transformation of the principle of mutual recognition, which created public and passionate opposition to the 'country of origin principle' mentioned in the original draft directive in the first place. Despite the opposition, however, the Commission succeeded in getting the final service directive passed with only minor, cosmetic changes. As this chapter has shown the Commission thinks and acts as if the original 'country of origin principle' is alive.

The outcome in the EU is the more remarkable given that a similar success cannot be reported for the United States, where one common *demos* exists. The absence of a federal-level actor promoting market integration by highlighting remaining non-tariff

barriers to trade and calculating the potential qualitative and quantitative effects on the internal market looms again large. While some are aware that the present heterogeneity of regulatory systems in the US reduces professional mobility and that reciprocity as it stands is a costly and time consuming process, most are unaware or deny that the present system poses any significant non-tariff barriers to the provision of services. National organizations tend to refer back to the individual states and many are skeptical of federal-level solutions to the present situation. Some of them are being afraid to lose complete control over qualification standards or more prosaically, losing income for not supervising tests themselves. None of which is true in the European system. With polity-wide solutions tending to be seen in the US as 'bigger is not always better' and the perception 'that there is too much federal government and the American people would like less", what gets overlooked is that strong central policies can lead to a more open market outcome by actually reducing the number of rules and barriers to trade and government interference due to the diversity of fifty different regulatory systems.

Thus, while the EU has successfully put in place a framework to shave off non-tariff barriers to trade in services, a similar cut to barriers is unlikely to happen any time soon in the US in the absence of an agent taking into account the entire internal market in the US. To close with the words by Jan Frydman, EU Commission Deputy Head of Unit for International Affairs, DG Enterprise and Industry and founder of the Transatlantic Business Dialogue, what might be needed is "a Cecchini report for the US perhaps" (personal interview 2010). To which might be added, what is needed is someone commissioning such a study and actually acting upon it.

CHAPTER VII

GIVING TRADE A LIFT

"The Directive 95/16 […] means that all member states now are obliged to meet the requirements included in the directive. Before the national legal acts regulating this market were different. So this created the barriers to trade. If there were different provisions in one country and different in another one that was the problem."
European Commission Official – DG Industry and Trade, personal interview, 2010

"Our members have no problems to sell elevators on a state by state basis and quite honestly we have never taken a position and we would not want the federal government involved."
Managing Director of the National Elevator Industry, Inc (NEII) in America, personal interview, 2010

The general assumption is that the United States of America is the epitome of a commercial republic with a complete internal market that due to the "flexibility and fluidity in its economic arrangements […] has fostered economic initiative, entrepreneurship, and creativity" (Friedman 2008, 88). Though the findings in the previous chapter challenge much of the received wisdom about a liberal and integrated US economy and interventionist and balkanized European markets, well-informed readers might still say that they knew that services and public procurement were not especially integrated or liberal in the US. Such readers would still presumably expect that the US market for *goods* is quite liberal and well integrated, and that it is more so than the EU even though this is also the area where European integration has clearly gone furthest. But this chapter will show that for a substantial category of goods - what I call "regulated goods" - the EU has again gone further in crafting centralized and liberalized rules.

A regulated good is any good that is controlled by a governmental body or through a government appointed agency via the specification of technical regulations reflecting societal norms. In the context of the EU and this chapter, regulated goods refer especially to those industrial sectors, such as automobiles, chemicals, electrical equipment, footwear, textiles, toys and others, for which the European Union has explicitly adopted legislation, i.e. where the European Union has approximated legislation. Based on the European Court of Justice's Dassonville and Cassis de Dijon case law and Article 34 Treaty on the Functioning of the European Union[119], the right of market access for goods is firmly guaranteed and can only be derogated based on clearly enunciated health, safety, environment and/or consumer protection concerns. In other words where the regulatory objectives of the different member states are considered equivalent, a member state must allow a product lawfully produced and marketed in another member state into their own market. However, in cases where the regulatory objectives of safety and health are not deemed equivalent market access can still be guaranteed by passing a polity-wide legislative act guaranteeing those objectives. Those goods for which legislative acts have been passed are considered in the EU lingo as harmonized or regulated goods. Goods for which no EU legislations have been adopted are considered to be goods in the non-harmonized fields. These goods are of course still regulated in the member states, but mutual recognition automatically guarantees market access polity-wide.[120]

[119] Article 34 (ex-Article 28 TEC) prohibits "[q]uantitative restrictions on imports and all measures having equivalent effect […] between Member States.

[120] Pelkmans (2007), however, points out that mutual recognition for non-harmonized goods does not always work smoothly in practice due to information and transaction costs. For instance out of ignorance might not consider mutual recognition "and thus either refrain from exporting to countries, or do export but after adaptations, which is exactly what MR [mutual recognition] aims to avoid" (Pelkmans 2007, 710).

This chapter will continue the argument that the EU has adopted rules that open exchange to competition more than the United States by taking a closer look at the achievement of a full-fledged common product market at the example of mechanical engineering, specifically the elevator sector. According to the European Commission, Europe is the world's largest manufacturer and exporter of machineries commanding 36% of the world market. Consequently, mechanical engineering "represents one of the largest industrial sectors in the European Union, in terms of number of enterprises (around 169 000 which are mostly SMEs), employment (3.3 million people), production and generation of added value" (Commission 2011d). It is therefore not surprising that it has been argued that "the elimination of technical barriers to trade […] is one of the most important routes to achieve a unified, genuinely free Internal Market" (Pelkmans 1987, 249; cf. Mastromarco 1990, 47). The creation of a truly free internal market in goods in Europe was the idea behind the 'new approach' to technical harmonization in the 1980s which subsequently led to a series of directives opening up the common products market in the EU. A similar framework, exemplified by the case of elevators, does not exist in the US. The regulated goods market in elevators in the United States remains disjointed among the great number of states and even local governments.

Hence, similar dynamics, as has been described in the case studies on public procurement and services, can be found in the arena of regulated products. The European Union has succeeded in giving trade a lift in the products arena, while in the United States, due to the fragmented nature of regulations and regulatory authority, freedom to trade is metaphorically stuck in the basement. Substantial technical barriers to trade presently persist in the United States.

Moreover, while the EU, as indicated by the entry quotes, is ideologically committed to the overarching goal of a free market, including the elimination of non-tariff barriers posed by a great diversity of member state rules, the United States is characterized by a general acceptance of the status quo combined with a reluctance to perceive federal intervention as a potential solution to remaining non-tariff barriers to trade. Indeed, the absence of an agent similar to the European Commission in the US with a mandate to identify trade barriers and to push an internal market as well as the ideological tendency in the US to distrust federal involvement in markets and to favor state rights looms again large to explain the difference in outcomes in the two compound polities.

As the elevator example will illustrate, it is thanks to the 'new approach' developed by the European Commission that today a regime exists on the European continent which simultaneously guarantees companies market access, flexibility and innovation as well as the member states' societal objectives of high levels of safety and health. The EU model in the area of regulated goods thus presents a teachable moment for the United States' internal market. It demonstrates that a federal-level agent intervening in the market is not reflexively to be dismissed as anti-business, as tends to be done in the United States, and can lead to freer markets. This chapter will consequently once more point to evidence that there is actually more acceptance of a strong central authority in the EU than in the US.

European Regime: Safety, Flexibility and Innovation – a Framework for Internal Market Freedom

How to achieve a "fully-fledged common product market, while the Member States retain the ultimate responsibility with respect to societal objectives (such as safety and health)" has been the "*central policy question* with respect to technical trade barriers" (Pelkmans 1987, 249; emphasis in original). The European Union has achieved these twin goals. Today elevators and other regulated goods can be freely sold and serviced across the member states of the European Union without member states blocking market access by enforcing different standards or codes. Thus, when asked whether it is easier nowadays for elevator companies to do business across state borders in the EU than the United States, Esfandiar Gharibaan, Vice President for Codes for the Finland-based manufacturer Kone International,[121] emphatically responded

> My first reaction is a very big "Yes"! The lift directive or say the 'new approach' to European legislation has removed these technical barriers for trade between the members of the European Union (personal interview 2011).

The legal framework for the free circulation of lifts and corresponding safety components is provided today by the so-called Lifts Directive, Directive 95/16/EC. The directive applies to all new lifts permanently installed in buildings and constructions for carrying passengers or passengers and loads as well as to a number of safety components

[121] This chapter is largely based on a handful of interviews with responsible managers from elevator companies and trade organizations. However, of the four largest international elevator companies, only German-based ThyssenKrupp and Finnish-based Kone International were willing to discuss the issue. American-based Otis, the world's largest manufacturer of elevators, responded via its manager for Worldwide Communications that "Due to the number of requests for information that we receive, we do not participate in research interviews of this kind" (personal correspondence 2011; cf. http://www.otisworldwide.com/). And the Swiss-based Schindler, the world's second largest elevator company, did not respond to inquiries at all (http://www.us.schindler.com/sec-index/sec-kg.htm).

listed in the annex of the directive.[122] The 1995 directive, however, was not the first directive applicable to elevators in the European Union. Two previous directives dealing respectively with electrically and hydraulically operated elevators, Directives 84/529/EEC and 90/486/EEC, were replaced by the new lifts directive of 1995, which also extended the scope to include all elevators regardless of the operating technique employed. The original lifts directives were largely the creation of the European Commission. The business community provided some input in a consulting capacity, but was not the driving force behind the creation and adoption of the original lifts directives.[123] As Gharibaan observes,

> there the initiative as far I know came from the Commission and the industry was consulted. It was not the industry that initiated the first directive. And with the introduction of the New Approach, the existing lift directive was transposed, converted to 'new approach' directive with all the benefits and rules of 'new approach' (personal interview 2011).

In short, the European Commission originated the first directive for the harmonization of standards in the elevator sector to facilitate free trade and then subsequently perfected the free market access for elevators by applying the 'new approach' to technical standardization. The 'new approach' itself was a Commission invention of the 1980s as part of the overarching goal to create a complete internal market in the ensuing years (cf. Garvey 1986).

[122] The safety of elevators manufactured and installed prior to the entry into force of Directive 95/16/EC remain the exclusive responsibility of the EU member states. Yet, the Commission also issued an official recommendation a couple of days before the adoption of the lifts directive addressing the safety of existing lifts (Commission Recommendation 95/216/EC).

[123] As Dashwood notes the first directives on eliminating technical obstacles to trade through harmonization of standards were result of a questionnaire sent out by the Commission "in 1962 to member states, after some preliminary work has been carried out on matters thought of as having priority" (Dashwood 1983, 184). The first list was in the following years extended to include more products.

The 'new approach' has been developed as a new method for the removal of non-tariff barriers to trade, specifically those linked to national standards and technical specifications.[124] Instead of prescribing highly detailed specifications for products, as was done previously, directives based on this new regulatory technique for technical harmonization are limiting legislation to establishing the mandatory essential requirements that products must meet to protect the public goals of health and safety and are applied to large families of products, such as machinery, construction products, toys and elevators.[125] Indeed, the lifts directive is only one of many directives which have been created as a result of a new approach to removing technical barriers to trade while ensuring a high level of product safety.[126]

The new approach was adopted by the European Council in May 1985 (Council Resolution 85/C 136/01*)* with the intent to compensate for the shortcomings of the traditional approach to harmonization in the regulated goods sector. It was thus an attempt to move away from a broken regulatory system of proliferating directives for each separate product that were excessively technical and unable to adapt to commercial

[124] As is frequently the case, the 'new approach' was not completely new. The reference-to-standard part of the 'new approach' was already introduced and tested in the 1973 Low Voltage Directive (Directive 73/23/EEC).

[125] The new approach to technical harmonization is presently not used for all regulated goods. The traditional way of harmonizing products by creating highly detailed legislation for example is still used in some sectoral legislation such as cars (Commission 2011b). Indeed, as Dzabirova observes, "[i]t is an inherent part of the New Approach, that if it does not work in a specific sector, one should go back to harmonisation in that particular sector" (Dzabirova 2009, 64). Yet, the new default position for regulated goods is the 'new approach' to technical regulation.

[126] A website maintained together by the EU, EFTA, and the European standardization bodies, such as CEN (Comité Européen de Normalisation), CENELEC (Comité Européen de Normalisation Electrotechnique) and ETSI (European Telecommunications Standards Institute), list all directives which have been adopted following the 'new approach'. The website also contains a link to other directives based on the principles of the 'new approach': http://www.newapproach.org/Directives/DirectiveList.asp
Pelkmans further notes that "a specific variant of New Approach thinking has been developed since the mid-1980s" regarding food laws (Pelkmans 2007, 704)

innovation in a timely manner. It has been described as "a decisive step towards the effective dismantling of barriers to trade in Europe" which "led to a fundamental and very rapid transfer of priorities from the national to the European level" (Egan 1998, 491).[127]

Similar to the other internal market sectors discussed in the previous chapters, the EU treaties already guarantee largely the free movement of goods and services. However, until the invention of the 'new approach', harmonization was limited to highly specific directives, seriously impeding the fulfillment of a single internal market. Thus, while in the previous "one and a half decades the European Commission has tried to pursue an ambitious harmonization programme", the "focus on specific technical aspects of products […] fail[ed] to solve all the problems of access in products markets" (Pelkmans 1987, 251).[128] Given the time-consuming nature of the traditional approach, the European Commission enacted "on average only a little over ten technical directives a year" over the previous fifteen years (Pelkmans 1987, 251; cf. Garvey 1986, 206). This situation was especially problematic given that member states tended to erect new regulatory barriers faster than the Commission was able to put them down. As Pelkmans observed, "given the increase in bureaucratic regulatory capacity in recent decades in all Member States and the greater societal preference for environmental and consumer protection, it can safely be presumed that the tempo of national regulation has, for many years, exceeded by far that of the annual output of 'aspect-directives' at EC level with respect to a rather limited group of products" (Pelkmans 1987, 251; cf. Dashwood 1983, 203; Egan 1998,

[127] Today goods falling under 'new' and 'old approach' directives "easily amount to 50 per cent of intra-EU trade" (Pelkamns 2007, 704).

[128] This section largely follows the seminal article by Jacques Pelkmans on "The New Approach to Technical Harmonization and Standardization" (1987).

490; Garvey 1986: 69). Moreover, the pre-'new approach' regime was characterized by a weak link between the European Union's own harmonization policy and the European standardization bodies. Thus, while standardization bodies, such as CEN (Comité de Normalization or European Committee for Standardization), go all the way back to the early 1960s, they did not develop long-term programs "to remove the trade-impeding effects of different national standards" (Pelkmans 1987, 252). These standards simply tended to be private and voluntary in character. In sum, standards developed by the European standardization bodies were not mandatory and universally applied while European Union harmonization was mandatory and universally applicable within the member states but too detailed and to slow to keep up with technological changes and new regulations imposed by member states.

The development of "excessively detailed regulations"[129] further represented a significant workload for the Commission staff, leading to less attention being paid to enforcement and implementation issues in the member states (Pelkmans 1987, 261). [130] The situation was therefore less than satisfactory. It has led, in the words of Jacques Pelkmans, "to profound feelings of frustration and disappointment" with the realization "that the individual protectionist was thriving whereas the dynamic exporter, attempting to encroach upon other markets, was hampered" (Pelkmans 1987, 253). Yet, the belief was and is in the European Union, especially among Commission officials, that "[o]f course, the opposite climate should characterize European market integration for the benefit of the Community's economy at large" (Pelkmans 1986, 253).

[129] Dzabirova agrees by stressing the "unnecessary uniformity" of the 'old approach' (Dzabirova 2009, 64).

[130] For an extensive list of drawbacks of the traditional approach, cf. Pelkmans and Vollebergh 1986 and Pelkmans 1987.

Change started to come about with the proposition by the Commission of a Mutual Information Directive in 1981. Adopted two years later as Directive 83/189/EEC it formed the cornerstone of the Commission's later conception and development of the 'new approach' to eliminate technical barriers to trade.[131] The 1983 Mutual Information Directive and the two-year later Council resolution establishing the 'new approach' to technical harmonization were both part of the larger parcel of the Commission's attempts in the 1980s "to give a fresh impetus to the European internal market" (Commission 1998, 10). The realization that its own efforts to harmonize technical regulations and standards tended to lack behind member states creation of new regulations led the Commission to propose to the member states a pre-adoption screening procedure for new technical regulations and standards. The idea was to make it mandatory for member states to inform the Commission about any new regulations and standards they were planning to draft. This gives the Commission the tool to avoid retroactive harmonization and to proactively propose the approximation of legislation before any new barriers to trade due to new and divergent national regulations emerge. The directive also enables the Commission to put on hold any national legislation on technical regulations and standards for a period of time to facilitate prior discussion at the federal level among all member states and the Commission. Once the Commission is notified by a draft national technical regulation, the member state concerned is strictly obliged to not enact the draft in question until the end of a standstill period of three months. Based on the circumstances, the standstill period can be extended, especially in the case where the Commission announces its intention to adopt its own legal binding act (regulation, directive or

[131] Commission official Tom Garvey refers to the Mutual Information Directive as "[t]he first movement of our symphonic approach […] marked 'allegro con brillo'" to the elimination of technical barriers to trade (Garvey 1986, 69).

decision). In the latter case, the member state is obliged to postpone any adoption of its own regulation or standard for 12 months.

The ability to proactively intervene in the setting of standards and drafting of technical regulations has, in the Commission's own words, been "revolutionary at the time and has remained so" (Commission 1998, 10; Commission 2005, 10). It created an "entire philosophy of information exchange, dialogue and cooperation" (Commission 1998, 11). The originality of the directive mainly rests on the preventive nature of the proposed system. The directive specifically allows not only the Commission but also each member state to examine and monitor draft regulations by another member state during the reflection period. This enables the member states to influence directly each others' internal legislative processes. The original European treaties did not provide for such proactive intervention by other member states. Only retroactive monitoring was foreseen through the mechanism of infringement procedures. However, they are "very rarely implemented" and tend to be more costly as has been argued in the previous chapters (Commission 1998, 10). In addition, by charging European standardization bodies via an annual contract to oversee the exchange of information on draft regulations and standards between national standardization bodies, European standardization bodies and the European Commission, the Commission established a direct link between the European standardization bodies and its own institutional body.

Yet, despite the apparent advantage, "[g]etting the Member States to accept a system of reciprocal transparency and monitoring in the field of standards and regulations was quite a challenge" for the Commission (Commission 1998, 7). In the end, however, the member states agreed to participate in a reciprocal transparency and monitoring

system in the regulatory arena, acknowledging "the advantages of a procedure which allows the others to influence the legislative processes" of other member states (Commission 1998: 10). Over time the scope of the directive has been extended and amended to cover all agricultural and industrially manufactured products. In 1998 the 1983 Mutual Information Directive was then codified by Directive 98/34/EC (as amended by Directive 98/48/EC) to further extend the transparency and monitoring procedures to include the rapidly changing field of information society services and products. Similarly the geographical reach of the directive increased by today including all member states of the European Economic Area as well as Turkey and Switzerland.

One of the most immediate and important results deriving from the Mutual Information Directive was the trail it blazed for the adoption of the 'new approach' to technical harmonization by limiting from now on legislative harmonization largely to the adoption of essential safety and health requirements and entrusting the drafting of technical specifications to the European standardization bodies. In its own documents, the Commission admits that it was the 1983 directive in conjunction with the 1979 Cassis de Dijon and the subsequently Commission-extracted mutual recognition principle, which "was the deciding factor which persuaded it to take the 'new approach' to technical harmonization" (Commission 1998, 11; cf. Alter and Meunier-Aitsahalia 1994). As Dzabirova observes, "the Commission seiz[ed] upon mutual recognition as a regulatory strategy for market integration in the wake of the *Cassis de Dijon* [by using] the New Approach [as] a basis for application of the principle of mutual recognition in the area of technical harmonisation and use of standards" (Dzabirova 2009, 65–66).[132] Michelle

[132] Similar to the distinction made at the beginning of the Chapter, Pelkmans aregues that we need to differentiate between judicial and regulatory mutual recognition. While the 'new approach' to technical

Egan shares the assessment of the Commission playing the critical role of eliminating present and future non-tariff barriers to trade in the arena of regulated goods. She notes that "[*t]he Commission, as always a 'purposeful opportunist'* seized the window of opportunity created by the Cassis decision to push forward new solutions to address technical barriers to trade" (Egan 1998, 490, my emphasis). The actual draft of the 'new approach' was a joint effort between Commission staff and a group of senior civil servants recruited from member states where they were responsible for standardization. The ad hoc group of civil servants was named "the 'Williams Group' after Eric Williams of the Department of Trade and Industry in Britain, who was the Chariman of the group" (Garvey 1986, 71). As Commission official Garvey notes, "[t]his ad hoc group worked side-by-side with the responsible Commission team in DG III:A1" and they "worked in the context of the Community philosophy statement and produced a balanced Community-oriented solution with great speed and efficiency" (Garvey 1986, 71).

The 'new approach' creates a new distribution of duties between the European Commission and the European standardization bodies. By not developing its own detailed technical specifications for the entire polity, but by delegating the task to the European standardization bodies, the Commission's 'new approach' allows for business actors to be more closely involved in the development of standards through the European

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regulation is closely related to mutual recognition it is not the same. Mutual recognition, or judicial mutual recognition, refers to whether the regulatory objective in one state for a good is equivalent in another member state and when this is essentially the case, a good can be freely imported. In other words a member state can still, under certain circumstances, invoke exceptions to free trade by citing different safety, health, environment or consumer protection objectives in another member states. Thus, if the regulatory objectives are indeed considered non-equivalent, the import of goods can be stopped. Here is where the ingenuity of the 'new approach' comes into play. By commonly defining objectives "the lack of equivalence can no longer be a reason to hinder imports" (Pelkmans 2007, 702). But as Pelkmans concludes, both approaches deliver "the quite sensational result […] that existing technical details in national laws, supposedly to be enforced by the responsible inspectors or civil servants, cannot be used to block intra-EU imports, except if that good does not comply with recognized European standards of clearly violates" the safety and health objectives (Pelkmans 2007, 703).

standardization bodies (cf. Egan 1998, 485). It allows for "[m]arket participants, and not Eurocrats or national civil servants, [to] develop standards for the EU" (Pelkmans 2007, 703). Therefore the 'new approach' is much more consistent with the spirit of subsidiarity (Aubry-Caillaud and Gautron 1996). Yet, the 'new approach' does not change the formal distribution of competences between member states and the federal level as established in the EU treaties. The member states ultimately keep intact their responsibility for the protection of health and safety of their citizens (cf. Pelkmans 1987). Yet, by devising safety, health, environmental protection, and/or consumer protection objectives for the entire polity, the European Commission ensures that market interference based on such arguments by member states are largely eliminated and that market access for regulated goods across state borders is guaranteed. And as Pelkamns points out, by harmonizing these objectives "the burden of justification lies with the Member State" (Pelkmans 1987, 255). In other words, member states have to clearly show why and how a regulated product does not fulfill the agreed upon essential requirements for market access. [133]

In practice this means that the European Commission defines the essential requirements that a product category must meet to be allowed on the market. These essential requirements are mandatory. In its directives, however, the Commission does not anymore specify the technical solutions for fulfilling the essential requirement but refers to general standards. This reference-to standards approach foresees the European standardization bodies, based on the mandate given by the Commission, to develop a new standard or identify an already existing one, which will offer technical solutions to meet the defined requirements. The standards developed by the European standardization

[133] Member states can only put restrictions on the free movement of goods when they can demonstrate that either manufacturers' declarations are erroneous or that standards contain imperfections or are incorrectly applied.

bodies, in contrast to the essential requirements, are, however, non-mandatory. Yet, once published in the Official Journal of the European Union, they grant a so-called presumption of conformity to all products applying these standards. This means that once a company chooses to comply with the harmonized standards, every EU member state is required to grant free access to its market without further ado. The presumption of conformity, as noted above, thus represents a reversal of the burden of proof. It is not up to the manufacturer to prove to a national government or public authority at large that its product is safe, but to the public authority to prove that it would endanger the public. A manufacturer who complies with the technical specifications described in the standards set forth by the European standardization bodies cannot be denied market access throughout the European Economic Area. Yet, manufacturers are also absolutely free in choosing how they are going to meet the essential requirements defined in the directive. The standards developed by a European standardization body represent only one way to fulfill the essential requirements outlined in a directive. Given that the harmonized standards developed by the European standardization bodies are voluntary, a company can choose to not follow these standards. In this case, however, the burden of proof that the product conforms to the directive rests with the manufacturer. The manufacturer then can demonstrate conformity via third party testing or by providing a declaration of conformity in combination with a manufacturing surveillance system.[134] Once done so, the manufacturer has to be granted again complete market access.

[134] The Commission maintains an on-line searchable database called NANDO (New Approach Notified and Designated Organizations). The database contains all notified bodies, i.e. organizations designated to carry out conformity assessment of essential requirements listed in a directive, which have been accredited by the member states or by countries with which the EU has mutual recognition agreements. The database allows for searches by directive, country and by type of assessment body. It can be accessed at: http://ec.europa.eu/enterprise/newapproach/nando.

As part of the larger transition to a 'new approach' to technical harmonization by transferring the development of technical specifications from the Commission to the European standardization bodies, the voting mechanism for the adoption of a standard within the European standardization bodies were changed from unanimity to qualified majority voting, which was also agreed upon by the members of the European Free Trade Association. At the time this represented a big step forward given that previously harmonization directives were subject to "the traditional Council approach to unanimity on technical details" (Pelkmans 1987, 256). This 'new approach' therefore also reduced the possibility of delaying tactics by member states.[135]

The 'new approach' to technical harmonization hence combines effectively market access and flexibility for innovation with ensuring a high level of product safety. The essential requirements, while written specific enough to allow for the assessment whether a product meets them or not, are drafted in such a way that they do not become outdated with technical progress. Yet, because no technical specifications are included, the directives do not require to be regularly updated to keep up with technical progress, as was the case with the old approach directives, and allow for different options for manufacturers to conform to the stated essential requirements. In short, this framework "by combining *total harmonization* of the objectives at issue (safety, etc.) with a *flexible approach* of the means (standardization) […] leaves room for original solutions in existing products and for products innovation" (Pelkmans 1987, 257–58, emphasis in original).

[135] Standards in the European standardization bodies, however, are in practice largely developed based on consensus (cf. Egan 1998).

The ‘new approach’ was modernized in the summer of 2008 when the European Union adopted a legislative package comprising three legal instruments to further facilitate the free movement of goods within the EU internal market. The system in place still had some shortcomings in that, among other things, different ways of controlling accredited bodies and different levels of import control and market surveillance persisted across the member states (cf. Gorywoda 2009).[136] Thus, Decision 768/2008/EC and Regulation 765/2008/EC review and update the ‘new approach’ system by reinforcing market surveillance mechanisms and the clarity of the EC marking and the conformity of the products as well as facilitating the drafting of future directives by creating a legislative tool kit setting out common definitions and procedures, such as conformity assessment modules. The ‘new legislative framework’ now calls for member states for instance to designate a single national accreditation body which in turn is responsible for accrediting all conformity assessment bodies operating within its territory. These national accreditation organizations must not offer conformity assessment services themselves and have to be non-profit organizations. In addition, they must be audited once a year (cf. Gorywoda 2009). The third legal instrument creating the ‘new legislative framework’ is Regulation 764/2008/EC which lays down procedures relating to the application of certain technical rules to products lawfully marketed in another member state. The focus of the directive is to overcome some remaining obstacles in the implementation of the ‘mutual recognition’ principle in the non-harmonized goods area. These are products,

[136] Egan also points out that the ‘new approach’ with delegating primary responsibility for technical specifications to European standardization bodies was not without its difficulties and not always led to a much faster pace of standard-setting given the speed of technological change (Egan 1998: 495 – 496). To avoid shirking and/ or slippage, i.e. a lack of effort on the part of the agent and/or skills in carrying out their delegated tasks, the Commission has put in place in its agreements with the European standardization bodies a series of budgetary sanctions and regularly checks whether the standards produced by the European standardization bodies are fulfilling the essential requirements set forth in the directives (cf. Egan 1998, 498).

such as food items, bicycles, furniture, ladders, etc., which are not subject to EU harmonization. They represent about 15% of intra-EU trade goods according to the European Commission (Commission 2011c). Based on the regulation, each member states is henceforth required to inform the company in detail why it plans to deny market access to a specific product, which is legally marketed in another member state. The detailed description of "the overriding reasons of public interest for imposing national technical rules" and why "less restrictive measures cannot be used" are aimed to provide the economic operator with the opportunity to "comment on all relevant aspects of the intended decision restricting access to the market" (Regulation 764/2008/EC, recital 22). It also attempts again to make sure that the burden of proof rests with the member state and not with the economic operator. Overall, the new legislative framework for the single market for goods has "an impact on a large number of industrial sectors, representing a market volume of around € 1500 billion a year" (Commission 2011c).

The elevator industry, of course, only represents a small slice of the overall amount of the goods industry in Europe. However, it serves as a good illustration on how market integration differs in the regulated goods sector between the European Union and the United States. According to Kone International's investor information, "the global construction and engineering industry –excluding homebuilding – [was] estimated to reach a market value of approximately USD 1.3 trillion in 2008" while "[t]he global homebuilding market [was] estimated to reach a value of approximately USD 840 billion by 2008" (Kone 2011a). In the same year the global elevator market amounted to the size of "approximately EUR 34 billion" (Kone 2011a).[137] Forty per cent of the €34 billion

[137] The closely related escalator market amounted to the size of €2 billion in 2008. In that year 500,000 escalators were in operation of which 42,000 were newly installed throughout the year. 52 per cent of all

consisted of new equipment sales while approximately sixty per cent went to the modernization and maintenance of existing systems. At the end of that same year approximately 9.1 (2007: 8.7) million elevator units were in operation worldwide, of which 478,000 (2007: 453,000) were installed in that year (Kone 2011a). Table 3 gives a regional break-down of the elevator market:[138]

Table 3: Global Elevator Market in 2008 (Source; Kone 2011a)

Elevators in operation (%) **Total units: 9,100,000**		New Elevator market (%) **Total units: 478,000**	
Area	**2008**	**Area**	**2008**
Europe	48%	*Europe*	23%
Americas	17%	*Americas*	10%
Japan and Korea	11%	*Japan and Korea*	10%
China	10%	*China*	40%
Rest of the world	14%	*India*	4%
		Russia	5%
		Rest of the world	8%

As stated at the beginning of this section, today's European elevator market is regulated by Lift Directive 95/16/EC. Given that the directive is a so-called 'new approach' directive it creates market access by eliminating barriers posed by member state technical regulations and standards. It creates a general framework of high levels of consumer and safety protection while at the same time allowing for market flexibility, innovation and the updating of standards without prescribing detailed technical solutions

new escalators were installed that year in China. China with 40% and Japan and Korea with a combined 20% hold the largest shares of the operational global escalator market in 2008. Europe's global share of operating escalator was 19 per cent; the Americas 11 per cent (Kone 2011b).

[138] Due to Europe's higher population density and the fact that more Europeans tend to live in apartments the European elevator market is significantly larger than the North American. Thus, while half of all newly installed elevators in Europe are for residential buildings, the market share for office buildings, sports and leisure facilities and residential buildings are approximately the same (Kone 2011a).

at any given time. As the European Lift Association sees it, "the "New Approach" procedure had clearly proven to be beneficial for the industry" (Bianchi 2007, 1). The Directorate-General Enterprise and Industry wrote the directive and presently oversees and manage it. To ensure uniform application of the lift directive, DG Enterprise and Industry has further, in close cooperation with a "small Editorial Committee, formed by representatives of Member States, Notified Bodies and Industry", including the European Lift Association, written a 'Guide of Application', "which can be described as "soft law" (Bianchini 2007, 2).[139] While not legally binding, this guide "is sometimes considered as more "helpful" than the actual directive, since it clarifies details and enables companies to make the safest possible products" (Bianchini 2007, 2). Moreover, given that the Commission office directly in charge of the lift directive has prepared the guide and consulted for approval member states and industry representatives, its content has become "the undisputed common understanding" (Bianchini 2007, 2).

On the whole then the European example here demonstrates that instead of hampering free trade, the intervention in the market by a federal-level agent dedicated to market liberalization cannot only effectively tear down non-tariff trade barriers and facilitate trade across member states but also create a framework which simultaneously ensures safety and consumer protection while granting the flexibility cherished by business to innovate at a rapid pace. As Kone International Vice President for Codes puts it, the European approach

> allows us to develop and introduce innovative solutions and new products into the market in a very rapid pace. We don't have to wait for standards to adapt to new technologies. We can bring the new technologies through risk-assessment and

[139] To allow for easy updates, the guide is only available on-line and in English. Member states, however, are free to suggest translations. The guide can be found at: http://ec.europa.eu/enterprise/sectors/mechanical/files/lifts/lifts_guidelines_en.pdf

> approval by third party. And when such a solution becomes state-of-the-art then it is included in the standards. So lift directive not only harmonized the technical regulations between member states, but opened the door for innovative solutions and new technologies at a much faster pace than we had ever experienced in Europe (personal interview 2011).

More material discussing the European regime, especially from interviews, will follow in the next section once the stark contrast to the American regime is introduced below.

American Regime: Disjointed Market - No Federal-Level Agent, No Market Liberalization

Similar to the market access of regulated professions, the fifty states retain the right to regulate the access of goods within their state borders based on safety and health concerns. Yet, not only states, but even sub-states' public authorities, such as municipalities, have the right to impose their own codes. Consequently, the United States once again resembles a regulatory patchwork quilt which makes market access for goods producers more difficult and entails significant, albeit to this day unquantified costs for the individual company as well as the American economy at large. The present day situation in the United States is especially ironic given that American business representatives, such as Dan R. Mastromarco, the Assistant Chief Counsel for Tax Policy of the U.S. Small Business Administration, have argued in the past that "[t]he successful harmonization, implementation, and enforcement of product standards is of paramount importance *to the realization of a fully integrated European Community*" (Mastromarco 1990, 47; my emphasis). As Mastromarco further notes,

> Some manufacturers have been forced to modify products and retool in order to comply with frequently changing, country-specific requirements. Other firms, especially smaller companies, have been discouraged from expanding into new

> markets. From the consumers' perspective, the need to have products modified, tested, retested, certified, and recertified for export to markets in neighboring countries causes delay, stifles competition, increases costs, and may reduce product selection. […] Uniform health, safety, and environmental standards, if properly implemented, would benefit most exporters to the EC as well as most Member State industries by eliminating barriers to the efficient flow of goods, and perhaps services, throughout the EC (Mastromarco 1990, 48).

Yet, the situation today in the United States remains largely similar to the one described in Europe in the 1980s and 1990s. American elevator companies are regularly forced to modify their products and retool in order to comply with the ever-changing rules imposed by the great number of jurisdictions *within the United States*. Thus, American business leaders figuratively have tended to only behold the mote in the eye of the European internal market while not considering the beam in its own internal market. In fact, while a national standardization body, the American Society of Mechanical Engineers (ASME), creates standards for the elevator industry, such as ASME A17.1 Safety Code for Elevators and Escalators, these standards are voluntary.[140] No overarching framework or harmonization for the entire American internal market exists to this day. While some federal agencies, such as the Environmental Protection Agency, the Federal Communications Commission, the Occupational Safety and Health Administration, the Federal Aviation Administration, the Consumer Products Safety Commission and the Department of Agriculture have the power to mandate federal standards, a vast amount of all standards, including for many, if not most regulated goods, remain in the hands of over 400 nongovernmental standardization bodies

[140] ASME, a not-for-profit membership organization, was founded in 1880. Besides sharing knowledge and enabling cooperation between engineers, the organization develops engineering standards. The first standard developed by the organization was the *Code for the Conduct of Trials of Steam Boilers*, in 1914. Today ASME has developed over 500 codes and standards, including safety codes for elevators (ASME 2011). More information available at: http://www.asme.org/

(Mastromarco 1990, 52).[141] As Kevin Brinkman, Vice President of Quality and Code Compliance for ThyssenKrupp Access, summarizes for the United States in the area of elevators

> The regulation actually occurs at the state and sometimes even at the city level. What we have here in the US [are] some national standards, but these standards are guidelines. [They] are published typically by a separate group and the local authorities, the state or the city, whoever governs the elevators for that area, […] will come in and say, okay, we are going to adopt for example ASME 17.1 2004 as our elevator code for this area. They can adopt this standard exactly the way it was written or they actually have the authority and come and say, you know what we like this code, but 90% of it, but there is some items we don't like. So we are going to go in and modify those to suit our needs. So they can actually change, they don't have to accept that national standard as their guideline. They can [accept it exactly] or they can accept a certain year and then not update it for a while or they can modify it. So the local authority has the right to change that (personal interview 2010).

He further elaborates that

> if you really got right down to it, there are rules in our country you should not discriminate how you do things, but in reality there is some room to play with there. The fact [is] that you can set up rules as long as it is not proven that you set up the rules to intentionally discriminate against somebody else. You can set up the rules to say, here are what my requirements are for an elevator without saying why I didn't, unless you prove that you did this purposely to hurt Otis or hurt ThyssenKrupp Access or whoever. You set these rules for safety reasons or whatever reasons you had. As long as other companies can adapt to them to meet those rules, you haven't discriminated in the general public opinion at least. Legally it might be hard to make this argument as well. So while […] they can't say every elevator has to be made by Otis, that's discrimination, but they can say every elevator has to have these features, because we feel this is necessary for safety and whether it is us or OTIS or whoever makes it has to make it to that requirement. That's not considered discrimination here in the US. That's considered setting a standard. It might be harder for us to comply than them but that doesn't mean that they are discriminating unless we can prove that they did it intentionally to hurt us (personal interview 2010).

Brinkman's counterpart at Kone International, Esfandiar Gharibaan, agrees by observing that

[141] According to Mastromarco, the American standardization bodies have been responsible for the issuance of around 30,000 voluntary standards by the late 1980s (Mastromaro 1990, 52).

> in fact the difficulty in the US [is that] we don't really have harmonized technical legislation for lifts at the federal level, and every state and every city has their own requirements. So it means that you have to adjust the products where it is destined to be used. And that brings a lot of difficulties, a lot of hassle with supply of these products. And also the technical legislation is very detailed, the standards that have been adopted by the legislation. So we have to fulfill every detail of the standards. So it means that when we have a new product, new solutions, new innovations, it takes quite, a very long time to introduce into the market, to convince all the jurisdiction that the solution is safe and can be used until the standards, technical standards catch up with this innovation and become [part] of this standard. This process can take years before any new solutions or innovation can come into the market! So in fact, *the difficulties in the US are non-harmonized requirements in the jurisdictions, and a second is rigidity of the system to introduce new solutions and new technologies* (personal interview 2011, my emphasis).

Gharibaan's comment especially shows that leaving regulations up to the states does not generally, as is frequently argued in the United States, lead to successful experimentation and innovation. Edward A. Donaghue, Managing Director of the National Elevator industry, Inc. (NEII), for instance, strongly contends that regulations are simply a state's rights issues and that any federal government intervention in the market would be more than unwelcome. Federal-level regulations are perceived as a serious obstacle to innovation and business expansion. As he notes,

> [the regulation of elevators], it's a state rights issue. […] The states have the right to regulate or not to regulate if they want to. It's up to them. […] and *we would not want the federal government involved*. […] *Our organization*, every time they have discussed that issue, *does not wish to engage the federal government in regulation of the industry.* We prefer the regulations to be where they are (personal interview 2010; my emphasis).

When further questioned why this strong belief against federal government involvement in market regulation, he comments that

> We quite honestly feel that if they got involved that the regulations that they would put in place would probably not be as easily updated to recognize new and advancing technologies than that we can do with the states (personal interview 2010).

Donaghue's statements illustrates the typical fear in the US that federal government intervention in market regulation will only increase the burden on business and make innovation harder and decrease an economic operator's flexibility. While some federal steps could, of course, become onerous to business, we can see in the US a variety of non-federal regulations that are clearly obstacles to free trade, and we can see in the EU a powerful federal agenda that has clearly gotten rid of many such state-level obstacles. The common American view that federal action per se will tend to be onerous to business can make little sense of these facts on the ground.

Instead, it is the the American market regime for regulated goods, characterized by an absence of a federal-level agent, which is rigid. Innovations take much longer to find acceptance across the entire American market. States are not automatically faster in adopting new standards and taking into account new technical developments than a federal framework regime as set up in the EU. Indeed, in the US no public or private federal institution has pushed or intervened to simultaneously facilitate innovations and market access. Rather the opposite has so far taken place with the NEII as a federal-level industry organization openly proclaiming disaffection for federal government. Thus, as the comments show, in the United States it remains possible for state and local authorities to hide behind the screen of keeping its own citizens safe to impose technical non-tariff barriers to trade. Yet, it is obvious for many practitioners that the differences in regulations and standards are not simply kept in place because of safety issues, but that other factors tend to play a much larger role. In the conversations with representatives of elevator companies, two examples came up which illustrate the parochial nature of the American regime, where nobody looks out for the overall benefit of the American

economy, but only to the short-term local economic advantage even to the neglect of the latest safety standards.

In the first case, the city of Chicago, in contrast to the rest of the state of Illinois, did not update their 1971 elevator code until 1998 although newer standards incorporating newer technology and additional safety features were developed in the intervening decades. According to ThyssenKrupp Access's Vice President for Quality and Code Compliance located in Chicago, the reason for not adopting the latest safety standards was simply to avoid having to pay for training inspectors on the newer codes. He remarks that the city of Chicago

> kept the 1971 system, even though the rest of the state has moved on to newer codes, because they had a certain quantity of elevator inspectors and the cost to retrain them on a newer code was too high So they were saying we are just going to inspect the '71 code, and they kept it for a long time (personal interview 2010).

Consequently, elevator manufacturers had to tailor their products and maintenance to the Chicago market.

In the second case, authorities in Massachusetts were reluctant to change. As part of the transformation initiated by the North American Free Trade Agreement, attempts were undertaken to try to harmonize American and Canadian elevator codes to facilitate trade in the long run between the two trading partners. Thus, to harmonize with the Canadian CAN/CSA-B44 Safety code for Elevators, ASME recommended taking platform lifts out of the A17.1 elevator code and creating an additional code. ASME's A18.1 Safety Standard for Platform Lifts and Stairway Chairlifts was approved and designated as an ASME Standard by the American National Standards Institute (ANSI) in June 1999. In the absence, however, of a framework law applicable to the entire American internal market, as is the case in the EU, standards approved by standardization

bodies such, as ANSI and/or AMSE, do not entail presumption of conformity guaranteeing market access. Thus, the Commonwealth of Massachusetts for instance decided to not go along with the changes introduced due to the separation of the codes. As Kevin Brinkman from ThyssenKrupp Access observes

> Well, the state of Massachusetts didn't like some of the changes that were made in A18 after it was separated out. So they are still enforcing the rules for platform lifts that were in effect in 1996. Even so they have gone to later elevator codes, they said we are going to stick to the '96 platform lift codes, because we don't want to make some of those changes. In that case some of the changes were made to address new technologies, accessibility issues, different things. So they said we are going to stick to the old ones, because we are used to those, we like them. So it is just a preference issue in the state of Mass. I will throw in the fact that the state of Mass. is highly union[ized] in the United States and the elevator [constructor] union is pretty strong there and I think it may have been for reasons that they don't really like the lifts as well (personal interview 2010).

In short, in the United States an economic operator cannot simply sell its goods to all states even when fulfilling the latest safety standards as developed by American standardization bodies. It all depends whether a state or even a municipality has adopted the same code. The US thus remains largely characterized by a negative regime of market integration, where economic operators are forced to go to the courts to sue for market access when a specific rule is perceived as discriminatory. The burden of proof, instead of resting with the member state as in the EU, remains in the United States with the individual business. No presumption of conformity guaranteeing market access has been put in place. Going the judicial route, however, is time-consuming and costly and does not in the end assure a solution for the entire market, given the case specific nature of most lawsuits. Even large and well-established companies are thinking twice of pursuing a judicial route in such a market regime. As a major elevator company representative pointed out,

> Let's say I am the Illinois company, because that's where I am sitting today, and New York passes a law that I have to do a certain thing, unless I want to take them through the legal system and prove that they did that to hurt me that law is going to be there. Somebody has to take the initiative to prove that they did this intentionally, to hurt somebody. And that costs money. Is it cheaper for me to comply or is it cheaper to fight that in court? (personal interview 2010).

This comment further makes three things obvious. First, it alludes to the importance of an agent who actually challenges the status quo and especially who points out any potential discriminatory effects of the existing system for the entire internal market. Second, if even bigger and well-known companies in the regulated goods sector have to think twice about going to the courts, smaller companies with lesser financial wherewithal and legal expertise are even more disadvantaged. This for example has been repeatedly pointed out by the European Commission, as has been noticed in the previous chapters. And third, importantly, a regime based exclusively on judicial recourse overlooks that even if there is not an intentional discriminatory effect, the regulations in place might still have a significant impact on the polity's overall economy. In comparison therefore the European regime emerges as much more business friendly than the American.

Yet, despite this patchwork quilt of regulations and the apparent drawbacks, NEII's managing director comments that "our members have no problems to sell elevators on a state by state basis" (personal interview 2010). When pushed about potential costs such a diversity of regulations might have for the economic operators, he simply replied

> As I said our members are comfortable with the regulations as they exist on a state-wide level and had discussion on and off over the years and have decided they, we, would, don't want to change it. [...] We have been doing business here for years and they know how to adapt (personal interview 2010).

Moreover, in his opinion it would violate American anti-trust laws for an organization such as his to calculate the negative economic impact the existing regime might have on the American market. As he contends,

> If that cost has been calculated, that would have been done by the individual companies. That's not the type of information that we as an association are allowed to start calculating. It might be a violation of some of the anti-trust laws in the United States. We are not getting involved with any type of pricing or cost analysis. That is done on a company by company basis (personal interview 2010).

Yet, companies while having some awareness of the economic burden the present regime represents have apparently not undertaken such a polity-wide study. When asked whether anybody has ever calculated the costs for the entire industry and the entire polity, the common response is "not that I'm aware of" (personal interviews 2010). And even the level of costs for the individual company is unclear besides that it is potentially substantial. Thus, while feeling accustomed to the existing regime in the United States, the companies interviewed did actually express their dissatisfaction with the American regime when aware of how the market is regulated in the European Union. As ThyssenKrupp Access's Vice President of Quality and Compliance observes

> I certainly, being on the manufacturing side would love to have the rules consistent from state to state. It [would] make my job so much easier" (personal interview 2010).

He goes on to note that while

> we would like to see a uniform standard throughout the country as being a manufacturer that doesn't always exist. So we end up creating options or accessories that meet certain market requirements, certain small segments of the market (personal interview 2010).

Companies are therefore rightly concerned about the notable costs involved for their business operations due to the fragmented nature of the American regulatory system. As one industrial representative remarked

> There are some [costs] because the different jurisdictions can adopt different versions of the standard or sometimes they can modify it. Sometimes we have to create special options for this area. There is engineering time involved; sometime there is additional inventory we need to hold because of that. Basically, yes there are some costs. Is it tremendous? In most cases I would say it is not tremendous cost, but there is cost there to develop these options (personal interview 2010).

A spokesperson for a different international elevator company largely agreed and more forcefully stated that

> *in principle it is a big burden on the organization*, administrative and also on the production side. Unfortunately I can't give you a percentage, but it is considerable enough that many, many efforts within the industry tried to harmonize the requirements first in different states in the US and second to harmonize at a global level to open the trade between the continents, specifically between Europe and North America (personal interview 2011; my emphasis).

Yet, the efforts so far to harmonize requirements has not gone very far from a comparative perspective. As NEII's managing director somewhat cryptically notes:

> Our members have discussed [such harmonization efforts] on occasion, but they have concluded to leave it as it is. They prefer it that way. They have their reasons and I am not going to go into those reasons, because I believe those reasons are confidential within the organization (personal interview 2010).

The maybe most important effort so far has been the recent attempt to develop and introduce a performance-based standard polity-wide as will be described in more detail below.

In short then in the regulatory goods sector, such as the elevator industry, the American internal market today is largely a mirror image of the 'pre-new approach' era in Europe; standards are voluntary and no linkage with a federal framework or a federal mandate guaranteeing market access in all fifty states has been established. Economic operators are at the mercy of the individual state or local governments, and even adopting the highest industrial safety standards are no guarantee for market access. States and local authorities can and do keep older standards or modify standards forcing companies to

retool in order to comply with the specific requirements of a specific city or state. Innovation instead of being promoted is rather hampered.

So how to explain then this startling difference in outcome between the European Union, where every attempt has been undertaken to eliminate non-tariff barriers to trade in regulated goods and create a truly single market for elevators, and the United States where barriers posed by different regulatory standards continue to persist?

As the previous paragraphs have already indicated, in contrast to the European Union, nobody really has calculated what the lost opportunity costs might be for the American market due to the different sets of regulations remaining in place all the way down to the municipal level. An instigator, an agent, willing to make the effort and take the cost of a polity-wide study, such as the Cecchini report in the 1980s or similar more directive specific reports as in the case of services and others, is evidently missing. In the conversations with industrial representatives two elements repeatedly came up to explain why the United States to this day has not succeeded in creating an open, liberalized market in the regulated goods sector. The first element is indeed the absence of agent willing to take the risk and carry the costs, financial and political, to undertake the enterprise of creating a truly internal market in the United States. The second element is the mistrust of many actors of more federal government intervention in American society in general and in the market in particular. As the NEII president's remarks above have already indicated, federal government intervention is considered to be malevolent and damaging to market freedom.

Institutional Aspects

Interviewees have time after time highlighted that an influential organization needs to be present to make the case that the current system of maintaining different codes and standards across the United States are akin to non-tariff trade barriers. In the absence of such an organization willing to carry the burden of tackling the issue, actors simply tend to largely accept the status quo. Thus, while this strong organization making the arguments, carrying out or commissioning the research, etc. in the EU is the European Commission, a similar actor has not come to the forefront in the US. As noted above, it was the European Commission which initiated the first elevator directives and then later developed the 'new approach' now applicable in the elevator sector today. The European elevator industry, while largely supportive of harmonization across Europe and especially of the transposition of the 'new approach' to elevators, did not initiate or originally strongly push for it. Based on the comments from industry representatives a similar passively supportive environment, but to a much lesser degree given misgivings about federal government intervention, appears to exist in the United States. However, what is missing once again is a policy actor not only willing to act but also having the institutional standing to act. Indeed, as Susanne Schmidt has argued, the Commission does not only use its agenda-setting power to bring about change but also strategically uses the European Court of Justice's decisions to "further its own ends" as well as "its role as a guardian of the Treaty to coax the Council of Ministers into action" (Schmidt 2000, 37). Thus, "[b]y being able to alter the status quo position of member states *unilaterally*, the Commission can improve the chances of getting its proposals accepted in the Council" (Schmidt 2000, 55; emphasis in original). This chance, when necessary,

comes about by either employing a divide-and-conquer strategy, largely based on information asymmetries between the Commission and member states, or by threatening "legal uncertainty and fragmentation ensuing from the case-specific transformation of the status quo" derived from ECJ cases if an EU-wide solution as proposed by the Commission is not put in place (Schmidt 2000, 55). In sum then, "[t]he Commission's broad powers in the administration of European law give it ample scope […] to threaten inquiries into established national practices if a government maintains its opposition to proposed liberalization measures" (Schmidt 2000, 54–55).

Indeed, when asked whether anybody has commented on and/or pushed against the remaining non-tariff barriers to trade in the regulated goods sector in the United States, an industry spokesperson responded,

> Again not that I am aware of. Obviously for those kinds of things to happen, for that research to happen or for those arguments to be made, in my opinion at least *you have to have a pretty strong organization* of the different parties. We manufacture these lifts, we have other companies that manufacture similar products to us and yes, we do have, you mentioned you spoke to National Elevator Industry rep, we have a group called AEMA [Accessibility Equipment Manufacturers Association], which deals with accessibility equipment, a similar type group for the disability market and we do as a group help to develop the codes, the standards that are out there. […] Now we really don't have the, *we never tried to tackle that bigger picture of you know, trying to take on the states and trying to force these kind of things. We haven't done anything politically* I guess in this respect (personal interview 2010; my emphasis)

The same person noted the absence of anybody making a cost-benefit argument and taking the lead for the entire industry. He further elaborated,

> One, *I don't think anybody has ever sat down and calculated the costs of doing business the way we are doing it today*. And two, the leaders have not sat down and said, you know what, this is an issue we have to fight and take the fight there. Is it possible? I guess it's possible, because it happened in Europe, but *nobody has taken the initiative* to do that (personal interview 2010; my emphasis).

When further presented with the European regulatory regime and the role of the European Commission in the European political system, the industrial representative strongly assumed that most likely the difference in outcome between the EU and the US is indeed the fact that in the United States no institution like the Commission exists to fight for internal market liberalization. He remarks,

> Maybe that's [a commission] what is missing in the US. I don't know. The [US] federal government has not decided to take on this role of fighting for the individual companies. I don't know. [In the EU] they have created this council and I assume it's represented by different countries in Europe, in the US because we are one country *we either have to have the federal government do that or I guess it could be an independent commission of some sort that was set up by members*, by people in the individual states. *Maybe the reason it didn't change is that it doesn't exist*. […] I am not aware of something like a commission or an organization that really out there for fighting for the rights of the individual companies (personal interview 2010; my emphasis).

Gharibaan from Kone International also points to the absence of political will and leadership in the United States to initiate and see through a push for internal market completion. It is not only the elevator industry which has not given enough attention to the American internal market but major industries in America in general. He comments that

> As far as I know there has not been that, let's say, full attention by other major industries to come to that harmonization level [as in Europe] (personal interview 2011).

He continues on the theme of missing clear and unified leadership in the business community by observing,

> That's maybe also part of the professional industry, not everyone has the consensus how to deal with this. Even in the lift industry you have different people and some have different views on this subject. So maybe it is also part of the industry to get its act together (personal interview 2011).

Given the dearth of unambiguous business leadership, the absence of an institutional agent, such as the Commission, able to pull business groups together and

create a focal point by proposing new legal instruments is even more sorely felt. The political will and laser-like focus on market integration is absent in the United States. Hence, for Kone's Vice President for Codes

> The whole aspect of this is creating a single market, and that has been the fundamental goal of the European Community and political will to create that. So we probably don't have that political element present in the North American market at this moment. It is very difficult to initiate such a grandiose scheme, legislative reform (personal interview 2011).

Thus, in the absence of a federal-level agent proposing further market liberalization by for instance inventing and proposing a regime that guarantees high levels of safety standards and market access while ultimately leaving the authority of protecting one's own citizens to the states as in the EU, it is unlikely that a major change in the American market will take place any time soon. Moreover, the negative attitude towards federal government in the United States complicates the situation even more and makes a channeling of political will rather unlikely in the short-term.

Ideological Aspects

Distrusting government, especially federal government, is for many in the US as American as apple pie. As Senator Claire McCaskill, Missouri-D, put it last year,

> Distrust of government is an all-American activity. It's something we do as Americans and there's nothing wrong with it (cited in Associated Press 2010).

Senator McCaskill's comments followed on the heels of the 2010 Pew Research study "The People and Their Government", which noted that nearly 80% of the American population does not trust the federal government and has little faith, if any at all, in it to solve the nation's problems (cf. chapter 4; Pew Research Center 2010). Yet, her comments are also emblematic for the regulated goods sectors. Thus, while in the United States distrust of the federal government has become part of the country's ideological

make-up, a similar level of distrust of federal governance in the EU cannot be found. Indeed, as noted previously, an absolute majority of Europeans wants more decision-making at the European level and trusts European level institutions more than their own state institutions (Eurobarometer 73; cf. Caporaso and Kim 2009). Moreover, by establishing "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital" as one of the community's core goals, it early on has infused the EU with the notion that market liberalization equals greater freedom (Treaty of Rome, Article 3(c)). The Commission personnel, charged by Article 155 of the Treaty of Rome to enforce and implement the treaty, has taken the mandate to pursue market liberalization very seriously and making it part of its institutional DNA. Thus, it is common to be exposed to the strong commitment to create a common market without any barriers by higher and lower ranking Commission officials. Jan Frydman, the Deputy Head of Unit for International Affairs in the Directorate General for Enterprise and Industry overseeing the regulated goods sector, emphasizes this political and ideological goal of the European Union and its absence in the United States. He observes that

> the starting point is of course [that] the EU internal market is a political objective as such. So we have an objective that we should have a free movement of goods and services and people and capital in the European Union and that is a political goal while in the US that is not necessarily as such a goal. […] So there you have the starting point of what we do. […] Let's say, in the US the interstate commerce clause, of course, is important, but [it] is based on what should be the competences of the state and federal level and not the overarching goal that we have of creating free movement of market aspects (personal interview 2010).

His colleague, Beate Pich, who presently is in charge of overseeing and managing the EU Lifts Directive, largely echoed his sentiments that when there are any barriers to internal trade then the Commission has to do something to eliminate them. She notes that

> There was a general policy of the EU to create markets, common market without barriers to trade. If there is an assessment that there is a technical barrier existing in this or that sector, we have to do something, to cope with this. *This is the general approach of the EU to eliminate all technical barriers to trade* (personal interview 2010; my emphasis).

Thus, while "an improved code of consumer and environmental protection legislated at the Community level" was one of the two "ultimate objectives of the 'new approach'", the first one, in Commission official Garvey's words, was "the promotion of free trade in the unified continental scale market leading to increased efficiency and competiveness, industrial development on a European scale, more wealth creation and more jobs" (Garvey 1986, 75).

The European Commission not only makes the assessment that there are still remaining barriers to trade, but also has shown the strength on occasion to pursue further market liberalization in the face of powerful national political leaders, such as Margaret Thatcher. Thus, Lord Cockfield, EU Commissioner in charge of the Internal Market under Commission President Jacques Delors in the 1980s, for instance even confronted Margaret Thatcher, the person who made him EU Commissioner in the first place. As a member of Lord Cockfield's cabinet recounted, Lord Cockfield was not afraid to repeatedly point out to Prime Minister Thatcher that she has signed up and ratified for further market integration and centralization. Hence, in the matter of taxation, Sebastian Birch reports that

> [the member states] guarded their own illusion, in my view, [that] their own freedom to tax as they wish was not a distortion and was therefore not something that the single market should affect. Mrs. Thatcher even went so far to claim that the Single European Act had said nothing about taxation and [I] had to have it read out to her in my hearing by my boss [Lord Cockfield] (personal interview 2009).

One of Mr. Birch's colleagues in Lord Cockfield's cabinet, Praveen Moman, further noted that without the leadership and especially the belief in market integration, economic liberalization to the degree we see in Europe today would simply not have taken place. He remarks that

> I think it would not have happened without the Commission. You know whatever quite started it in this group [of people around Lord Cockfield and Delors] is questionable, but the leadership of the Commission was very strong. *They believed in it* (personal interview 2009; my emphasis).

Indeed, Lord Cockfield in his own work has strongly expressed that a truly united Europe only exists when all barriers are broken down and not those simply posed by frontiers. Consequently he justified his efforts to go after *any* barrier to trade by contending that

> If the Community was to become a United Europe […] the frontiers and the controls associated with them would have to go. It is useless simplifying the controls and leaving the frontiers in place. As long as the frontiers are there they will attract controls: each control will be the excuse for some other control (Cockfield 1994, as cited in Dzabirova 2009,: 70)

So while Americans tend to talk about the US being a commercial republic and a champion of free trade and business, it appears to be more lip service in comparison to the EU, where especially Commission officials take the mantra of a common market very seriously. Moreover, large business in the EU strongly favored the 'new approach' to technical harmonization and welcomed the Commission's proposal, perceiving it more as a friend of than a hindrance to business. Heinz Kröger, representative of UNICE (Union des industries de la communauté européenne), even observed that 'supporting' the Commission's new approach is too weak a term, because his organization has been asking the Commission to go to bats for such a reference-to-standard approach in the previous years following the Commission first usage of such an approach in the 1973

Low Voltage Directive (Directive 73/23/EEC) (Kröger 1986, 80 and 82). [142] The ideological and cultural differences between the EU and the US find their echo more specifically in the comments of business leaders in the elevator sector. The Vice President for Codes of Kone International declares that

> I agree there is some sort of resistance of, dislike for involvement of federal government in the business activities in North America in general. And that maybe creates a sort of atmosphere that such an initiative, like the New Approach, becomes difficult to establish in North America (personal interview 2011).

And his counterpart at ThyssenKrupp Access shares his assessment that different norms of legitimate governance prevail in the US and the EU. Kevin Brinkman contends that

> Part of it is culture, in my opinion at least. This country [the US] was founded on certain principles and beliefs. One of those is that the federal [government] should not have authority over all things. We kept in our Constitution […] the right for states to […] make their own decisions and have some independence. So part of it I think is the culture this country was founded on, in that we have individual ideas. And certainly if you look at the opinions of somebody in California and then someone in New York they might be totally different. So it's somewhat the individuality we have here that people want to retain their own thing. The states want to retain certain rights to make their own decisions. Some of the local authorities, they want to say, hey, we have some rights and our Constitution allows for that. So I think that's one reason why we are getting away with the differences. It's one of the reasons why we have the differences (personal interview 2010).

For the Vice President of Quality and Compliance at ThyssenKrupp Access there is no doubt that the reason why the US has not succeeded in creating an internal market similar to the European Union in the regulated goods sectors is in the end largely due to the absence of an institution clearly mandated to push for market liberalization in the US and the different perception of federal government legitimacy. He summarizes,

[142] Kröger writes: "Pourquoi l'UNICE en tant que porte-parole de l'industrie européenne appuie-t-elle la nouvelle approche de la Commission ? Et lorsque je dis 'appuie', le terme est encore trop faible étant donné que l'UNICE appartient à ceux qui depuis des années one demandé à la Commission de favoriser la nouvelle approche. Déjà en 1977, l'UNICE, dans un document qu'elle a adressé à la Commission, s'est prononcée pour des directives se référant à des normes" (Kröger 1986, 80)

> It really comes down to somebody at a level, […] maybe some outside commission in some point in the future, to come in and say, you know what, this is not right, we need to fight it, we need to take this to whatever method we need to get us to match the European model. But it really has to be somebody makes an organized effort. I don't think any individual company can make that fight, it has to be organized either by the heads of various smaller companies or some commission either appointed by our federal government or maybe a commission brought up by members, not only by the elevator industry, but multiple industries maybe working together to change those rules. Go back to the culture issue, I think the culture here in the US that most of the people would like to see less government involvement. We tend to look at how do we avoid that much government. [The European approach] might be deemed to go in the direction of more government of overseeing everything, therefore this is against what we kind of want to see. The people, we want to be more independent, less governed by federal level or [even] state levels (personal interview 2010).

These words by Mr. Brinkman neatly encapsulate and recapitulate the major elements contributing to the different paths the American and the European internal markets have taken over the last decades. The divergent paths have now even reached a point where the European Commission suggests its model to be adopted by the US and other countries in the world and where business leaders, such as Mr. Brinkman, express not only their admiration for the European model in the regulated goods market, but strongly hope for a similar outcome in the US in the future.

Promoting the European Model

As was the case with agreeing on trans-polity trade accords in services and in public procurement, the European Union and their negotiators from the European Commission encounter similar problems when dealing with the United States in cooperating in the regulated goods sector. Given the nature of the disjointed market in the US where the states retain substantial regulatory authority, no one single person speaks for the entire polity, making successful negotiations nearly impossible. Jan Frydman, the EU Commission official in charge of monitoring and promoting transatlantic trade for

DG Enterprise and Trade, for instances notes that the American regime on occasion poses a serious impediment for cooperation in international trade. He remarks in regards to regulated goods, such as elevators, that

> These are the kind of things where my colleagues here in my unit are working on. We are trying to harmonize [or] to at least minimize the differences in regulation, and it could be for any kind of product where we both [the US and the EU] have jurisdiction to regulate. […] Lifts or elevators [are] in fact an example where we couldn't cooperate because there are areas […] where we have EU competence. Elevators happens to be an area where we [in the EU] managed to agree between member states to regulate or to harmonize the rules but when we told the US, well, you know, why don't we cooperate to have the same rules for elevators or lifts, then they would say well, that is actually state competence, we, [at the] federal [level] have no competence to regulate elevators" (personal interview 2010).

Yet, there is a desire in the US to come up with a similar model to the European approach to regulated goods and to promote it throughout the fifty US states. Similar to sentiments heard in Europe in the past, the Chief Elevator Inspector for the State of Ohio, Norman B. Martin, has expressed his frustrations with the regime in place in the US,

> An elevator is an elevator and if you build an elevator in California, you should be able to sell it in Ohio; and if you build it in Ohio, you should be able to sell it in Ontario (cited in ASME 2011).

In fact, the American elevator industry together with the ASME has lately started to look into and develop performance-based standards, modeled largely on the EU's notion of safety objectives. Hence, ASME vaunts in one of its brochures its new A17.7 codes as a "progressive alternative to the prescriptive A17.1 safety code", because it "allows for more flexibility in problem-solving" (ASME 2011). These are the same advantages which have been at the center of economic operators' praise for the EU's 'new approach' to technical harmonization. Yet, the American A17.7 performance-based standards has one major shortcoming vis-à-vis the European model, it does not guarantee

market access. Whereas the Lifts Directive ensures a legal framework covering the entire polity, economic operators in the US remain confronted with a patchwork quilt of regulatory regimes. Not until all jurisdictions in the United States have decided to implement this standard would equivalency with the European regime exist. Kone's Vice President for Codes therefore comments that

> It has been a big effort, for the lift industry anyway, to go in the direction of, not similar or identical to the European model, but rather introducing what we call a performance-based [approach] to technical regulation. So rather than describing technical details in the legislation [the idea is to] just describe the safety objective to achieve and using the technical specifications with approval [by the] authorities to fulfill the safety objective by other means. So that effort has been done, actually at this moment there is also a new standard introduced in the US about two years ago, it's A17.7. This is the performance-based code for elevators and escalators in the US. But again *like any other standard, every state, every jurisdiction has to adopt that as a standard before it can be used*. As far as I know at this moment maybe only 30% of jurisdictions have adopted that standard (personal interview 2011; my emphasis).

Thus, ironically given the common perception of the EU being riddled with obstacles to free trade, it is the European Commission that is arguing for market liberalization in the regulated goods market abroad along the line of the European model. In 2005 on World Standards Day, the Director for Regulatory Policy at the European Commission, Mr. Michel Ayral, gave a speech extolling the virtues of the European 'new approach' to technical harmonization, noting for instance the interest of the Russian Federation and China for this model and the EU's support to internationalize as much as possible the European model to eliminate international non-tariff trade barriers to regulated goods. Mr. Ayral sums up,

> In the case of the European Union, the political objective for the completion of the Internal Market in 1980 called the European Commission for more effective and simplified approach to regulate. It required the Commission to develop the New Approach. The "New Approach" allowed for more flexible and less stringent forms of legislation in areas where, otherwise, any detail would have to be determined by the legislative act itself. At this stage, I can confirm that this new

> approach to legislation was successful and positive. *It was rather easy to get a political consensus on the common principles of the legislation* and to agree that their technical transposition should be left to those who have the real expertise and knowledge. I believe that cooperation in standardisation could be inspired by this experience. On the basis of this background, the Commission is supporting activities at international level which recommend the use of voluntary international standards, thus opening international markets by removing barriers to trade. […]. One could compare this concept with EC New Approach as it encourages governmental cooperation on "essential legal requirements". Governments would also identify the relevant international standards and conformity assessment requirements needed to meet the common regulatory objectives. We most welcome the interest shown by the Russian Federation and China for this model. The very positive experience of the "New Approach" has demonstrated the capability of standards to simplify EU legislation further, to contribute to better regulation and to the integration of the internal market. […] *It is one of the objectives of the European standardisation policy and it is also reflected in the Action Plan to promote the European standards-receptive model at the international level* (Ayral 2005; my emphasis).

The Director for Regulatory Policy at the European Commission also observed that in the end it was relatively easy to get the member states in the EU on board in support of the Commission's proposal to create a 'new approach' to technical harmonization. This strong political support given as this section has shown is unlikely to materialize in the US as long as no strong institutional actor advances such an agenda and a consensus can be found to overcome the inherent anti-federal attitudes in the American polity. Yet, as Mr. Ayral's speech demonstrates, it might be worthwhile for the US to study the European approach to also ensure the elimination of non-tariff barriers to trade for regulated goods within its own internal market and as a corollary to facilitate international trade in the long run.

Conclusion

Even in the goods sector, the European Union once more emerges as the more liberalized internal market to the point that for some economic operators familiar with both entities the European Union is becoming a business model to be followed by the United States. The findings show again that the European Commission has played the pivotal role in guaranteeing market access across all member states by developing the 'new approach' to technical harmonization as a result of its own developed understanding of the mutual recognition principle. While business has been supportive it has not been the driving force behind the regulatory innovations put in place by the Commission.

Consequently, the absence of a similar actor intervening on behalf of elevator companies in particular and of the regulated goods sector more generally is lamented by business representatives acquainted with the regulatory regimes in the EU and the US. The EU has gone substantially further than the US in creating a centrally-governed and liberalized single market in the regulated goods sectors. And it has done so because of an unusually strong executive institution with a clear liberalizing mandate. As comments from Commission officials have shown, this mandate is taken very seriously. Moreover, the regulated goods case has shown once more the greater acceptance of strong central authority in the EU than in the United States. Hence, while "a political consensus on the common principles" of the 'new approach' to technical harmonization proposed by the Commission was relatively easily be found in the European Union, commentator after commentator observed that in the US the dominant culture is characterized by asking for less government overall and not interfering with state rights. Contrary to the EU, in the US the federal government is perceived by many as hampering trade and innovation

when intervening in the market. Thus, in the absence of an institutional actor actually pointing out that a regime like the EU's in the regulated goods sector ensures the retention of the powers of the states to regulate safety but at the same time guarantees free internal trade and enables more flexibility and innovation, nothing is likely to change in the United States.

In short, a certain envy of the European single market in regulated goods persists, as Kone International's Vice President for Codes remarks,

> you see very clearly in comparison that the single market in Europe has by far much [more] advanced than any other region I am familiar with, including the United States. But there are other things than the lift industry, we are very much promoting this European approach, even our colleagues in the US are very much in favor of adopting similar approach to technical legislation as we have in Europe (personal interview 2011).

CHAPTER VIII

CONCLUSION

“"Bolkestein go home" was on the banners of the demonstrators”.[143]
Arte Journal, August 24, 2010 (my translation)

This study started out with a little tale about regulation and markets in the two major transatlantic polities: the United States and the European Union. This little tale showed that the EU has already implemented at the federal level regulations that enshrine non-discrimination for out-of-state visitors to museums while in the US discriminatory practices in regards to museum entrance fees for out-of-state residents remain in place. These European federal-level regulations were part of a larger package of liberalizing services across the entire European Union. During the process of passing the new European directive on services liberalization, the original draft proposed by the then Internal Market Commissioner Frits Bolkestein created an outcry among many labor unions that feared an “Americanization” of the European market. In fact, during street demonstrations in Brussels, protestors held up signs enjoining Bolkestein to go back home. However, these protestors did not ask for Commissioner Bolkestein to return to his native Netherlands. “Bolkestein go home” was written on large American-style flags. These protestors, similar to the assumptions of the vast majority of scholars and pundits, thought that the American internal market is the epitome of market integration and liberalization, where market liberalization is part of the country’s “cultural DNA of the past 400 years” and its “gospel of success” (Brooks 2009). The irony is, though, that, even after amending the original Bolkestein directive, the European Union has today

[143] "Bolkestein go home" stand auf den Transparenten der Demonstranten […].

adopted rules more like a single market than the US, both with respect to the centralization of the market (having a single set of coherent rules for exchange) and its liberalization (adopting rules that open exchange to competition). Moreover, this is true not only in the vast services sector but also in other important economic sectors. Perhaps most striking of all, these rather clear comparative observations have largely escaped most observers. Even the architects of the European Single Market, like Lord Cockfield, many of whom actively studied the United States as a model, contributed strongly to a discourse in which the US will forever remain the ideal-type end-point for European integration. In a speech given at the European University Institute in Florence in 1989, Cockfield remarked that it would be a mistake to talk about the European Union "in terms of a "United States of Europe"" because the EU will never follow the US in regards to centralized authority given that "essentially on the ground […] the United States gives far more power to the federal authority than is likely to be necessary or acceptable in Europe" (Cockfield 1994, 164). And Sir Andrew Cahn, former member of Lord Cockfield's cabinet and until recently the Chief Executive of UK Trade and Investment, the British government department that promotes exports and attracts foreign direct investment, cannot believe even to this day that American "state authorities, city authorities could only buy stuff produced" within the same state while this is not the case in the European Union (personal interview 2009). As he repeatedly stated: "I just don't believe it" (personal interview 2009).

Yet, contrary to the expectations by experts on the two polities and laymen alike, this study has shown that in major economic sectors, public procurement (15 – 20% of

GDP), services (70% of GDP) and even in regards to goods, the EU has succeeded to eliminate barriers to domestic trade that are still in place in the United States.

While public procurement, i.e. the purchase of any goods and services by public authorities at all levels of government with taxpayer money, accounts for an equally large part of the two polities' internal markets, the European Union and the United States have taken two different paths (cf. Chapter III). In the European Union a series of directives have over time eliminated any form of official discrimination between member states and opened up public procurement to competition across the entire polity. This is not to say that in practice the European public procurement regime is as efficient and obstacle-free as desired by some of the major actors involved, but simply that legally discrimination based on residency is not allowed. In the United States, on the other hand, each state retains the right to discriminate against another sister state by putting in place legislation to limit the buying and selling of goods and services from and to residents of their own states. These discriminatory practices vary from outright prohibition of buying any specific goods, such as coal, recycled paper or snowmobiles, from other states to enforcing 10 to 15% preference laws that add these percentage amounts to bids coming from out of state. The right to discriminate against sister states as proprietor of one's own public domain has become known as the market participant exemption. As long as a state acts as a participant in the market instead of as a market regulator, it receives from the U.S. Supreme Court a free pass from the dormant commerce clause.

A similar picture emerges in the arena of services, especially concerning the provision of temporary services across state borders. While the actual integration of flows on the ground are still generally less across European states than American ones, the

many political rules in the services sector are more – and more liberally – integrated in Europe. Thus, similar to the dynamics present in the public procurement case, the European Union ends up with a more liberal internal market regime in services than the United States (cf. Chapter V). Non-tariff barriers to the temporary provision of services abound in the United States. In contrast to the EU, practitioners of regulated professions already licensed in one US state need to make sure that they are also licensed in the host state, too, before legally providing their services even for one single day. A reciprocity agreement between two US states does not automatically guarantee market access. Practitioners still might be required to pass additional exams, including law exams, as well as criminal background checks before being allowed to, for instance, cut somebody's hair across a state border. In the EU, on the other hand, a simple on-line notification system has been put in place for those services which are regulated in a host state. Once notification is given by a service provider, he or she is largely free to provide his or her services up to one year before having to renew the notification. Moreover, while the notification system in the EU is free, in the United States the different regulatory bodies charge considerable amounts of fees, not only for the license itself but as well as for the exams and classes an already licensed out-of-state practitioner needs to pass in the host state. Thus, today a service provider in the US would have to go through the courts to demonstrate how specific regulations to another state's market actually pose an access barrier and might not be permissible under the commerce clause or the privileges and immunities clause. However, such an approach is very expensive, especially for individual service providers.

The analysis of the goods sector, especially at the example of elevators, also challenged the received wisdom that the US market for goods is generally more liberal and better integrated than the European market (cf. Chapter VII). Indeed, the European Union has implemented a regime for regulated goods, such as elevators, that not only facilitates market access across the entire polity for manufacturers but also allows for innovation and high level of safety standards. Once fulfilling the essential requirements set forth in an EU directive based on the EU's so-called 'new approach' to technical harmonization, a manufacturer is free to sell and install his product anywhere within the European Economic Area. A similar polity-wide regime that guarantees market access for elevator manufacturers is absent in the United States. In the American polity, not only states, but even municipalities have the right to and do regularly impose their own codes, creating a disjointed market resembling a large patchwork quilt.

Recent developments indicate that the present trajectories of the European Union and the United States are not changing any time soon. Preference laws in public procurement for instance continue to proliferate in the United States. At the end of April 2011, the Oregon House of Representatives unanimously passed House Bill 3000 allowing contracting agencies within the state to give a preference to procure goods that are fabricated or processed, or services that are performed entirely within Oregon of a price premium of up to 10 percent more than goods that are not fabricated or processed, or services that are not performed entirely within Oregon. A month later the "Buy Oregon" bill also passed the Oregon Senate and is presently awaiting the governor's signature. As has been typical in such cases in the United States, nobody has calculated what the impact of these kinds of preference laws might be on the *entire* American

market. When any kind of assessments have taken place, they were narrow in focus, only paying attention to effects such laws might have on the economy of a single American state and not the union as a whole. However, even when the focus was narrowly on one state, the potential economic impact were generally considered indeterminate. Not surprisingly then, the Oregon Legislative Fiscal Office similarly concludes its very brief fiscal impact assessment on the new 10% permissive preference law by observing that it "could potentially increase the total cost of procurement for goods and services […] but that cost remains unknown" (Stayner and Byerly 2011, 1).

In the European Union, on the other hand, we see the opposite trend taking place. For instance, even in patent policy , which until recently was the one major economic area were the United States had established ultimate authority at the central plane of government and the EU so far had not,[144] the European Union is now moving towards a

[144]The United States succeeded early on in doing so by providing a constitutional grant of authority to the Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (U.S. Constitution, Art. 1, § 8, cl. 8). Thus, the two first Patent Acts, the Acts of 1790 and 1793, were federal law, not state law. Before the creation and ratification of the US Constitution only "a patent custom existed in a number of states whereby exclusive rights were granted by private legislative enactment" (Walterscheid 1997, 63). Thus, "[p]rior to the ratification by the requisite nine states in 1788, there was no federal patent law because under the articles of Confederation each state retained "every power, jurisdiction and right, which is not by the confederation expressly delegated to the Untied State, in Congress assembled" (Walterscheid 1997: 66; Articles of Confederation, Art. II). Thus, the states retained, among other powers, "the right to issue patents or otherwise grant rights with respect to inventions and discoveries" (Walterscheid 1997, 67). Why in this case the United States has succeeded early on to impose a coherent set of rules polity-wide remains largely unclear and somewhat fortuitous. Walterscheid repeatedly emphasizes the fact that "[l]ittle has been written" and that "little is actually known about how" the intellectual property clause became included in the US Constitution (Walterscheid 1998, 18–19). Nothing in the events leading up to the constitutional convention suggests "that a lack of a power in the Congress to issue patents played any role" in convening it in the first place. Only one known document apparently exists which hints at this issue in a peripheral way. And even this document by James Madison rather highlights that "the lack of uniformity in state laws concerning literary property was […] "of inferior moment"" (Walterscheid 1998, 17). Moreover, none of the general schemes of governance debated by the Framers nor the first proposals regarding the enumerated powers of Congress seemed to have included this clause (Walterscheid 1998, 17). Yet, according to Madison's notes, the clause was adopted without any dissenting voice, or "*nem: con*" (Walterscheid 1998, 19). This suggests, on the whole, two possible interpretations. First of all, that the clause met indeed universal approval. The second possible interpretation is that the delegates were "tired, wanted to go home, and simply did not perceive this particular grant of power to the Congress to warrant any further debate, regardless of whether they considered it to have any particular significance" (Walterscheid 1998, 19).

single set of coherent rules for exchange with the creation of an union-wide patent.[145] While previous attempts over the last three decades have failed due to disputes over the use of national languages, the European Union is now in the process of implementing an "EU patent" and establishing an "European and EU patent Court" as proposed by the European Commission in 2000 (Pompidou 2011, 2).[146]

In short, what has emerged throughout the study is that scholars and pundits have it largely wrong in portraying the United States as a commercial republic endeared with market liberalization and despising obstacles to free trade among the sister states while perceiving the European Union as generally more riddled with internal barriers to trade. It turns out that the United States, the land of the free, the home of the unregulated at the federal level, has substantially more non-tariff barriers to trade legally in place than the European Union which at the federal level has created single sets of coherent rules for

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While some authors, such as Prager (1961), pointed out to some lobbying efforts by "interested persons" on the delegates, it is not quite clear to what extent interest groups really played a role in the incorporation of the clause in the US Constitution. Walterscheid for example notes that it is likely that John Fitch, a steamboat inventor, sought to obtain exclusive rights through the federal government and certainly had the chance to do so at a most opportune time, but "that there is no specific evidence that he actually did so" (Walterscheid 1998, 30 – 31).

[145] Until now, the absence of a community-wide patent based on Community legislation meant that patent protection in the European Union was based on two systems: the national patent systems and the European patent system (cf. Cannon 2003, 418).

[146] The European Commission repeatedly noted that "[t]he fragmented single market for patents has serious consequences for the competitiveness of Europe in relation to the challenges of the US, Japan and emerging economic powers such as China" [COM (2007)165 final, 2]. According to Charlie McCreevy, European Commissioner for Internal Markets and Services, the previous non-union-wide "European patent designating 13 countries is about 11 times more expensive than a US patent and 13 times more expensive then [sic] a Japanese patent" (Speech/07/206:2). In its economic impact assessments, the Commission calculated that "[a]lthough there are differences between Member States and industry sectors, the overall "patent premium" for the reviewed Member States amounts to 1% of national GDP for the period 1994-1996 and had reached 1.16% of GDP during the period 2000 – 2002 [COM (2007)165 final, 2]. The new system presently put in place is based on the concept of reinforced cooperation. Reinforced or enhanced cooperation. Introduced with the Treaties of Amsterdam and Nice, allows a minimum of nine member states to establish advanced integration in a policy area without the other member states having to join in or being able to block it. As of spring 2011, 25 of the EU's 27 members have signed onto the new EU-wide patent regime, with Italy and Spain continuing to refuse to join due to their language concerns. However, it can be assumed that it is only a matter of time until the last two member states will also join the regime.

exchange in major policy areas and ensured that these rules open up exchange to competition.

What accounts partially for the scholarly myopia is that the literatures on America state-building and on European integration have largely foregone systematic comparisons due to respective *sui generis* concerns. Hence, not much empirically-oriented comparative work has been done to explain the construction of single markets in the EU and the US. However, while there is a dearth of empirical comparative work of the two polities, the explanatory frameworks employed to explain one or the other polity's absence or present of a coherent set of rules for market exchange and the degree to how much they open exchange to competition are very similar. As I argued (cf. Chapter II), these explanations can be divided in three major categories: 1) structuralist-materialist / rationalist-functionalist ; 2) institutional and 3) ideational/cultural. Yet, what is highly problematic is that all these explanations have been developed by only analyzing one of the two polities without attempting to see whether the logic of the arguments hold up when employed in a comparative context.

First, structuralist-materialist / rationalist-functionalist explanations would let us expect that institutional outcomes and market integration are either the result of self-serving agendas of specific interest groups reacting to general structural economic pressures or the result of shared interests of many socio-economic groups in functionally efficient institutional arrangements.

Second, institutionalist explanations argue that pre-existing institutional arrangements, mediated by the presence or absence of active interest groups, hinder or facilitate mobilization in favor of more centralization, or create difficult-to-alter

organizational constellations that either lend themselves to more centralization or do not. From a broad institutionalist perspective then we should expect that the earlier delegation of power to the central government in the US would have created federal entrepreneurs with an interest in more central power who should have generated more path-dependent dynamics of centralization and liberalization than in the European Union.

A third perspective comprises ideational and cultural approaches to market building. Based on many of the ideational accounts emphasizing the pro-market liberalization mindset in the US we should also expect that the US ended to be more liberalized than the EU.

This study, however, has shown that the existing explanations are unable to clearly account for the different outcomes the European Union and the United States in the three major policy areas examined. Consequently I have proposed a more nuanced explanation that combines institutional and ideational elements. I offered here an explanation based on an institutional argument playing out in a broad ideational context. I have argued that taking the notion of American exceptionalism, in both the liberal or cultural nationalist form, *and* the role of the European Commission as centralization and liberalization catalyst due to its comparatively narrow mandate into serious consideration does a better job in explaining the cross-polity variation in outcomes. In other words, in combination the institutional and ideational elements explain better why the European Union has adopted a single set of coherent rules as well as rules that open exchange to competition much further than the United States than either of them alone could do.

The evidence indeed shows that in all three cases the European Commission has played the key role in pushing forward and ensuring the creation of a single set of

coherent rules for market exchange and the adoption of rules that open exchange to competition polity-wide. Business groups were in neither of the cases at the forefront of centralizing and/or liberalizing policy areas in the European Union. There is strong evidence, especially in the public procurement case, that the Commission has fomented its own supportive business environment. Moreover, frequently the European Commission made and succeeded in pushing through proposals against the expressed interests of some of the major EU member states. As Lord Cockfield has noted in his memoirs, the Commission "went further than they [UK government officials] had imagined and therein lay the seeds of my disagreement with many of my former colleagues in that government" (Cockfield 1994,179). What has been striking in the United States is the absence of an actor that takes the entire market of the US polity into account and that attempts to estimate the costs of the remaining obstacles to trade. Repeatedly throughout the research interviewees have brought up the absence of such an institutional actor willing to undertake such work and bear the costs of it. In the EU, on the other hand, the Commission has actively researched costs to make its case to the national governments for the need to further integrate market sectors. Lord Cockfield himself commissioned the Cecchini report on the cost of non-Europe after first laying out his and his colleagues' vision for an open and integrated single market in the now famous 1985 White Paper (Cockfield 1994). As Lord Cockfield observed

> [With the White Paper] suddenly we had passed from rhetoric to action. The vision was no longer just a vision: it was a vision in action. […] A window of opportunity had opened. And it was through this window we went. […] Whatever the calendar might say, it was the springtime of our youth and of the Community. […] The success of the programme was a triumph of the spirit over the lethargy and narrow vision of the past. […] The White Paper was no mere catalogue of proposals, it also set out a clear philosophy (Cockfield 1994, 159, 176 and 180).

It is this philosophy of market liberalization and the taking advantage of windows of opportunities which is still guiding Commission endeavors today.

Besides the role of the Commission what has also clearly emerged is a different attitude towards federal-level government involvement in the market, even if it means market liberalization. Societal acceptance of federal level involvement in the market appears to be largely greater in the European Union than in the United States. A general distrust of federal government in the US was present throughout the interviews and poll data. In short, broader norms of legitimate governance favor a centralized authority, even a liberalizing central authority, more in the EU than in the US.

This study has shown that we need to challenge more the assumptions and theoretical explanations derived from simply looking at one of the two polities. More empirically-oriented, systematic comparisons between the United States and Europe and other polities, especially other federal polities, are necessary to test the existing theories and to either refine them or to develop new ones. Indeed, it appears that Canada, similar to the United States, suffers from non-tariff barriers to trade in services and other sectors due to the absence of a federal level agent able to perceive the domestic market in its entirety and to negotiate on its behalf with other polities such as the European Union. Jan Frydman, Deputy Head of Unit for International Affairs of the EU's Directorate General for Enterprise and Industry, for instance remarked that

> Canada is really even worse - worse in quotation marks - even more difficult than the United States. This free trade agreement we are negotiating now with Canada, it includes not only customs but also regulatory [elements]. This is the second time we try a trade agreement with Canada. The first time I wasn't negotiating myself and we discovered that when we told the Canadians that we would like to have a possibility to have our engineers, our architects, and these kinds of professions freely establish in Canada and you should then be able to send your architects and [so on] to Europe, they said, "this is a great idea, but there is only

> one problem that in Canada if you are an architect from Vancouver you cannot establish yourself in Alberta or anywhere else. We would never be able to agree with you, because we don't even have it ourselves" (personal interview 2010).

Bolkestein's home therefore rather appears to be in Europe and not in North America. To end therefore this study with the words of Lord Cockfield,

> we have started a process [with the White Paper and the Single Act] that will not, and cannot, be stopped (Cockfield 1994, 160).

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