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How the EU Became a Global Regulatory Power

SINCE THE 1990s, the EU has embarked on an ambitious project to build a European regulatory state. Through regulation, EU institutions have integrated the common market by adopting common standards to protect the health and safety of consumers and the environment, to foster competition, and to safeguard the integrity of personal data. An important motive behind these regulations has been to build a single market that allows for a harmonized regulatory environment and thereby frictionless trade across the member states. Over the years, this internal goal of pursuing European integration through regulation has gained an increasingly external dimension—driven by the Brussels Effect—establishing the EU as the global regulatory hegemon. For a long time, the Brussels Effect was an ancillary and largely unintended by-product of a regulatory agenda that was driven by internal motivations. Only more recently, a conscious external agenda has emerged alongside this internal one.

This chapter discusses the EU's evolution into a global regulatory power. First, it briefly introduces key EU institutions and their role in the regulatory process. It then explains how regulation has been developed to advance European integration, giving these institutions a powerful motivation to pursue an ambitious regulatory agenda, while catering to the European Commission's bureaucratic interests in the process. Finally, it considers the internal and external motives that have guided the EU's regulatory rule-making.

The Key Institutions Generating EU Regulations

The EU institutions involved in the legislative and regulatory process are comprised of three primary players: the Council of the European Union (Council), the European Parliament (EP), and the European Commission (Commission),

representing the interests of the individual EU member states, the European citizens, and the EU as an institution, respectively. In addition, European courts play a crucial role in the interpretation and enforcement of EU treaties, regulations, and directives.¹

The Council brings together the executive branches of the member states and is composed of the government ministers of each member state. It forms the legislative arm of the EU and meets in different configurations, depending on the policy area being discussed. For example, when the Council considers an environmental regulation, each member state sends its environmental minister. Similarly, when the Council legislates on agricultural policy, the minister responsible for agriculture represents each member state. These representatives are authorized to vote on behalf of their member state, binding their respective countries to the decisions the Council makes collectively. The Council makes decisions in accordance with a simple majority, qualified majority, or unanimous vote, depending on the subject matter.

The EP represents the EU citizenry and exercises legislative authority in conjunction with the Council in this capacity. The EP consists of 751 members (MEPs) who are directly elected by European citizens. Each member state is afforded representatives in the EP roughly proportionate to its population. For example, while Germany, as the most populous nation in the EU, is allotted 96 MEPs, Malta, Estonia, Cyprus, and Luxembourg each have 6 MEPs. The MEPs organize themselves into political groups and typically vote with their political group as opposed to along national lines. For example, Spanish center-right parties align themselves with MEPs representing center-right parties in all other member states (European People's Party) while the Spanish socialists align themselves with socialists from all other member states (Progressive Alliance of Socialists and Democrats).

The Commission functions as the EU's executive arm and enjoys substantial independent decision-making authority. The Commission consists of the political "College of Commissioners," with one commissioner hailing from each member state. Each Commissioner is assigned responsibility over a certain policy department known as a Directorate-General (DG). Each DG focuses on a specific policy area, such as health and food safety or competition policy. Even though commissioners come from all twenty-eight member states, the commissioners advance the common EU interest as opposed to that of their own member state. In addition to the politically selected commissioners, the Commission has a large bureaucratic staff of approximately thirty thousand career civil servants.

The Commission has significant agenda-setting power through its right to propose legislation. It remains influential throughout the legislative process, acting in close cooperation with the Council and the EP, and is also in charge of the

implementation and enforcement of EU legislation. As the “guardian of the treaties,” the Commission oversees the enforcement of EU law. If an individual member state fails to implement certain regulations, the Commission has the authority to challenge the noncomplying member state before the European Court of Justice (ECJ or CJEU). It also negotiates treaties on behalf of the EU after receiving a mandate from the Council. In many policy areas, the Commission is a semi-autonomous actor, with extensive powers to engage in the legislative process and independent regulatory activity. The Council has delegated to the Commission significant regulatory powers in several policy areas, including competition law, allowing the Commission to pursue its regulatory agenda largely unconstrained by other EU institutions.

Finally, European courts play a significant role in interpreting and enforcing EU laws and regulations. The European courts consist of the ECJ and the General Court, both of which are composed of judges nominated by each of the member states. The main task of the European courts is to ensure the uniform application of EU law across member states. This uniformity is facilitated by the ECJ’s authority to give preliminary rulings that guide national courts in EU member states in their interpretation and application of EU law. Many key elements of EU law, such as the concept of the primacy of EU law or “direct effect,” did not originate in EU treaties but were later pronounced by the ECJ in its rulings.² In addition, the European courts are the key to ensuring that member states and EU institutions abide by EU law, and that the rights of individuals under EU treaties are upheld.

Promoting European Integration via Regulation

The desire to build a single market has always been a primary driver behind EU regulation. Developing harmonized EU regulations is critical for the operation of the single market as inconsistent product standards can hinder cross-border trade. If each of the twenty-eight individual member states adopted a different national standard to protect the environment or to safeguard personal data, the single market could not function efficiently, as companies would face a different regulatory environment in each country. This would force companies to modify their production and business practices from each member state to another, or even to produce different product varieties for different member states. For this reason, harmonized standards became a key goal for European integration early on, serving both the specific substantive goal (such as environmental protection) and the broader economic and political goal of achieving greater market integration. Thus, every directive and regulation—be it on chemical safety, environmental protection, or data privacy—typically has a dual purpose: it serves not only to

advance consumer or environmental protection but also advances a single market where divergent national regulations are aligned so as to ensure free movement of goods and services across the EU.³

The pursuit of EU-level harmonization need not entail complete uniformity in national standards. Acknowledging the legal and cultural heterogeneity across member states and respecting their distinct regulatory preferences, the EU has often opted for “minimum harmonization” and mutual recognition of national standards. This is especially true after ECJ issued an influential judgement in *Cassis de Dijon*, where the Court established the principle of mutual recognition of national regulations.⁴ According to this principle, member states must recognize each other’s regulations as sufficient, as long as they equally protect the public interest in question. Minimum harmonization calls for a common EU standard only to the extent that is necessary to ensure the functioning of the single market, while preserving the flexibility for member states to enact more stringent standards domestically. This flexibility is also inherent in the directives, which are an often-used legislative instrument in the EU. Directives are legislative acts that set out the goals that all member states must achieve. Yet they preserve the freedom of member states to decide how to best achieve those goals. These flexible instruments have been essential in securing broad support for the EU’s regulatory agenda.

Although EU-level regulations are the key drivers of the Brussels Effect globally, often those regulations have their origins in individual member states.⁵ EU member states tend to be policy innovators in areas where the EU has not acted, and in areas where they retain authority to regulate under the EU treaties. For instance, Germany, the Netherlands, and the Nordic countries were the forebearers of the EU’s environmental regulations.⁶ Germany regulated automotive emissions before the EU by strengthening its emission standards. Sweden and Denmark restricted antibiotics in animal feed before the EU followed suit. Denmark and the United Kingdom had a national emissions trading scheme before the EU decided to adopt one at the EU level. Similarly, EU regulation on GMOs was preceded by similar regulations in Germany and Sweden. Further, France and Denmark were frontrunners in banning BPAs in products for infants, paving the way for the EU to do so later.⁷ Similarly, regulators in France and Germany were some of the key member states that exported their privacy regulation upward within the EU.⁸ Because these national regulations risk fragmenting the single market, the EU is prompted to harmonize standards at the EU level in an effort to preserve the integrity of the common market. Notably, the EU has tended not to pursue “downward harmonization,” which would entail letting the member states with low levels of regulation set the common standard for everyone. Instead, as in the examples just mentioned, it has typically pursued “upward

harmonization” and regulated toward more stringent standards of its members states—something which, as discussed later in this chapter, has been a key factor in extending the Brussels Effect.

There is always a risk that efforts to harmonize regulatory standards will lead to the lowest common denominator prevailing across all states. Too often in multilateral negotiations, the least ambitious state gets to set the standard. Especially where the consent of all states is needed, provisions get watered down as the threat of a veto held by each state hangs over each negotiation and vote. It is also often easier to harmonize to the least burdensome standard rather than forcing reluctant states to adopt rules that are costly to enact and enforce. Indeed, for the EU, there have been many incentives and pressures that could have caused it to pursue downward harmonization. For example, there have been obvious losers from high regulatory standards. These include individual consumers who would have preferred lesser protections in return for lower prices. Similarly, some of the less-wealthy member states would arguably have benefited from less-stringent regulations to facilitate much needed economic growth. Finally, corporate interests would typically advocate for a less-burdensome regulatory environment, citing costs on innovation and their international competitiveness.

Yet there are several reasons why “harmonizing up” as opposed to “harmonizing down” took place. First, stringent standards were often adopted to reassure the European public that economic integration would not be pursued at the expense of consumer health and safety or environmental quality. As economic integration deepened, Europeans began to resist the liberalization agenda that was seen as a threat to these non-economic values.⁹ To defend continued economic integration and to vest themselves with greater legitimacy, EU institutions thus set out to expand the integration agenda to these other values, adopting stringent standards—in areas such as environmental protection, food safety, or data privacy—to ensure that economic gains from integration are not pursued without protecting quality of life.¹⁰ Thus, upward harmonization of regulatory standards was seen as necessary to ensure continuing political support for economic liberalization.

Upward harmonization has also been politically more palatable among the states that already had the highest standards in certain regulatory areas. The Commission has thus found it easier to convince the regulatory laggards to respond to their citizens’ demands for greater protections rather than trying to persuade the first movers to back down and repeal their domestic protections. The EU’s efforts to harmonize regulations on the health and safety of workers illustrates this dynamic.¹¹ In the early 1990s, the EU member states with high standards—including Belgium, Denmark, France, and Germany—advocated for greater EU harmonization of labor protections to protect their industries

that faced competition from other member states—including Greece, Ireland, Portugal, and Spain—whose domestic laws contained lower labor standards. In the end, all members (with the exception of the United Kingdom, which negotiated an opt-out) agreed to sign a Social Protocol, which was annexed to the 1992 Maastricht Treaty.¹² The Protocol contains provisions, for instance, on working conditions and equal treatment in the workplace. To persuade even the low-regulation member states to join the Protocol, the Commission agreed to provide them compensation in the form of structural funds that allowed them to offset some of the costs resulting from the adoption of higher labor standards.¹³

When considering the views of the various key interest groups, harmonizing up as opposed to down also provides a fertile ground for compromise. Marrying each standard's economic purpose to its broader societal purpose helps build coalitions among different stakeholders. During these harmonization efforts, for example, non-governmental organizations (NGOs) who advocate for environmental protection have at times been able to find common ground with businesses that desire a harmonized regulatory environment. While these businesses would often prefer laxer rules, upward harmonization remains preferable to discordant national standards, which inevitably increase costs and complexity. This rare alignment of interests paves the way for a distinctly powerful pro-regulation coalition, making the two interest groups—firms and consumers—unlikely allies in a quest for harmonized rules for the European and, ultimately, through the Brussels Effect, the global market. The EU also has a particularly strong incentive to act externally when the moral and economic imperatives of the Community coincide: that is, when it enjoys political rents from the EU industry and the consumer and environmental advocates at the same time.¹⁴

One example of such an alliance that resulted in foreign regulatory changes was a coalition between EU corporations and environmental groups regarding the EU's Eco-Management and Auditing Scheme (EMAS), which was first introduced in 1993.¹⁵ EMAS regulates public disclosure of corporations' environmental improvement records. Already subject to the disclosure obligations, the EU corporations teamed up with environmental NGOs to lobby for the adoption of the same standards by US and Asian corporations. In the end, the campaign was successful and the International Organization for Standardization (ISO) adopted the European standard as a global standard in 1996.¹⁶ Similarly, in the fight against GMOs in the mid-1990s, Greenpeace and other environmental and consumer NGOs mobilized overwhelming popular support from diverse sectors. NGOs found surprising allies for their cause, including European farmers, represented by Copa-Cocega, and the European retail industry, represented by Eurocoop and EuroCommerce.¹⁷ The conventional farming industry in the EU was opposed to GMOs and shielded away from cultivating them. The retail

industry similarly resisted the GMOs, largely in response to the public opposition. Through the lobbying by these key stakeholders, in 2003 the EU adopted two regulations—one establishing a system to trace and label GMOs and one regulating food derived from GMOs.¹⁸ Since 2003, these partnerships have persisted, maintaining joint pressure on the Commission to ban all non-authorized GMOs in food.¹⁹

Similarly, this dual purpose behind regulations has often helped political parties from the left and the right find common ground. Harmonized environmental or product safety standards across the EU allow political parties on the left to protect consumers while also allowing parties on the right to prioritize trade across the common market. Of course, political tensions may still remain and interests are not always easy to align. However, this dual purpose broadens coalitions and increases the likelihood that the key interest groups—which in other political and regulatory contexts might have agendas firmly in opposition—have something to gain from a regulation, paving the way for a compromise that allows stricter standards to emerge.

The EU's tendency to harmonize standards upward has also been facilitated by changes to treaties that enabled regulations and directives to be adopted with a qualified majority of the Council—requiring the support of 55% of member states representing a minimum of 65% of the EU's population—as opposed to unanimity. This move toward qualified majority voting can be traced to the adoption of the 1987 Single European Act (SEA)—a major treaty revision that paved the way for the completion of the single market—and has continued with each treaty revision since.²⁰ The ability to proceed with legislation even in the absence of consensus established the foundation for significant rule-making in the aftermath of the SEA. Had the member states insisted on unanimity as the default decision-making rule, it is doubtful that its ambitious regulatory agenda would have emerged. The reliance on legislative techniques, such as minimum harmonization, further fostered an extensive regulatory agenda by relaxing the EU's insistence on complete uniformity in favor of greater flexibility in national implementation.

A qualified majority makes it easier to adopt regulations as it often silences the laggards; the more ambitious states prevail because they do not need to convince everyone to support a legislation.²¹ However, wealth, expertise, and issue salience also matter. The member states eager to elevate regulatory standards in many policy areas are often wealthier countries from Northern Europe, vested with greater political leverage associated with their economic success. For example, high growth rates and competitive economies in Northern Europe enhance these countries' ability to advocate for environmental regulations that do not compromise economic goals. These countries are also often vested with greater persuasive authority stemming from their experience in already regulating that

area domestically. These high-regulation states also have a strong incentive to Europeanize their standards so as to ensure that their domestic firms are not disadvantaged when competing in the European market. Indeed, research on Council voting suggests that the salience of issues often explains outcomes even more than raw voting power.²² Small states are likely to intervene more selectively, advocating for their positions on issues particularly salient to them, making their positions more credible and influential.²³

Pro-regulation member states have also found ways to influence EU decision-making through their greater expertise. The Commission relies heavily on expert groups in developing its regulatory policies, and recruits approximately half of these experts from national governments.²⁴ Considering that the pro-regulatory member states already regulate certain policy areas domestically, they often have a higher number of technical experts at their disposal, giving them a greater resource advantage as a result. These experts can be deployed to influence the Commission at the early stages of policy development.

For example, Germany and the Netherlands—both known for their progressive stance on environmental regulation—have exerted significant influence over the EU's environmental policy making by supplying staff power and expertise. The German Ministry of the Environment has 900 employees, and the Federal Environmental Agency in Germany has a further 850 experts. The Dutch environmental administration employs approximately 1,500 people.²⁵ Not surprisingly, German and Dutch experts are omnipresent in the environmental committees and hearings of the various European institutions including the Commission, the Council, the EP, the Economic and Social Committee, and the Committee of the Regions. These resources have allowed German and Dutch experts to assume an influential role in the committee work of the various European institutions involved in environmental policy making.

Finally, package deals (also known as issue linkages) offer another technique to facilitate regulatory rule-making in the midst of disagreements among member states or political groups. Package deals refer to the practice of deciding on multiple legislative proposals together in order to harness support for them from a wide variety of interest groups. Such bargains are often feasible in the EU given the breadth of the EU policies subject to negotiation. Some member states objecting to a given regulation may still be persuaded to support it in return for enhanced regional subsidies or additional transfers under the Common Agricultural Policy.²⁶ A study by Raya Kardasheva examined package deals between the EP and the Council that use issue linkages across multiple legislative proposals.²⁷ Kardasheva found that approximately 25% of all EU legislation completed between May 1999 and April 2007 was decided with the help of a package deal.²⁸ Issue linkages were

most common in the budgetary sphere but were also used in environmental legislation as well as health care and consumer protection.²⁹ The addition of new member states to the EU through multiple rounds of EU enlargement has further enhanced the reliance on package deals as EU institutions have managed increasingly diverse policy preferences.³⁰ This way, the regulatory density in the EU has had the effect of enabling more ambitious rule-making as the reluctant member states have been brought onboard through concessions on other policy areas.

The Commission's Pro-regulation Agenda

The previous discussion has shown how the impetus for the EU's ambitious regulatory agenda has often come from the pro-regulation member states that have advocated upward harmonization at the EU level, yet emphasized the Commission's central role in promoting integration through ambitious regulation. While the Commission is at times able to exercise independent regulatory authority, the Council and the EP's approval is needed for legislative acts. This grants these institutions an important role in building and extending the European regulatory state. Yet it is within the Commission where regulations are initiated and drafted. Consequently, the Commission's agenda-setting role calls for a closer look at its powers and preferences in particular.

The Commission's overarching task is to advance the common interest of the EU, making it often the leading promoter of closer European integration. It is therefore only natural that the Commission has always played a critical role in ratcheting up regulatory standards at the EU level. It is quick to advocate for a harmonized European solution whenever a handful of member states proceed to regulate on their own by adopting stringent national standards. The Commission is spurred into action whenever it detects a risk that the single market is becoming more fragmented. For example, the Commission has been responsive to the demands of frontrunners in environmental regulation for the fear that their stringent national standards could distort trade between member states, thereby hindering the functioning of the single market.³¹

The Commission has a strong ideological commitment and institutional preference for European integration.³² As more regulation typically amounts to more integration, the growing regulatory agenda has clearly served the Commission's fundamental goal of furthering European integration. The Brussels Effect itself has been important to this goal—for one, the Brussels Effect helps the Commission level the international playing field, thus mitigating concerns from EU firms of their global competitiveness. This helps win broader support for further EU regulation. For another, due to the Brussels Effect, the EU increasingly

becomes a global standard setter, which enhances the legitimacy and influence of its standards, both at home and abroad.

The Brussels Effect also strengthens the Commission's bureaucratic interests by enhancing the impact of its regulatory activities. Regulators generally have the incentive to generate more regulation rather than less because their success is measured by how much of their agenda is accomplished.³³ Among the EU institutions, the Commission, in particular, is widely portrayed as a "competence-maximizer," constantly looking to expand its powers and increase its influence over policy making. And when the Commission seeks to expand its competencies, it tends to do so via regulation.³⁴

To a large extent, the Commission's tendency to govern through regulation is a result of the EU's small budget. The EU's budget amounts to only around 1% of its GDP, which comes primarily as transfers from member states.³⁵ To put this figure in perspective, US federal government spending regularly exceeds 20% of its GDP.³⁶ These tight budgetary constraints restrict the Commission's ability to pursue direct-expenditure programs, such as large-scale industrial policy, innovation policy, or job creation programs at the EU level. In contrast, there is no "regulatory budget" to limit the amount of regulations and directives the Commission can promulgate.³⁷ The Commission does not even need significant funds to enforce its regulations—it can leverage member state funds by delegating the actual implementation and enforcement to them. Thus, the only way for the Commission to expand its influence without extensive financial resources is to engage in regulatory activity, as regulations do not depend on the tax revenues available to the Community institutions.

As Giandomenico Majone has noted, "since the [Commission] lacks an independent power to tax and spend, it could increase its competencies only by developing as an almost pure type of regulatory state."³⁸ In Majone's demand-and-supply model of EU regulation, the Commission is the primary actor on the supply side due to its right of legislative initiative.³⁹ Historically, vesting the Commission with so much regulatory power might have been unintentional: the member states wanted to restrict the powers of the Commission through tight budgetary discipline. Yet in the absence of traditional powers of states to tax and spend (not to mention wage a war), the Commission has built an empire of laws and regulations, maximizing its own influence in the process.⁴⁰

Regulatory policies, including their extension through the Brussels Effect, are nearly costless for the Commission to pursue because the actual costs of complying with regulations fall on the firms and individuals that the regulations target. In addition, enforcement costs are borne by member state governments whose task is to implement the regulations.⁴¹ Take, for example, the

new data protection regulation GDPR (which is discussed in more detail in chapter 5). With that extensive regulation, the Commission can mandate firms to re-design their products and rewrite their privacy policies. These mandates are costless for EU institutions. Similarly, the GDPR is not enforced by the Commission but by each individual member state's data protection agencies, whose staff and enforcement budgets are funded by national governments, making the actual enforcement also a matter of member state budgets as opposed to that of the EU.

The Brussels Effect also offers an important foreign policy instrument, compensating the Commission for the lack of power it otherwise has in external affairs. The Commission's legal competence to act on its member states' behalf in foreign policy or security-related matters outside common commercial policy is limited.⁴² For instance, imposing economic sanctions requires a unanimous decision in the European Council, making such decisions vulnerable to a veto exercised by any member state.⁴³ Nevertheless, the Commission is delegated with substantial powers to implement measures necessary to create and maintain the single market.⁴⁴ In Brussels Effect, the Commission has a powerful tool to shape global markets and the international regulatory environment, without the need to secure unanimity in the Council.

Although the Commission has been a key institution for extending the European regulatory state outside the EU, the other EU institutions—particularly the EP and the European Courts—have also been critical, and their role has grown in importance over time. These institutions also benefit from the externalization of the EU's regulatory agenda through the Brussels Effect. Mark Pollack, for instance, argues that the Commission's pro-integration agenda is shared by other institutions. Pollack analyzed six case studies involving conflicts with member states regarding the use of discretion by the Commission and the ECJ. The cases represented a mix of market liberalization and social policy issues.⁴⁵ He found that almost invariably, the Commission, the Court, and the EP behave as competence maximizers. These institutions tend to advocate for a broad interpretation of the objectives and powers the treaties vest on EU institutions, including the regulation of the single market. This, according to Pollack, is due to their "shared organizational preference for greater European integration" vis-à-vis the member states.⁴⁶

This suggests that the Brussels Effect serves the interests of the EP and the Courts similarly to those of the Commission. For example, if the Parliament cares about the protection of personal data or privacy—as its strong support for the GDPR indicates—its gains are only magnified when the GDPR penetrates global markets, making the EU privacy norm a global norm. Indeed, in a brochure published in October 2017, *Future of Europe: European Parliament*

Sets Out Its Vision, the Parliament highlights its goal to “Export European Standards.” The document refers to the Parliament’s 2017 resolution on the impact on international trade, which details a variety of mechanisms by which the EU may export, monitor, and enforce the extension of European policies abroad.⁴⁷

Similarly, the European Courts’ pro-integration tendencies are likely to be reinforced by the Brussels Effect. The Brussels Effect creates market-based incentives for compliance with EU rules, including with court rulings aimed at enforcing them. This enhanced compliance further helps to preserve the authority and legitimacy of the European Courts. In some recent decisions, including a case still pending querying whether the right to be forgotten should extend to global domain names, the ECJ is clearly invited to consider the external effects of its rulings.⁴⁸ The 2009 Lisbon Treaty provided the court with a constitutional foundation for external policy considerations, authorizing the court to look beyond the single market.⁴⁹ These changes in treaty framework have made the ECJ even more conscious of the external effects of its rulings and empowered it to issue rulings that have an effect outside of the EU’s frontiers. Regardless of how far the ECJ will push the EU’s external powers, most commentators agree that all EU institutions have obtained significant gains from entrenching their regulatory priorities across the world.

The Emerging External Regulatory Agenda

Originally, the EU’s supranational regulatory apparatus was created to establish and oversee an integrated, liberalized, and competitive market in Europe. The European regulatory state was hence a response to internal challenges driven by a political agenda that was largely inward looking. In its early decades—beginning in the 1960s but continuing well into the 2000s—the EU’s external influence can thus best be viewed as an incidental by-product of its internal motivations. However, more recently, a conscious external agenda has emerged to complement the EU’s internal regulatory agenda. This shift is associated with a broader global development in the early 1990s, where the external effects of countries’ regulatory policies began to occupy the global trade agenda. Increased efforts to engage in “global governance” in various forms led to increased regulatory cooperation and multilateral standard setting. Various domestic regulations were increasingly seen as non-tariff barriers, prompting multilateral efforts to abolish them. These negotiations culminated in the establishment of the WTO in 1995. Partly for this reason, the external effects of the EU’s regulatory policies became a more salient issue, both within and outside the EU.

Internal Motives: Single Market

The EU has traditionally externalized its regulations without any active effort to shape markets other than its own. It has been sufficient to simply generate regulations to strengthen its single market, with external influences emerging as incidental by-products of this internal goal. As noted earlier, inconsistent regulations among member states are seen to threaten the single market, prompting the need to enact EU-level regulations that harmonize laws across the member states. For instance, many regulations in the environmental domain were enacted to serve the dual purpose of protecting the environment and facilitating the single market through harmonized environmental standards.⁵⁰ Rather than aiming to provide global environmental standards, the EU was thus concerned with the efficient functioning and the legitimacy of the single market program.⁵¹ Advancement of the single market also provided a solid legal basis for EU institutions to act, providing a rationale that regulation at the EU level, as opposed to the national level, was necessary.

The internal market rationale was central, for example, in enacting the chemical safety regulation “REACH,” discussed in detail in chapter 6.⁵² In its 2001 white paper, the Commission stated that one of the key objectives of the EU’s new chemical policy was to “[p]revent fragmentation of the internal market.”⁵³ In its first recital, the 2003 legislative proposal for REACH notes that “(1) The free movement of substances, on their own, in preparations and in articles, is an essential aspect of the internal market and contributes significantly to the health and wellbeing of consumers and workers, and to their social and economic interests, as well as to the competitiveness of the chemical industry; (2) The efficient functioning of the internal market for substances within the Community can be achieved only if requirements for substances do not differ significantly from Member State to Member State.” Similarly, the 2005 Council’s Political Agreement for a Common Position discusses REACH’s aim and scope stating that “The purpose of this Regulation is to ensure a high level of protection of health and the environment as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation.”⁵⁴

The EU’s regulation of data protection similarly has its origins in the goal of establishing a single market for the transfer of data across the common market. Earlier statements by EU institutions make no references to the external aspects of data protection but rather cite disparate national measures as adversely impacting the single market.⁵⁵ For example, the 1981 Commission Recommendation regarding the automatic processing of personal data notes:⁵⁶

Divergent data-protection law in the EC Member States creates disparate conditions for data processing. The establishment and functioning

of the common market in data processing calls for extensive standardization of the conditions obtaining in relation to data processing and, therefore, to data-protection at European level. Approximation of data-protection is desirable so that there can be free movement of data and information across frontiers and in order to prevent unequal conditions of competition and the consequent distortion of competition in the common market.

Several other preparatory works confirm that a key goal of the EU's data protection regulation has always been the desire to "unleash the potential of the Single Market."⁵⁷ The 1994 Commission white paper on "Europe and the Global Information Society" emphasizes the risks associated with "[d]isparities in the level of protection of such privacy rules [which] create the risk that national authorities might restrict free circulation of a wide range of new services between Member States in order to protect personal data."⁵⁸

The 2010 Commission Communication on personal data protection similarly warns of the "divergences between the national laws implementing the Directive, which run counter to one of its main objectives, i.e. ensuring the free flow of personal data within the internal market," acknowledging that private stakeholders have complained about administrative costs stemming from the lack of harmonization.⁵⁹ The legislative history of the GDPR continues to stress the single market, emphasizing the need to remove a "considerable divergence in the rules across Member States" and to remove "the uncertainty and uneven protection for individuals" associated with the "fragmented legal environment" in the EU's single market.⁶⁰

These statements call into question critics' views arguing that the EU is a "regulatory imperialist" that is consciously seeking to externalize the single market.⁶¹ Instead of having a deliberate external agenda, these communications illustrate how much of the EU's rule-making stems from the internal goal to protect the integrity of the single market. Especially early on, the external effects of the single market were, at best, an afterthought for the EU institutions that were preoccupied with the market integration goal. This internally driven, passive externalization of EU rules has been particularly effective in that the EU institutions have only had to generate the consensus to pursue a goal that lies at the heart of the EU project: European integration and the establishment of the single market. Often, EU standards have been externalized as a by-product of that mission, not by EU institutions but by market participants who need to comply with EU rules and who often decide to apply the EU standard globally.

External Motives: Global Norm Setting

While the primary objective of European regulatory activity has clearly been to establish the single market, this activity has had the ancillary effect of establishing the EU as a global regulatory hegemon. This external dimension of the single market was only fully realized when the EU's trading partners, including the United States, expressed concerns that the single market might impose costs on third countries.⁶² Of course, the EU benefits from such "incidental externalities" associated with the single market, and the EU's internal motives are not inconsistent with the EU's external motive to shape the global regulatory environment and pursue global influence.⁶³ The Commission, for example, likely welcomes the EU's newfound external regulatory power, however unintended its origin. In addition, it appears that the EU's internal goals have been gradually giving way to a more multifaceted set of goals—both internal and external—that the EU is pursuing in setting its regulatory policy.

While the Commission has, in its communications, demonstrated a traditional focus on strengthening the internal market, a review of these communications reveals a trend toward increased attention on the external dimension of the single market over time. In its documents discussing the single market generally, references to its external effects begin to emerge around 2007, with multiple publications devoted solely to this topic since. This demonstrates a significant change compared to the 1985 white paper and a 1996 Commission communication on the single market, both of which reflect an almost purely internal perspective.⁶⁴ This indicates that the Commission is becoming more self-conscious of the need to externalize EU rules as well as its increased ability to do so.

In its 2007 working paper "The External Dimension of the Single Market Review," the Commission acknowledges that "[T]he EU is emerging as a global rule maker, with the single market framework and the wider EU economic and social model increasingly serving as a reference point in third countries as well as in global and regional fora."⁶⁵ The Commission also recognizes that "[t]here is a window of opportunity to push global solutions forward. The EU is in a good position to take a lead, promoting its modern regulatory framework internationally."⁶⁶ In another communication, the Commission emphasizes how the "EU [is] being looked upon as the global standard setter in many areas such as product safety, food safety, environmental protection, public procurement, financial regulation, and accounting."⁶⁷ These statements point to the EU's growing awareness of its ability to shape the global regulatory environment beyond the single market.

At the same time as the awareness of this opportunity grew, the Commission began to emphasize its potential for global impact. For example, in its 2007 policy

paper, “A Single Market for Citizens,” the European Commission envisions the EU and its internal market to be standard setters at the international level:⁶⁸

[The EU] has spurred the development of rules and standards in areas such as product safety, the environment, securities and corporate governance which inspire global standard setting. It gives the EU the potential to shape global norms and to ensure that fair rules are applied to worldwide trade and investment. The single market of the future should be the launch pad of an ambitious global agenda.

Around this same time, in a notable change from its earlier communications on data protection regulation, the Commission also began to emphasize the importance of promoting EU data privacy laws as a benchmark for global standards. In its 2009 communication, for example, the Commission noted that the “Union must be a driving force behind the development and promotion of international standards for personal data protection and in the conclusion of appropriate bilateral or multilateral instruments.”⁶⁹ These comments are in contrast to earlier statements when the Commission simply emphasized the need to harmonize standards to ensure a smoother flow of data across the common market. In a 2010 communication, the Commission defended its stringent standards, noting that “[a] high and uniform level of data protection within the EU will be the best way of endorsing and promoting EU data protection standards globally.”⁷⁰ The Commission also called for universal principles based on EU norms:

Data processing is globalised and calls for the development of universal principles for the protection of individuals with regard to the processing of personal data. The EU legal framework for data protection has often served as a benchmark for third countries when regulating data protection. Its effect and impact, within and outside the Union, have been of the utmost importance. The European Union must therefore remain a driving force behind the development and promotion of international legal and technical standards for the protection of personal data, based on relevant EU and other European instruments on data protection.⁷¹

This vision of the EU as providing a benchmark for the world affected the drafting of the GDPR. In 2017, the year before the GDPR came into force, Vera Jourova—the Commissioner for justice in charge of data protection—announced unambiguously that “we want to set the global standard.”⁷²

Over time, the EU has also become more explicit in stating its goal to promote its regulatory preferences through trade agreements.⁷³ Today, the

Council's website discussing the EU's trade policy denotes that "[o]ne of the most important aspect of EU's trade policy is that—alongside protecting European businesses and consumers—it is promoting the EU's principles and values," citing human rights and environmental regulation as examples.⁷⁴ Recent EU treaty revisions also reflect a change in the mindset toward a more externally focused Europe. For instance, the 2007 Lisbon Treaty vests the EU with an explicit mandate to project its internal norms and values externally, emphasizing the importance of those values in the EU's relations with the wider world.⁷⁵

Overall, these statements point to a growing awareness of the external effects of the single market, and the realization that this dimension presents the EU with opportunities. The internal goals have not faded and the external motivations seem to supplement, rather than substitute, the internal agenda of EU institutions, which remains paramount. While the fundamental rationale underlying the internal goal to strengthen the single market is well understood, it is less obvious as to why the EU would care about being a global standard setter. What does the EU gain from being a global leader in regulatory reforms, setting benchmarks for rules and standards worldwide?⁷⁶

The economic goal of ensuring a level playing field for, and protecting the competitiveness of, European industry likely goes a long way in explaining the EU's willingness to externalize its regulatory agenda. A failure to export its standards to other countries would put European firms at a competitive disadvantage.⁷⁷ Yet by acting as a global regulator, the EU can defend its social preferences without compromising the competitiveness of its domestic industries. If foreign companies adhere to EU norms on the European market, the import-competing industries are assured a level playing field. If the EU's norms further spread to third countries, the EU can ensure that its export-oriented firms are not disadvantaged either. Being able to influence global standards minimizes the adjustment costs for European companies, which are then able to operate in foreign markets based on their home market rules.

Beyond the concern over the competitiveness of the European industry, the EU may have additional incentives to project its regulatory power abroad. For one, the EU may be motivated by a desire to obtain greater legitimacy for its rules through globalizing them. If foreign companies and governments endorse EU standards, those standards are seen as having a wider appeal and thus greater legitimacy.⁷⁸ One concrete benefit from this is that the EU's trade partners are less likely to challenge the legality of EU standards before forums like the WTO if those standards are already replicated globally. Less tangibly, being the global standard setter has the benefit of expanding the EU's soft power and validating its regulatory agenda, both at home and abroad.

The EU may also be motivated by a desire to replicate its own governance model and regulatory experience abroad. The EU's own successful experience in creating a common market has encouraged it to pursue a global order based on those same rules. More regulation in EU has meant more predictability and stability. This has fostered a belief that an extensive regulatory system is similarly needed to preserve global public goods. The EU subscribes to a view that trade liberalization fails to achieve economic goals without a simultaneous harmonization of policies. For the EU, this offers the most efficient and universally valid model of economic and political integration,⁷⁹ and potentially a compelling reason to replicate its experience abroad.

In recent years, the broader geopolitical context may have provided an additional incentive for the EU to assume the role of a global standard setter. The WTO has become increasingly dysfunctional since the closing of the Uruguay Round in 1995. Its inability today to effectively address regulatory barriers to trade has left a vacuum that the EU has been uniquely positioned to fill. Also, the US government has increasingly retreated from domestic regulation and international institutions. The absence of US leadership in this area gives the EU a further impetus to act. Scandals such as the Snowden revelations that exposed extensive US government surveillance activities worldwide may have further increased the EU's resolve to act as the global guardian of personal data and the right to privacy. Finally, the awareness that the EU's role in the world economy is declining while Asia's is rising may have similarly contributed to the EU's desire to cement its rules globally at the time when the EU still has the power to do so.

Finally, being able to set norms globally allows the EU to prove to its critics that it remains relevant as a global economic power. Embracing the role of a regulatory hegemon reinforces the EU's identity and enhances the EU's global standing even in the times of crises where its effectiveness and relevance are constantly being questioned. If the EU wants to exert influence, it must do so with the means available to it. Lacking traditional means of power, the EU's greatest global influence is accomplished through the norms that it has the competence to promulgate. In the absence of military power or unconstrained economic power, the EU can exercise genuine unilateral power most effectively by fixing the standards of behavior for the rest of the world.⁸⁰ In the world where the United States projects hard power through its military and engagement in trade wars, and China economic power through its loans and investments, the EU exerts power through the most potent tool for global influence it has—regulation.