

Brexit Monograph 15: Leaving the Single Market - Part 1 ¹

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Introduction

The question of whether the UK should seek to remain in the Single Market (or Single European Market) has become one of the main battle lines of the post-referendum debate.

However, there does not appear to be a succinct description of the essential elements that go into making up the Single Market and allowing it to function.

In this Monograph, therefore, we attempt this basic descriptive task, exploring the precise nature of the Single Market and how it functions.

We do not rehearse the merits of the Market, but seek to define it and then explore some of the issues relating to a possible UK withdrawal. Specifically, we ask whether we are even asking the right question.



Nomenclature and definitions of the Single Market

Understanding the Single Market is not helped by a general looseness in the use of terminology.

In Article 26 of the Treaty of the Functioning of the European Union (TFEU)², it is called the "internal market". Throughout the entire treaty, there is no reference to the "Single Market". In treaty terms, it does not exist. The "internal market" is defined by Article 26(2), as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

The "Single Market" could be taken to apply to the 31 members of the European Economic Area (EEA). There is no support for this in the literature, but making such a distinction could reflect the wider scope of the market in the EU Member States and the reduced participation of the three EFTA states, Norway, Iceland and Liechtenstein.

Another term also used is the "Common Market", although this is obsolete. With the Single European Act of 1985, which introduced provisions for the approximation of laws, the term was largely replaced by "Single Market". – sometimes known as the Single European Market (SEM) with its greater emphasis on non-tariff barriers and, in particular, regulatory barriers.

The official definition – whether applicable to the Internal or Single Market – is couched in terms of a "area without internal frontiers..." The reference to frontiers is thus misleading and harps back to the origins of the Community, when the emphasis was on customs duties which were collected at the borders in the days of "stripy pole" border crossings.

Furthermore, although the reference to a single area implies a contiguous trading zone, the island states of the United Kingdom, Cyprus and Malta and the overseas departments of France make it anything but contiguous. Sea transport presents special problems for the Market as goods transported between two Member States by sea lose community status as soon as they leave the despatching port. On arrival, they are treated as if they are entering the EU for the first time, creating administrative burdens, involving several authorities and intermediate parties. Procedures and requirements are not only complex but repetitive, affecting productivity and making unnecessary work.

So the Single Market is a group of nations which agree to be bound by treaty provisions and a common regulatory code which requires its subscribers to adhere to "four freedoms", the free movement of goods, persons, services and capital. It is, in effect, a regulatory union.

If the Single Market is treated as a regulatory union, it becomes more appropriate to talk in terms of states outside the Market trading with the group, rather than having access to it.

This also helps define the UK's post-Brexit relationship with the Single Market. It can retain its membership of the group or it can leave it – one of two absolutes, the choice being membership of the wider EEA grouping. To have "access" is a largely meaningless concept. If the UK leaves the Single Market, it can continue trading with members of the group, but on different terms. The precise nature of those terms will depend on the Article 50 negotiations.

The nature and purpose of the Single Market

The Single Market is a trading system that boasts a customer base of 500 million. There are three major areas of activity: goods, services and digital trading (the so-called Digital Single Market). Goods account for the majority of transactions.

¹ The original monograph, written by Dr Richard North, can be found here: <http://www.eureferendum.com/blogview.aspx?blogno=80999>

² Often called the Lisbon Treaty.

Secondly, **the Services Directive** is to permit companies established in any State within the EU to establish themselves in other Member States. They also have the facility to provide services in other countries too.

The third area of activity is the **Digital Single Market**. Although this sector is even less developed than Services, a fully developed system could contribute €415 billion to the EU economy annually, creating hundreds of thousands of new jobs. The Commission has adopted what it calls "an ambitious strategy" to modernise intellectual property rights enforcement, the rules on parcel delivery, the collaborative economy and e-commerce.

This, though, is a one-dimensional view of the Market. From the very start, the purpose of economic integration was to vest control of the economic means of making war in a single, supranational authority, thereby removing war-making capabilities from nation states.

The functioning of the Single Market

Free movement of goods has to prohibit tariff barriers and quantitative restrictions such as quotas. The treaties explicitly prohibit the imposition of charges which have an effect equivalent to those of **customs duties**. A third element is the progressive harmonisation of **national laws**. By replacing national codes (and the freedom to legislate unilaterally), regulation ceases to act as a barrier to trade.

Barriers to trade could be removed by **market liberalisation** where the state retreats entirely from product regulation and allows market forces to prevail. But such expectations of extensive liberalisation (deregulation) are unrealistic.

Or they could be removed by **mutual recognition of standards** where each Member State recognises the regulatory standards of the other Members, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject. It is estimated that mutual recognition affects 25 percent of intra-EU trade, applying mainly to newly emerging products.

The "building blocks" which support the Single Market

At the heart of the Single Market is its regulatory code – the *acquis*. As it applies to the EEA, it comprises 5,288 legislative acts (Directives, Regulations and Decisions), roughly a quarter of the 19,886 laws currently in force in the European Union.

The first of the "blocks" is the comprehensive body of law specifying minimum requirements for **the safety and environmental impact** of a wide range of products, together with a major tranche of standards legislation which defines technical or quality requirements.

The second "building block" is a body of law defining the **conformity assessment procedures** which must be carried out before certain products can be placed on the EU market.

Another "building block" of the Single Market in goods is **CE (Conformité Européenne) marking**, used to signify that products have been assessed in accordance with relevant EU rules.

Underpinning the entire system is then the "building block" of market surveillance. In the UK, this includes the Health & Safety Executive, and at local level by Trading Standards and other officials. Different sectors are handled by different bodies, feeding into agencies and government Departments then report findings and observations to the Commission.

Rule-making within the Single Market

Based as it is on an ever-expanding and developing regulatory code, the Single Market requires a capability to produce formal (and informal) rules. **The rule-making process itself is an integral part of the Single Market** – not an adjunct. Even if the broader political functions of the legislature were removed, there would still be a requirement for the production of actionable (i.e., enforceable) instruments. Product standards through to procedural rules define the functioning of the market and its administration.

But much of what becomes EU law starts off as quasi-legislation, produced by a wide range of **global and regional bodies** ranging from the World Trade Organisation (WTO), Codex Alimentarius and the Basel Committee on Banking Supervision, to the United Nations Economic Commission Europe (UNECE). This is then processed by the EU to turn it into actionable legislation for use by Member States, reflecting a progressive globalisation of the *acquis*.

However, it would be wrong to suggest that the EU is entirely a passive receiver of quasi-legislation. Its institutions are often heavily engaged in proposing, negotiating and revising it at global level. **Globalisation and the Single Market are inseparable.**

Single Market infrastructure

Once it is acknowledged that the rule-making process is an integral part of the Single Market, it becomes easier to appreciate that there is **a complex infrastructure** which makes the system what it is. It is not simply a collection of

trading rules but a dynamic entity which is constantly changing and evolving.

This function is mainly undertaken by the Commission but it takes political guidance from the European Council. In turn, many policy decisions are shaped by research, either commissioned directly or emerging from the EU's framework research programmes. Both policy formulation and research, therefore, also comprise an integral part of the Single Market.

Research has a wider function, in giving the EU greater authority in global institutions. Food safety and plant health issues, for example, are reliant on scientific/technical inputs and the EU has a capacity to organise and fund the underlying work which can give it the edge in arguing its case.

Heavily involved in this process, amongst other things, are the EU's decentralised agencies. These bodies act as a conduit for external, expert opinion and serve to marshal consensus on specific topics. To develop what a very often complex technical standards in the first instance requires a network of standards bodies.³

Once a product is produced with the intention of circulation, the availability of testing bodies – with suitable laboratories and other facilities – becomes essential. These contribute to the initial approval processes and also provide technical facilities for formal and informal enforcement, as well as providing the basis for much of the industrial self-regulation. This then links in with the surveillance system described earlier.

Effective enforcement depends to a large extent on the efforts of Member States, and on the degree of cooperation between them. The aim, in the view of the Commission, "should be to minimise bureaucratic obstacles".

At the centre of this system is the Commission. In its routine monitoring of the functioning of the Market, the Commission can take direct action, either against Member States or individual companies, in graduated steps, starting with a "reasoned opinion" and culminating in a reference to the European Court of Justice, which becomes an active partner in how the market works, and this includes several important online services.

The Commission now undertakes routine regulatory reviews to ensure that legislation "delivers results for citizens and businesses effectively, efficiently and at minimum cost". This is the so-called "Refit" programme.

Conclusions

The Single Market is a complex and sophisticated creation. It would not be wrong to describe it as the most complex and sophisticated trading agreement ever attempted, with depths which defy easy description.

The Single Market is a composite creation with multiple "owners". It is not solely an artefact of the European Union as it comprises components which function at a global level, which are not completely (or at all) under the control of the Union, while other components rely on the active participation of Member States and private bodies. So the Single Market is better defined as a cooperative venture between Member States

All developed nations regulate their internal markets to an extent. Even if the UK was to withdraw from the Single European Market it would retain the components which go towards the functioning of its own internal trading system – including market regulation, supervision, monitoring and enforcement, complete with global elements. What would be lost as a result of withdrawal would not be the regulation. Rather, the UK would cease to coordinate its measures with other countries in the EEA and lose access to their markets. Even if the UK fully withdrew from the Single Market, it would not so much be leaving as switching from one system to another. Come what may, the UK market would not be unregulated. It would just be differently regulated with a different balance of advantages.

There is no specific issue for the UK in deciding to withdraw from the Single Market, and no great gain in so doing. The concern has been the use of the Single Market to further the Union's political agenda. If that agenda was removed, there could be less reason for rejecting the concept of a single market. The issue might then be best couched in terms of how that single market was managed, and by which body.

Whether to leave the Single Market, therefore, is perhaps the wrong question. It might be a better idea to ask how the Single Market could be changed to make it unnecessary for the UK to leave, and politically possible for it to maintain an active trading partnership with EU Member States.

3. Initially, these were nationally rooted, as in the British Standards Institute (BSI) and Deutsches Institut für Normung (DIN), these now work alongside the European bodies CEN and CENELEC, which in turn work with the International Standards Organisation (ISO) and the International Electrotechnical Commission (IEC). Increasingly, standards-setting is delegated to these bodies, with the output given legal status where necessary.