

UCL POLICY BRIEFING – FEBRUARY 2014

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**KEY CONCLUSIONS**

- the EU single market raises important **constitutional issues for the UK and member states**
- **market regulation cannot be detached from wider policy coordination** at the EU level
- new modes of governance have not led to more informed debates on the internal market
- the UK government's Single Market Review illustrates that **whilst the UK wants a single market, it is uncomfortable about the political implications** of that market;

## The Single Market

### Liberalisation, harmonisation and mutual recognition: Time to rethink the balance of competences between the EU and Member States?

**SUMMARY**

This brief discusses key issues in the governance of the single market and the relevance of the Balance of Competences Review on the single market, released by the UK government in July 2013. It highlights:

- the **constitutional issues** that the single market raises;
- the **new modes of governance** of the single market
- the UK government's **Single Market Review**

## Introduction

The establishment of a single market has been a core element of the EU project and one of its most important achievements to date. Despite the successive changes in terminology ('common market', 'internal market', 'single market'), the concept of a unified market within the EU comprising persons, services, goods, and capital has remained a constant feature of EU integration.

However, significant economic and political developments, such as the financial crisis, the Union's enlargement and the important trade imbalances between the member states, have led to a reassessment of the costs and benefits of the single market in the domestic context. In July 2012, the UK Government launched the ambitious project of reviewing the balance of competences between the UK and the EU in 32 reports. In July 2013, the Single Market Review<sup>1</sup> was released.

## Key issues

### Constitutional aspects of the EU single market

Article 26 of the Treaty on the Functioning of the European Union (TFEU) establishes an 'internal market' amongst EU Member States and sets out its main elements.

By enshrining the ‘four freedoms’, the Treaty establishes the EU single market as a free trade and, indeed a free movement, area. Yet, the ‘internal market’ concept has limited descriptive value as it refrains from defining the constitutional aspects of the single market. The Treaties do not explain **how the internal market operates** or **how responsibilities are allocated** amongst its different actors. These questions are particularly significant as tensions can and do arise between member state agendas and that of the EU.

Article 26 (2) TFEU:

*“The internal market shall comprise 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.”*

More specifically, the establishment of the single market poses challenges regarding:

- the **autonomy of member states** and the **reach of EU regulation**: for example, how much is too much EU regulation? What are the respective responsibilities of member states and of EU institutions in overseeing the principles of a single market?
- the type of **justifications that should be taken into account when derogating from common standards**: for example, how much ‘national interest’ do member states retain?
- the **quality of EU legislative activity**: for example, what kind of harmonization is the EU aiming for and is it interested in fighting a ‘race to the bottom’?

These issues are the subject of a long-standing debate between the EU and the member states and involve significant political choices. However, current policies in the governance of the single market fail to take this debate into account in any depth. Rather, **concerns regarding expediency and effective regulation often take centre stage**. Reinforcing administrative cooperation, rather than making room for a classic legislative format, is often considered preferable<sup>2</sup>. Shying away from directional questions regarding the single market is likely to create further problems in the long term.

## New modes of governance and their impact

### Towards broader policy coordination

In the early 1990s the single market was the platform for discussing the Union’s main policy issues. Today, it has been overtaken by wider EU agendas, such as a plan of exit from the financial crisis and the Europe 2020 strategy. It is through the lens of these policies that the single market is now discussed. This has important implications for the architecture of the single market and the ways it is governed.

Firstly, traditional concepts of market governance, such as ‘deregulation/reregulation’ no longer function seamlessly: deregulation at the national level is not necessarily accompanied by corresponding re-regulation at the EU level. Rather, **market governance is increasingly taking the form of wider policy co-ordination**, which can blur the lines between these concepts. Accordingly, the objective of Europe 2020 is integration of the different areas of EU competence through policy coordination, rather than subject-specific regulation.

Secondly, there is an increasing amount of **country-specific governance** after enlargement and the financial crisis. New policies, such as the European Semester, operate on the basis of

<sup>2</sup> As the European Commission’s Single Market II report demonstrates

country-specific reports asking member states to follow certain recommendations (e.g. to liberalise specific markets), rather than harmonising at the EU level. Additionally, for those states that are in receipt of financial support, there is a degree of conditionality: the reports do not merely contain recommendations but, rather, stipulations, in order for financial assistance to be continued.

It follows that there are now **dependencies between regulation of the single market and other EU policies**. No clear lines can be drawn between market regulation and policies such as labour regulation, environmental protection and the management of the financial crisis. It is therefore unhelpful to imagine the EU internal market today as an area of different compartments.

### No more than a change in terminology?

On the whole, the internal market, characterised by legal regulation, judicial decisions and technical language, has been less politically sensitive than other areas of EU competence. New modes of governance may now blur the boundaries between the market and other fields of EU activity, and in light of the financial crisis and the heightened debate on “social Europe”, there may have been a move from ‘shared competences’ towards ‘shared responsibilities’. This notwithstanding, there has arguably been little change in the way the internal market itself is perceived, or indeed, negotiated.

In many ways, the internal market remains a community of law. Economic models are increasingly taken into account, but this only seems to have complicated matters further, while **political questions still remain largely outside of single market discussions** proper. Nonetheless, the policy implications of the single market do raise political controversies (e.g. autonomy of member states, social policy, immigration) and debating these publicly is a matter of constitutional significance for the Union, as well as a question of identity formation more broadly. Indeed, the interplay of different elements in the single market – its laws, its economics and its politics – remains far from reaching a satisfactory balance.

## The Single Market Review

### No new vision, but a contribution to a discursive approach

The Single Market Review was conducted against an ambiguous background. One of the main objectives of the Coalition’s Programme for Government had been to ensure that no further transfers of sovereignty from the UK to the EU would take place. The Balance of Competences Review, which is still ongoing, was intended to assess the allocation of competences between the UK and the EU in different fields. The single market was one of these fields. One view is therefore that the UK government was hoping to confirm its assessment of a clear *imbalance* in EU/Member State competences with a report based on independent evidence.

The Single Market Review has a more nuanced conclusion. It accepts that the single market today is more than just the four freedoms and that there are no clear dividing lines between the competences of the EU and the Member States. It also notes that constitutionally ambiguous concepts, such as labour regulation, have made their way into the internal market more recently.

The Single Market Review exposes some of the contradictions embedded in single market discussion in the UK and spells out one of the main points of contention in public debates: **the UK is content with the economic benefits of the single market but not about the accompanying regulation.** It acknowledges that striking a balance between the EU and Member State competences is a complicated matter and that answers in this field are far from clear. Overall, the Review sets out the components of the single market rather than contributing any new information, but does help to raise awareness and promote discussion of the single market in the UK.

## Impact assessment of the single market

The Single Market Review seeks to assess the UK national interest in the internal market and to quantify the impact of the internal market on the UK. However, three significant problems can be identified in the analysis:

Firstly, **the Review relies on inconclusive data** and opinions expressed by powerful British businesses (submitted through an open call on the government's website), rather than on independently collected data. Furthermore, in its assessment of GDP, the Review relies mainly on EU-wide reports conducted by third parties, rather than on independent and recent research focusing specifically on the UK, to assess GDP.

Secondly, **impact is considered only in economic terms.** Whilst this is considerable (UK GDP has likely increased, overall, by virtue of the internal market), the internal market has also had a positive impact on individuals and on individual rights. It creates a community linked not only by free movement, but also by broader concepts, such as EU citizenship and common values. It is difficult to detach these issues from the single market today (although it is also difficult to quantify them).

Thirdly, the Review **overlooks a number of important problems** in the single market, such as the proliferation of agencies; the centralisation of certification (rubberstamping); and overall standardisation as opposed to a principle of mutual recognition. These developments are controversial and impact assessments regarding their effectiveness would be a valuable contribution to the evolution of the single market and help to address the ultimate question as to the legitimate degree of interference of the EU with the domestic realm.

## A level playing field? Different member state agendas

The Review emphasises the **inability of Member States to integrate levelly.** Whilst this is an important concern, a degree of differentiation is unavoidable (for example, the obligations of Eurozone versus non-Eurozone Member States). Although there are significant problems in the way Member States integrate, the Review's consideration of these appears selective and does not reflect that the single market is a complex epistemic community.

## BACKGROUND

In the academic year 2013-14, the UCL Faculty of Laws, the UCL European Institute, the UCL Institute for Human Rights and the UCL Centre for Law and Governance in Europe jointly hosted a project on 'Britain & Europe'. Through a series of public debates with experts from academia, the judiciary and policy-makers, and an accompanying resource collection, it sought to shed light on the contentious relationship between the United Kingdom on the one hand, and the European Union and the Council of Europe on the other. The project addressed key issues currently affecting this relationship, with a special focus on their legal dimension.

The third seminar of the Series, 'The Single Market & liberalisation, harmonisation and mutual recognition: Time to rethink the balance of competences between the EU and the Member States?' was on 27 November 2013 and concerned current developments in Europe's single market, governance issues and the UK government's Balance of Competences Review on the Single Market. The seminar was chaired by Dr Ioannis Lianos (UCL) with presentations by Professor Kenneth Armstrong (Cambridge), Professor Kalypso Nicolaïdis (Oxford) and Professor Stephen Weatherill (Oxford). This policy brief is based on their contributions as well as background research.

Arguably, the UK government seeks solutions that will keep the single market in place while **shaping it according to national interests.** It thus favours cross-sectoral horizontal transfers of power (such as the 'Digital Single Market'), rather than mutual recognition (that is, accepting different standards). Instead of using the EU to drive debates on how to improve regulation – a field where the UK could be a leading contributor – the UK all too often folds such issues into a constitutional debate about either domestic sovereignty or EU law, combined with the question of the UK leaving the EU. This undermines opportunities to discuss internal market policy in a constructive way.

## Conclusions

The single market today faces important challenges. EU policies have failed to accommodate these and consequently they garner significant concerns domestically. It is becoming increasingly clear that the political implications of the single market cannot be detached from its regulation and that a **culture of more open debate amongst the EU and the Member States is required.**

The Single Market Review spells out many of these issues and presents a clear picture of the UK position on the EU single market: the UK is benefiting from the single market, but is dissatisfied with several aspects of EU regulation. The Review is an important development in the sense that it presents a measured assessment of the single market, which can raise awareness. However, **many of its findings are presented in a partial way** and appear to advance a particular political perspective.

The single market is not an area of clear compartments; it increasingly spills over into particularly sensitive fields. Whilst it is important to keep discussions about market regulation open to political issues, it is equally useful to keep this debate **collective and forward-looking,** rather than allowing it to enter the realm of specific Member State politics.

