

LEAVE ALLIANCE

Brexit Monograph 15

Leaving the Single Market - Part 1

16 November 2016

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. Continued participation is regarded by some as indicative of an intent to stay on the European Union. They believe that a clean (immediate) break – otherwise known as a "hard" Brexit - is an essential precondition for fulfilling the referendum mandate.¹

This debate was brought into high profile by the Prime Minister's conference speech of 2 October 2016 in which she spoke of controlling immigration and removing the UK from the jurisdiction of the European Court of Justice (ECJ).² Her comments have been widely interpreted as favouring a "hard" Brexit and thereby eschewing further participation in the Single Market.³

However, it would appear that the antipathy to the Single Market stems from profound misunderstandings as to its nature and its reach – more so as 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 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.

¹ For instance, see here as a typical example of an anti-Single Market polemic: <https://www.totalpolitics.com/articles/opinion/david-herdson-hard-brexit-only-option-theresa-may>

² <http://press.conservatives.com/post/151239411635/prime-minister-britain-after-brexit-a-vision-of>

³ For instance: <https://www.theguardian.com/politics/2016/oct/20/uk-will-get-a-hard-brexit-if-may-pursues-tough-approach-hollande>

Nomenclature and definitions

Understanding the Single Market is not helped by a general looseness in the use of terminology. Particularly unhelpful is the imprecision of the EU's legal definition, found in Article 26 of the Treaty of the Functioning of the European Union (TFEU), where 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.⁴

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". This same definition is repeated on the European Commission website, but under the heading: "The European Single Market".⁵

However, there is some sense that the term "internal market" applies only to the European Union, while 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.

For instance, the mutual recognition provisions set out in Regulation 764/2008 only apply in the Efta states to products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System (Combined Nomenclature), thereby excluding trade in agricultural and food products.⁶

Another term also used is the "Common Market", although this is obsolete, applying to the European Economic Community (EEC) and the 1957 Treaty of Rome with its emphasis on creating a customs union and the removal of tariff barriers. 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.

It is unfortunate that the official definition – whether applicable to the Internal or Single Market - is couched in terms of a "area without internal frontiers..."⁷ when the primary purpose of the Market is to remove regulatory barriers.⁷ These are not geo-located and are often referred to as "beyond border barriers".⁸ 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.

⁴https://europa.eu/european-union/sites/europa.eu/files/eu_citizenship/consolidated-treaties_en.pdf

⁵ https://ec.europa.eu/growth/single-market_en

⁶ See EEA Agreement, Article 8, and Annex II Part II, p.214.

⁷ *Ibid.*

⁸ http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147629.pdf

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.⁹

With these matters in mind, and in any event, it might be better to offer a different definition for the Single Market, focusing its specific characteristics. In those terms, 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.

When expressed in this way, it is much easier to define relationships with other bodies, avoiding complaints about the ambiguity of terminology.¹⁰ 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. Its 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

Ostensibly, 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).¹¹ Goods account for the majority of transactions.

Less well-developed is the services sector, even though services account for over 70 percent of all economic activity in the EU and a similar proportion of its employment. The primary effect of the treaty provisions and secondary legislation – in particular the Services Directive - is to permit companies

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http://www.shortsea.fr/sites/default/files/fichiers/public/shortsea_shipping_the_full_potential_yet_to_be_unleashed_ecsa_2016.pdf

¹⁰ See comments by Lord Hannay: <https://hansard.parliament.uk/Lords/2016-10-24/debates/A32D4EB6-8FCA-4901-BC98-82B489E5A973/BrexitSingleMarket>

¹¹ https://ec.europa.eu/growth/single-market_en

established in any State within the EU to establish themselves in other Member States. They also have the facility to provide services in countries other than the one in which they are established.^{12,13}

As to the third area of activity, the Digital Single Market, it is anticipated that a fully developed system could contribute €415 billion to the EU economy annually, creating hundreds of thousands of new jobs. Although this sector is even less developed than services, the Commission has adopted what it calls "an ambitious strategy" to improve matters. It is also dealing with flanking measures such as the modernisation of intellectual property rights enforcement, the rules on parcel delivery, the collaborative economy and e-commerce.¹⁴

This, though, is a one-dimensional view of the Market. In addition to the purely trade functions, the process of economic integration embodied in building the Market is also used to further the broader agenda of political integration through the so-called "Monnet method" of step-by-step integration, or *engrenage*. 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.¹⁵

The functioning of the Market

The main mechanism for securing free movement of goods across internal borders is the establishment of treaty commitments between member states, which prohibit tariff barriers and quantitative restrictions such as quotas.

Additionally, the treaties explicitly prohibit the imposition of charges which have an effect equivalent to those of customs duties (Articles 28(1) and 30 TFEU) and measures having an effect equivalent to quantitative restrictions (Articles 34 and 35 TFEU). These provisions have been substantially reinforced by rulings from the European Court of Justice.¹⁶

A third element is the progressive harmonisation of national laws, establishing common rules aimed at guaranteeing both free circulation of goods and services. In respects of goods, manufacturers and traders only have to work to one code. By replacing national codes (and the freedom to legislate unilaterally), regulation ceases to act as barriers to trade.

Despite its prominence, the harmonisation process is only one of three possible mechanisms by which regulatory barriers to trade can be removed. Market liberalisation is one other – where the state retreats entirely from product regulation and allows market forces to prevail. However, regulatory intervention has been building over centuries and is now so well established,

¹² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN>

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ For a full description of this mechanism, see *The Great Deception*, by Christopher Booker and this author.

¹⁶ http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.2.html

either as a result of consumer pressure or demands from trade, that expectations of extensive liberalisation (deregulation) are unrealistic.

An alternative mechanism is mutual recognition of standards where each Member State recognises the regulatory standards of the other Members. Thus, any product which satisfies the regulatory requirements of the state in which it is produced (the Home state) can be lawfully marketed in any other state, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject.¹⁷

This has not happened spontaneously, but emerged from an ECJ ruling in the now famous *Cassis de Dijon* case of 1979, reinforced by Case 113/80 of 1981.^{18,19} The principle was not fully incorporated into EU law until 2008, in Regulation (EC) No 764/2008, "laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State".²⁰ It is estimated that mutual recognition affects 25 percent of intra-EU trade, applying mainly to newly emerging products.²¹

The "building blocks"

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.²²

In explaining what the Market is, the Commission resorts to analogy of "building blocks". These are best developed in the goods sector, where 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.²³

Alongside this is the second "building block" - a body of law defining the conformity assessment procedures. This law sets out the testing and verification procedures which must be carried out before certain products can be placed on the EU market. A parallel body of law defines a system of accreditation, designed to ensure that conformity assessment bodies have the technical capacity to perform their duties. This in turn relies on law which defines and records official Notified Bodies - organisations authorised by Member States to assess the conformity of certain products before they are placed on the market.

¹⁷ http://aei.pitt.edu/1852/1/ENEPRI_WP16.pdf

¹⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61978CJ0120&from=en>

¹⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61980CJ0113&from=EN>

²⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0764&from=EN>

²¹ http://ec.europa.eu/internal_market/economic-reports/docs/bkground_en.pdf

²² As of October 2016.

²³ http://ec.europa.eu/growth/single-market/goods/building-blocks/market-surveillance/organisation_en

Another "building block" of the Single Market in goods is CE marking, used to signify that products have been assessed in accordance with relevant EU rules and meet the relevant safety, health and environmental protection requirements. Then, according to the Commission, the final pillar or "building block" of the Single Market is its legal metrology, with legislation providing a consistent basis for measurement.

Underpinning the entire system is then the "building block" of market surveillance. This is a systematic process of official monitoring to ensure conformity with community law. Much of this is carried out by regulatory agencies. 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.

Key details are lodged on the Information and Communication System on Market Surveillance (ICSMS) and the EU Rapid Alert System for Non-Food Consumer Products (RAPEX).²⁴ These are IT platforms designed to facilitate communication between market surveillance bodies in the EU and EFTA states.

Rule-making

Based as it is on an ever-expanding and developing regulatory code, the Single Market requires a capability to produce formal (and informal) rules, and the ability to adjust and amend existing codes as the circumstances demand. Necessarily, this means that the rule-making process itself is an integral part of the Single Market – not an adjunct. This is clearly illustrated by a 1988 Commission brochure explaining the Single Market, where the first part is devoted to the law-making process.²⁵

Although the EU's formal rule-making apparatus is multi-functional, standard-setting is an ongoing process and a recognisable and necessary part of the Market. 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. It is they which define the working parameters across the entire spectrum of market activity, from product standards to procedural rules which define the functioning of the market and its administration.

The classic tripartite system of the European Union is well known – the Commission, Council and European Parliament – and relatively well understood. Less well-known are the legislative systems adopted, in particular the co-decision process (now called the ordinary legislative process) by which much of the legislation is approved.

Less well-understood is that the formal, visible legislative system is but a small part of the whole. When it comes to product standards, much of the rule-making

²⁴ <http://ec.europa.eu/DocsRoom/documents/19308/attachments/1/translations/>

²⁵ http://aei.pitt.edu/40873/1/IM_services_DEC.88.pdf

is undertaken outside the formal the European Union, to the extent that the EU as a whole has become a law-taker rather than a law-maker.

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.²⁶ Its institutions are often heavily engaged in proposing, negotiating and revising it at global level. In some instances (as with UNECE/WP.29 vehicle standards), the quasi-legislation is based on EU law, "uploaded" to the global level and then "downloaded" under a new identity as a global standard.²⁷

As such – in what amounts to a two-way process – the EU is part of the globalisation dynamic which in turn is a major contributor to the Single Market *acquis*. To that extent, globalisation and the Single Market are inseparable.

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.

As such, change must be directed and managed, for which purpose policy must be formulated. In the main, this function is 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, and thus greater say in the formulation of some global standards. This enables the Union to "export" its regulatory system, to the general advantage of its Member States. 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, which act in an advisory capacity to the Commission. They offer formal opinions on the need for legislation, or the content thereof,

²⁶ See Monograph 13: <http://www.eureferendum.com/documents/BrexitMonograph013.pdf>

²⁷ https://ec.europa.eu/growth/sectors/automotive/technical-harmonisation/international_en

and report on its functioning and whether amendments are needed. These bodies also act as a conduit for external, expert opinion and serve to marshal consensus on specific topics.²⁸

At a global level, as well as regionally, standards must be broadly acceptable to whom they apply. There must be a sense of legitimacy if a high level of compliance is to be assured. While the EU cannot reasonably lay claim to a democratic mandate, it does seek to ascertain views through consultation with trade bodies, with civil society and with individuals who express an interest.

To develop what a very often complex technical standards in the first instance requires a network of standards bodies. 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.

This process embodies a shift to what is known as the "New Approach" to technical harmonisation. The "old" system of the 1970s and 1980s was regarded as heavy-handed and costly. The better (New) approach focuses on common objectives (which overcome the market failures) - and ensure a co-regulatory system with the European standard bodies under strict guarantees, certification (under quality obligations) and EU accreditation of the certification bodies. This regime is regarded as far more flexible and more market driven.²⁹

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.

According to the Commission, another essential element of the Market is the application and "reasonably homogeneous" enforcement of the rules in the Member States. Without this, the Market cannot be said to be truly complete. 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".³⁰

At the centre of this system is the Commission. Empowered by the treaties, it sets the operating framework and, in particular, sets and enforces competition policy, with the prohibition of state aid unless authorised, which monitors

²⁸ [https://europa.eu/european-](https://europa.eu/european-union/sites/europa.eu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf)

[union/sites/europa.eu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf](https://europa.eu/european-union/sites/europa.eu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf)

²⁹ <https://www.coleurope.eu/sites/default/files/research-paper/beep25.pdf>

³⁰ http://aei.pitt.edu/1531/1/internal_market_1994_report.pdf

subsidies, mergers, monopolies and cartels, as well as dumping by external trading partners. In these functions, the Commission also relies on national agencies such as, in the UK, the Competition and Markets Authority (CMA).

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.^{31,32} The Court itself, also functioning as a dispute settlement mechanism, is thus part of the Single Market matrix, taking an active role in the shaping of laws and the functioning of the market.³³

To augment the Court's activities, in 2002, there was a change of emphasis, allowing for a degree of decentralisation. This started with a complaints system called "Solvit", which facilitates direct interaction between Member States and citizens to resolve issues of concern without resort to formal legal proceedings.^{34,35}

Subsequently other networks have been established, such as the Points of Single Contact, which allows service providers to complete procedures online and in one place so they can deliver services in other Member States.³⁶ Another is the Internal Market Information System, which allows Member States to share information quickly on services and recognition of qualifications.³⁷

Longer term, 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, which aims to "keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising on policy objectives".³⁸

Conclusions

What is evident from the narrative offered in this Monograph is that the Single Market is a complex and sophisticated creation. It is far more than a set of trading rules or concessions of the type that are seen in free trade agreements, whether basic or comprehensive. It would not be wrong to describe it as the most complex and sophisticated trading agreement ever attempted, with depths which defy easy description.

³¹ https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/infringement-procedure_en

³² https://ec.europa.eu/info/infringement-procedure_en

³³ <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4769&context=lcp>

³⁴ http://ec.europa.eu/internal_market/economic-reports/docs/bkgground_en.pdf

³⁵ http://ec.europa.eu/solvit/index_en.htm

³⁶ http://ec.europa.eu/internal_market/eu-go/index_en.htm

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http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/internal_market_information_system/index_en.htm

³⁸ http://ec.europa.eu/info/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less_en

What is also evident is that 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.

On that basis, the Single Market is better defined as a cooperative venture between Member States which agree to coordinate their regulatory systems, and related operational systems, in the interests of expanding trading opportunities

What this highlights is an interesting conundrum. 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, *per se*. Rather, the UK would cease to coordinate its measures with other countries in the EEA and lose access to their markets. With that would come the freedom to devise internal regulation more in keeping with domestic needs, although the price of closing down trade with former EEA partners may prove unacceptable.

If, as a result, the UK decides on a different set of arrangements – with the same or different partners - trade barriers would again be reduced, perhaps to a lesser extent or in different ways, depending on the degree of access demanded and the extent of reciprocity.

Viewed from that perspective, 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.

Logically, therefore, 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 fully and reliably separated, 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.

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