1. The European Single Market (SM) is ultimately based on Treaty provisions, in particular on the foundations set out in the Treaty of Rome, establishing the free movement of goods, services, capital and labour, and the Single European Act (SEA), which set the objective of establishing a single market by 31 December 1992.

2. Establishing new Treaties requires a unanimous vote of all member states. The SEA extended Qualified Majority Voting (i.e. removing the ability of individual states to veto new legislation) to new areas to facilitate further economic integration, within the framework of the Treaties. All legal provisions underpinning the SM are thus based on the consent of the member states (as well as the European Parliament), following the relevant legislative procedure prescribed by the Treaties.

3. The final and highest arbitrator for the interpretation of these provisions and legal principles is the European Court of Justice (ECJ). Individuals and economic actors have rights and obligations under these provisions, which are enforced directly through their national courts which refer relevant cases to the ECJ. The jurisprudence of the ECJ is an important component of the European Single Market.

A level playing field

4. To ensure the free movement of goods the Single Market is based on a customs union, i.e. a free trade area with a common external tariff. However, the most challenging aspect is how to deal with potential Non-Tariff Barriers (NTBs), for example red tape or specific health or environmental provisions that hinder or prevent cross-border market access. Where national regimes differ, legal provisions pursuing legitimate national policy objectives (e.g. public health provisions) may also distort the level playing field and prevent market access.

5. Different standards on horizontal framework policies, such as consumer protection or data protection, can also distort the market, leading potentially to countries gaining an unfair competitive advantage by undercutting standards,

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1 This note does not discuss the issues raised by the UKIM Bill for the UK-EU relationship, in particular the admission by the UK Government that the bill breaks international law.
ultimately leading to a race to the bottom. In addition, unless there is horizontal competition policy and provisions to limit/prevent state aid, which are uniformly enforced, companies or countries can gain an unfair competitive advantage.

6. A further complication can arise in the cross-border provision of services, for example if there are significant differences in professional qualifications or if there are specific differing professional registration requirements.

7. The European Single Market also provides for an opening of public procurement across borders, where non-domestic EU companies have to be treated equally to domestic ones.

Potential policy approaches to create a Single Market

8. Harmonisation – legislation which is identical across the whole single market territory - removes the risk of regulatory divergence but does not allow for differing policy preferences.

9. Minimum standards – a form of harmonisation requiring only a minimum level, e.g. of environmental standards, leaving it to individual countries to exceed these minimum levels if politically desired. While this can prevent dumping, it can be tricky to define the minimum standard required and it can lead to market fragmentation.

10. Non-discrimination - Under EU law, a Member State measure is not permitted if it is a quantitative restriction or a measure having equivalent effect to a quantitative restriction (MEQR). The 'Dassonville Formula' (Case 8-74) set out by the ECJ determines an MEQR as 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. This rule is subject to important exceptions.

11. Mutual recognition - products lawfully marketed in one Member State can be sold in other Member States whether or not they comply with the national technical rules of these Member States. This principle is recognised and well-practised within the EU Framework (Case 120/78 Cassis De Dijon) particularly to manage areas where harmonisation does not exist in order to keep the internal market functional and operational. Again, this rule is subject to important exceptions.

Possible justifications for provisions that might hinder cross-border trade

12. Under EU law, Article 36 TFEU (goods) and Article 45 TFEU (services) allow Member States to derogate from the rules of non-discrimination and mutual recognition where this is justified by policies aiming for protection in areas such as health, environment, and for consumers and workers. Article 36 TFEU also includes exceptions for the protection of national treasures, protection of industrial or commercial property, public morality, public policy, public security and public health. In addition to Article 36 TFEU, EU law recognises additional exceptions to the mutual recognition principle (‘imperative requirements in the
public interest') which were outlined in Cassis and include important exceptions such as protection of the environment, workers’ rights and fiscal supervision.

13. EU Internal Market Law relies heavily on the principles of proportionality and subsidiarity\(^2\) when determining whether a measure is in contravention to regulation:

a. Subsidiarity: In areas not falling within its exclusive competence, the Union shall only act if the objectives being pursued cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but by reason of the scale or the effects of the envisaged action, rather be better achieved at Union level.

b. Proportionality: The principle of proportionality requires that the content and form of Union action must not exceed what is necessary to achieve the objectives being sought.

The law relating to provision of services follows similar, but not identical lines, particularly as regards the grounds on which freedom to provide services may be restricted by national measures, and the rules regarding mutual recognition of professional qualifications.

**The European Single Market: complex and balanced**

14. The European Single Market has developed significantly over time, and is still in the process of changing, for example with continuing discussion and legal cases aiming to determine whether different corporate tax arrangements are unjustifiable distortions of competition.

15. The uniform application and enforcement of horizontal policies, such as public procurement, competition law and state aid control, are crucial for the creation of a Single Market. In addition, there is also a need to address cooperation outside the four freedoms in so-called flanking areas, including Budgetary Matters, Civil Protection, Company Law, Consumer Protection, Cultural Affairs, Education, Training and Youth, Employment and Social Policy, Environment, Gender Equality, Anti-Discrimination and Family Policy, Health and Safety at Work and Labour Law, Public Health, Research and Innovation, Single Market Policies and Tools and Statistics.\(^3\)

16. The development of the Single Market has had to rely on the consent of the member states, respecting their regulatory and policy competences and political preferences while at the same time ensuring that there are no undue impediments to cross-border trade. This has required striking a balance between principles such as harmonisation and mutual discrimination, and proportionality and subsidiarity.


\(^3\) Taken from [https://www.efta.int/eea/policy-areas/flanking-horizontal-policies](https://www.efta.int/eea/policy-areas/flanking-horizontal-policies)
17. The resulting regulatory framework is rather complex. To illustrate this complexity, it is illuminating to simply look at the number of headings, principles, exceptions and special provisions that are listed in the European Commission’s Guide to the application of Treaty provisions governing the free movement of goods.  

18. Crucially, the enforcement of the SM provisions is not in the hands of politicians. Rather the opposite, the SM constrains political administrations in those areas where competences have been transferred to the European level. Without such an impartial and overarching implementation, the SM would simply not work.

**UK Internal Market (UKIM) Bill in contrast with the European Single Market**

19. While the proposals for the UK internal market use some of the same terminology as the SM (mutual recognition and non-discrimination), there are many crucial differences. For example, Sir David Edward has noted “the White Paper omits any reference to the principles of proportionality and subsidiarity which are essential ways of balancing and reconciling conflict.” He also observed that “the principles of mutual recognition and non-discrimination are not simple matters.” He has pointed to a huge volume of European case law and other writing on what he calls a “highly complex and sophisticated subject”.

20. There are many differences in the UKIM bill to the European SM provisions, ranging from the scope of exceptions listed (e.g. Schedule 1 of the UKIM Bill establishing the exceptions on goods (Clause 10) does not include protection of national treasures, protection of industrial or commercial property, public morality, public policy, or public security unlike Article 36 TFEU) to the possibility that the exceptions may be amended by the Secretary of State under the affirmative resolution procedure (a parliamentary procedure applying to statutory instruments which demands approval from the House of Commons and the House of Lords) (Clause 10(2)-(3)).

21. Certain crucial horizontal powers are allocated to the UK Government, for example the power to provide financial assistance in areas which, under the EU Structural Funds, the devolved administrations had discretion on how it was spent. Under the UK Shared Prosperity Fund the UK Government has direct control over how financial assistance is allocated in devolved areas including: water, sewerage, railway facilities, roads and other transport facilities, health, education, cultural and sports facilities, courts, housing. Under Clause 48 the devolution statutes are to be amended to reserve State Aid solely for the UK Government.

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4 Ref. Ares(2013)3759436 - 18/12/2013  

5 Neither the proportionality nor the subsidiarity principle are mentioned also within the UKIM Bill.

6 As quoted by Michael Russell  
https://www.theyworkforyou.com/sp/?id=2020-07-30.1.0
22. There is also a governance gap. A new independent Office for the Internal Market will be set up within the Competition and Markets Authority (CMA) and given a monitoring function under the UKIM Bill. It will be given powers to monitor and report on the operation of the UK internal market (Clause 29), advise on proposed regulation (Clause 30), provide reports on already passed regulations (Clause 31), and has certain information-gathering powers in which it can enforce penalties for a failure to comply (Clauses 36 – 38). But, unlike the Commission, there are no enforcement powers for the CMA. Disputes and regulatory differences between the UK Government and the Devolved Administrations, according to the White Paper, are to be resolved at the political level in the Joint Ministerial Committee and through the Common Frameworks.

23. In conclusion, the UKIM Bill only superficially resembles the European Single Market. There are crucial omissions and differences to the legal framework and its enforcement. In particular, the UKIM Bill appears to strike a different balance, strongly prioritising internal trade and mutual recognition over subsidiarity and proportionality considerations, which are omitted altogether. In addition, the governance differs significantly, with the SM overarching, objective enforcement and arbitration not replicated in the UKIM Bill.

Fabian Zuleeg
Committee Adviser on EU Constitutional Law