
EU Regulation and the European single market: Incompatible or inseparable?

A significant element in the present debate about the future of the United Kingdom (UK) within the European Union (EU) is the supposed regulatory burden imposed upon the British economy by British membership of the Union. Those who are opposed to British membership of the Union, at least on present terms, often like to depict the EU as a self-aggrandising institution addicted to centralising regulation for its own sake. Too many of those in this country who are more sympathetic to the Union seem to accept this general complaint, but simply argue that EU legislation is not as burdensome as the most vociferous critics claim, and that the overall benefits of EU membership outweigh any disadvantages of this nature. The previous Labour government was often inclined to propagate this second perception of the EU. Its cautious and apologetic tone in European matters was presumably adopted as a tactic intended to neutralise hostility, in the fear that a more assertively pro-European case would be provocative. Whatever the reason for this tactic, from New Labour and others, it has clearly failed. The balance of public debate about the EU in the UK, and the way in which the debate is framed, have moved relentlessly towards an ever more irreflective endorsement of eurosceptic analysis and policies. The following paper makes a series of observations to challenge the premises which participants in the discussion about the appropriateness of EU regulation, sometimes from different sides of the debate, all too often accept.

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The extent and desirability of European regulation

Underpinning much of the debate in the United Kingdom about the EU is a widespread assumption that European regulation, notably that of an economic or social nature, is in itself undesirable. It is held to be a restraint upon potential economic dynamism, imposing a burden on business and generally interfering in people's lives in an undesirable and inappropriate fashion. Opponents of the European Union in this country routinely seek to emphasise the quantity of UK law which is supposedly of European origin, apparently on the grounds that such measures are inherently bad, and the more of them there are, the worse.

It should be stressed from the outset that the relationship between European and British law is a complex one, allowing a wide range of 'calculations' affecting to demonstrate the statistical relationship between one and the other. Most European regulatory activity is agreed between the member states of the Union, including the United Kingdom, in the form of European directives, which do not usually have direct effect in British law. It is therefore up to the British government to decide how it will implement in British law its European obligations arising from any directive. Like all European governments, the British government may well go further than its European obligations demand when producing legislation which it depicts as simply the implementation of European directives. Furthermore, the British government can if it wishes present as 'European legislation' measures which it had in any case intended to implement for purely domestic reasons. The same Act of Parliament or statutory instrument may contain some clauses which are European-derived and others which are not, making the straightforward classification of legislation as 'European' problematic. Consequently claims about percentages and costs are often dubious. Research produced by the House of Commons

Library, the work of which was often relied on by the previous government in parliamentary statements, suggests that between 1997 and 2009 14.1 per cent of statutory instruments (secondary legislation) and 6.8 per cent of statute laws (primary legislation) played a part in the implementation of EU requirements. These figures fall well below more sensationalist assertions and insinuations. Yet even they should be approached with caution since – as the Library acknowledges – they do not reveal the extent to which each piece of legislation is a direct consequence of EU law. It should also be noted that quantitative measurement, in as far as it is possible, does not reveal the relative qualitative importance of particular pieces of legislation, and individual sections within them.

Furthermore, the very premise that European regulation is a negative phenomenon should be challenged. Such regulation may in many cases be intrinsically desirable, and would command wide popular support in Britain if the public were asked about the principles it enforced. The EU is in a unique position to produce legislation that benefits all of the member states and their populations. EU regulation, like regulation issued at all levels of governance, may of course vary in its desirability and effectiveness. But it does not follow that the less regulation which exists the better.

Even if the narrow perspective of financial costs arising from regulation is used, it is important to include all the financial elements of the calculation. Having single regulations covering the whole of the EU means that, in each given area which a particular regulation covers, firms only have to meet one set of requirements for the whole market, not a different one for each member state. Consequently, the general tendency of European regulation is to bring about reductions in the financial burden of regulation for companies operating within the single market (and potentially when exporting outside the EU). The more widely they trade, the more they benefit. This arrangement can hardly be

seen as a restraint on economic dynamism to those, within the UK and elsewhere in the EU, who benefit from it.

Furthermore, it is necessary to consider what are the wider costs of failing to regulate, or not regulating in a sufficiently demanding manner. Regulation can be a means of preventing businesses from creating costs to society, for instance through pollution or traffic congestion. The concept of avoiding wider social costs through regulation is important. The present global economic downturn is to a large extent the product of the failure effectively to regulate banking. In this case the costs of non-regulation are incalculably high. More specific problems can arise in particular sectors as a consequence of inadequate regulation, as with the recent horsemeat scandal. These episodes can seriously undermine consumer confidence. The negative financial consequences for the businesses involved are likely far to outstrip the supposed burden of the additional regulation which might have prevented the particular problem in the first place. Indeed, in the wake of these kind of incidents there is often clamour for more regulation, including from media sources in the UK that are otherwise highly critical of the very idea of EU regulation. It seems likely, in the wake of the horsemeat affair, that EU food labelling regulations will – with public support – be tightened in future. The immediate ‘cost’ could therefore rise. Yet both consumers and producers would benefit from this change if executed properly. Producing no new regulation, or removing the regulation which exists, could end in a recurrence of food labelling-related scandals.

The relationship between regulation and the single market

A widely accepted principle across the EU, including within the UK, is that the single market is essential to the economic well-being of the EU and its member states. In his speech

on the European Union given on 23rd January 2013, David Cameron stated: “At the core of the European Union must be, as it is now, the single market. Britain is at the heart of that single market, and must remain so.” But Mr Cameron and many of his supporters all too often seem to ignore the reality that sustainable free markets require a substantial amount of regulation. Indeed it would be fair to say that regulation makes the difference between a simple customs union, as prevailed in the European Community in earlier decades, and a genuine single market as introduced in 1992.

The foundation of any market economy is the rule of law, that is a transparent set of regulations, independently enforced, to which all players – both private and public – are subject. It means, for instance, that contracts are binding, conditions of trade are protected from arbitrary modification, and some degree of equality exists between different parties. Deficiencies in the rule of law create a damaging climate of uncertainty with harmful consequences for business activity. Like any other genuine free market, the European single market has mechanisms to ensure the prevalence of the rule of law, including legislative, executive and judicial institutions. The existence and activities of precisely these bodies are a focus for much criticism of the EU within the UK. Yet they are essential to the maintenance of a market economy in which meaningful competition takes place. For instance, were it not for European regulations, the environment for new entrants and for the small and medium-sized enterprises to which the present UK government attaches great importance could be made more difficult by more established and larger players.

As well as a general requirement for the rule of law, there is a need for market regulation. Free markets need protecting from themselves. The different players within them are driven by self-interest, not a desire to preserve a particular ideal economic system. If not constrained, a danger exists they will pursue restrictive

practices, either on their own account or in cartel-type alliances with others. In the EU context a particular danger is that national-level regulations will serve to discriminate against firms within the EU but outside the particular member state concerned. The mere removal of tariffs within the European customs union was not sufficient to the establishment of a functioning European single market. It was necessary to seek to eliminate and prevent the re-appearance of so-called 'non-tariff barriers'.

Since single markets require a degree of conformity, the European single market requires in the same way conformity of national regulations. Every member state participating in this market has to some extent altered its practices to comply, and has had to accept that future decisions in this area will be taken at European level, with member states participating. In any given area, what might seem an appropriate way of operating from within one particular member state – for instance, the approach to beer content that traditionally prevailed in Germany – may seem to others an unacceptable non-tariff barrier. Since every member state has distinct economic circumstances, the impact of each given EU directive cannot be uniform throughout the EU, which means that for each measure, the benefits and costs for different member states will vary. Sometimes, for the UK as for every member state, the costs in individual areas will outweigh the benefits; but the net impact of regulation, which sustains the single market, is beneficial to all who take part. Indeed, a problem which is often overlooked in this country because of the perception of European regulation as purely a negative phenomenon, is the need properly to enforce regulations across the EU. If it seeks a more effective single market, the UK might be better advised to seek more comprehensive and rigorous compliance with regulation amongst all member states, rather than a reduction in the regulatory scope of the EU.

Social regulation is particularly controversial. Yet there is a strong case that it is

necessary to a functioning single market to have minimum social standards of some kind. One means by which states can seek to secure commercial competitive advantage over other states is through lessening the obligations of employers to their employees. Rivalry of this kind between parties within the same single market could, if taken to an extreme, undermine the cohesion and even political stability of that bloc. For a single market to function effectively it is necessary to have at least basic minimums of some kind in place. How extensive those standards will be varies according to a combination of social, economic and political tendencies within the single market concerned. But they will exist in some form, determined by whatever mechanisms for deliberation and decision exist within the given single market. To realise the principle of basic social harmonisation at European level, once again, some degree of convergence has been necessary, with member states in some cases moving away from their previous approaches, and having to accept that future decisions will be made on a European rather than national basis.

How one views particular measures depends partly on perspective. While opponents of the EU on the political right in the UK regard the impact of European social legislation as excessively interventionist, some within the UK labour movement complain of supposedly rising neo-liberal inclinations within the EU. It is impossible for all groups within all member states to be satisfied all the time. But this fact does not mean that the practice of social regulation by the EU should or can be abandoned. If in a particular area the UK believes that the EU is intruding into areas that would be better dealt with at member state level, it remains open to it to seek to build a coalition within the EU to try and achieve change, an approach much more likely to succeed than seeking the chimera of dismantling the Union's regulatory structure, or achieving a substantial change in UK terms of membership of the EU.

European regulation, then, is intrinsic to the

European single market. It is ironic that British discourse surrounding the perceived problem of European regulation treats the single market as a desirable feature of the EU, but attempts to separate that single market from the regulation which it implies. In his speech of 23rd January Mr Cameron asserted that members of the public “resent the interference in our national life by what they see as unnecessary rules and regulation” and wanted to know “why can’t we just have what we voted to join – a common market?”. The comments Mr Cameron reports show a misunderstanding of the present nature of the EU. The time of a Common Market, which prevailed when the UK joined the Community in 1973 and when it held a referendum on continued membership in 1975, is long past. Nonetheless here is the crux of Conservative policy on the issue.

Broadly speaking the desire of Mr Cameron’s party is to remain within the EU, but to see it become a free trade area rather than the single market it has been since 1992. Under their ideal arrangement, European regulation would be kept to an absolute minimum, and the UK would be able to pursue the most flexible arrangements possible. If this kind of change cannot be achieved for the EU as a whole, Mr Cameron and other Conservatives hope that the UK can achieve its own opt-outs, enabling it to deregulate while retaining access to the single market. The internal flaw with this approach is that if the EU as a whole was not bound by its present corpus of common regulations, individual member states would not only be able to remove regulations (which is something the Conservatives, rightly or wrongly, tend to see as desirable), but introduce new ones which created non-tariff barriers intended to favour commercial concerns within the member state concerned. Constraints on trade within the EU would thereby grow, to the detriment of its overall effectiveness. It would no longer be the European single market. If, on the other hand, the UK were to obtain some kind of opt-out from certain regulations (or if it left the EU),

it seems implausible that other EU member states would tolerate an arrangement which meant the UK enjoyed full access to the single market, while being able to use a greater level of flexibility heavily to pursue competitive advantage against the member states.

Another point of note is that the criticism of European regulations within the UK is taking place within a member state that was an important motivating force behind the move to pursue the single market in the mid-1980s. Those who sought to extend the scope of the European Community at this time judged that this particular goal, given expression by the Single European Act, was acceptable to the UK. The UK is therefore a longstanding supporter of the single market but cannot fully accept the means involved in securing it. Portions of Mr Cameron’s speech even called for extensions of the single market. He lamented that “the single market remains incomplete in services, energy and digital”. It was, Mr Cameron argued, “nonsense that people shopping online in some parts of Europe are unable to access the best deals because of where they live.” He wanted “completing the single market to be our driving mission.” Mr Cameron did not acknowledge that these objectives could only be achieved by more regulations, alongside new bureaucratic structures to develop and implement the associated policies. He then stated his support for EU free trade agreements with the US, India and Japan, which would inevitably entail further regulation and bureaucracy still, a fact which again he did not note. Curiously in the next sentence he described his desire “to be pushing to exempt Europe’s smallest entrepreneurial companies from more EU directives”.

All of these objectives cannot be reconciled. A more complete single market, part of a growing international network of free trade agreements, cannot be accomplished while at the same time exempting a significant portion of business from the regulations that would be needed to achieve these goals. Nor would it seem plausible to reduce the scale of the EU

administration while attaching significant new responsibilities to the EU, which extensions of the single market and additional free trade agreements would inevitably involve.

The implications of a reduction in EU regulation, either across the EU as a whole or in its application to the UK, for the viability of the single market

It follows from the preceding account of the inseparability of regulation and the single market that a lessening of the remit of the EU with respect to the former could undermine the viability of the latter. Member states, driven by domestic interest groups, would be likely to establish non-tariff barriers. Increased scope for large enterprises to pursue practices inimical to competition would probably develop, if such issues were to be tackled at member state rather than European level. Small and medium-sized enterprises and aspiring new entrants into markets might suffer. These trends could be detrimental to consumers within the EU, the overall global competitiveness of the EU economy, and the particular objectives of member states including the UK. A lessening of regulation in areas such as health and safety and employment rights could encourage some member states to seek competitive advantage through reducing standards. The consequence could be destabilisation of the European economy, social strains, and pressure for a 'race to the bottom' between member states. Citizens of the EU as a whole could lose out both as consumers and workers. It is likely that, if there were serious downward pressure on standards as between member states, a number of countries would be able to 'underbid' the UK. Criticism of such practices would be voiced in the UK, including by those who at present object to EU regulation. But there would be nothing that could be done to prevent them.

There is a further international dimension to EU regulation. Were its role somehow to

be lessened, the position of the EU within the World Trade Organisation (WTO) could be compromised, as might the overall credibility of the WTO and the trade liberalisation agenda it promotes, backed by the EU (and by the UK individually). The ability of EU member states to seek other parties internationally to comply with WTO or equivalent standards would be undermined. Existing trade agreements between the EU and outside parties might be jeopardised if the EU ceased to comply with standards contained within them. The chances of reaching projected free trade agreements with states such as the US and Japan, which the UK government sees as essential to future economic success, would be harmed.

The merits and effectiveness of the EU as compared with other governmental institutions

Criticisms of European regulation often form part of a broader narrative about the supposed negative features of the EU. In such accounts the EU is portrayed as an excessively bureaucratic organisation. It is held to operate in an inefficient fashion, but at the same time succeeding in interfering in the economies of the UK and other member states. The overall picture is of an overpowerful and overblown institution, with these characteristics disposing it towards the production of unnecessary regulation.

Yet the size of the staff of the EU and the budget at its disposal, when compared to other tiers of government in Europe, including that of the central executive in the UK, do not immediately appear to support such suppositions. Indeed it would be possible to make the case that the EU is surprisingly efficient given the pan-continental scale of its role. Yet there remains an area in which the EU might be considered to fall well short of optimal effectiveness. When compared with member state-level government institutions,

its decision-making procedures, which involve member states as well as European institutions, can indeed appear tardy and ineffectual. Indeed, in his speech on Europe, David Cameron stated “we urgently need to address the sclerotic, ineffective decision-making that is holding us back.” The most obvious solution to this problem, however, would be to lessen the capacity for delay and hesitation from each individual member state in decisions pertaining to EU activities, and to introduce more qualified majority voting, which is certainly not a path favoured by Mr Cameron or others in his Party. They are more likely to see a need to increase the role of individual member states and to promote simply consensual intergovernmentalism, a path which would lead to an EU pattern of decision-making more cumbersome still.

The compatibility of EU economic and social regulation with British models

In eurosceptic accounts the EU is often portrayed as pursuing a socially and economically interventionist model. It is held that the mainland Western European powers that have played a major role in the long-term shaping of the EU tend broadly towards characteristics such as relatively high levels of taxation, more generous welfare provision and more highly-regulated labour markets. EU regulations, it is suggested, have reflected these kind of preferences. The UK, such accounts suggest, is forced increasingly by its EU membership to conform to these models, and is restricted in its ability to pursue more flexible methods that might increase its international competitiveness. Such accounts often seek to place the UK within an ‘Anglo-Saxon’ group alongside the US, in contrast to other European economies.

Those more sympathetic to the EU often point out to claim that membership of the EU has not prevented the UK from following

its own course of greater flexibility. The same Prime Minister, Margaret Thatcher, who is regarded as the most significant promoter of free market economics for the UK in modern times, encouraged the introduction of the single market, which she perceived as an integral part of her economic agenda, though it did not develop precisely as she envisaged. But more importantly, the UK should not anyway be considered a perpetual outlier within Europe in its economic and social structures. While the UK may be caricatured as divergent from the EU mainstream, the reality is more complex. Approaches to social policy differ across the EU according to the specific subject under consideration. Attention is often drawn to the considerable overlap which exists between the United Kingdom and, say, Germany on many social issues. Furthermore, the grouping of the UK with the US rather than the rest of the EU is misleading. On important issues, such as public healthcare provision, there are substantial differences between the UK and the US, and this fact is widely recognised within the US.

The possible British approach to regulation if it were outside the EU, or the EU as a whole was reformed, or the UK had altered terms of membership of the EU

A key purpose of many eurosceptics who advocate substantially altering UK terms of membership of the EU, or withdrawing altogether, is to release it from the obligation to abide by European regulatory provisions. Power in certain regulatory areas would, in this scenario, return to UK level. Consequently it is important to consider how this power might be exercised. Eurosceptics usually envisage a reduction in the overall level of regulation. It should not be conceded that such an outcome would necessarily be desirable in itself; and it is doubtful how far it would be achieved anyway. Regulations of some kind would still be needed in the areas presently covered by the EU. Regulations singled out by critics of the EU, such as on the environment and on traffic safety, would inevitably have to be replicated

at UK level if the EU was no longer operating in these fields. Key issues requiring regulation would not go away. The existence of so-called 'gold-plating' of EU directives by the UK government when transposing them into UK law shows that the desire to regulate does not emanate purely from Brussels.

It should not for instance be assumed that no British government would ever wish to adopt legislation relating to hours worked by employees. In his speech of 23rd January, David Cameron singled out for particular criticism one individual piece of European legislation, the Working Time Directive, first adopted in 1993. He argued that "it is neither right nor necessary to claim that the integrity of the single market, or full membership of the European Union requires the working hours of British hospital doctors to be set in Brussels irrespective of the views of British parliamentarians and practitioners." While the Prime Minister's criticism of the directive focuses on the idea that it is inappropriate for a decision in this area to be taken at European level, it is difficult fully to isolate such arguments from a consideration of the substantive content of the directive. The proposition that junior doctors should have appropriate periods of rest in their treatment of patients can hardly be regarded as one intrinsically repellent to British public opinion. Any British government that sought to use repatriated powers to lengthen the working hours of hospital doctors, might well encounter public opposition in the United Kingdom. It is in any case worth recalling that the British Medical Association says it is happy with the current form of the directive. It seems paradoxical indeed that a directive which inter alia has the apparent effect of protecting the welfare of patients should be held up by the Union's critics in the United Kingdom as a central example of the supposed iniquities of European regulation.

More generally, if the UK utilised its ability to diverge from EU regulations in a way intended to give domestic enterprises a com-

petitive advantage, such activity would have implications for the position of the UK within the single market (or its degree of access to the single market from outside). Retaliatory measures from the EU would be likely which, given the relative sizes of the UK and EU economies, would be more problematic for the UK than for the entire EU. There would also be negative consequences for the part the UK could play in existing or future trade agreements with third parties negotiated by the EU. Yet not to follow a different path from the EU would be to negate the supposed value of obtaining exemptions from its regulatory corpus.

Finally, if the UK obtained a power in some areas to pick and choose which European-level regulations it opted into (aside from how plausible it is that the EU as a whole would permit such an arrangement), British policy-makers might well find they were more often choosing European solutions than they might have expected. The pattern that has been followed with the use of Justice and Home Affairs opt-outs under the Lisbon Treaty is worth noting. The present Coalition has found itself opting in to European measures in this area more than many might have anticipated at the outset of the government. It might do so under public pressure, or simply because a minister deems the measure concerned to be useful. The chance to escape from European obligations in Justice and Home Affairs has not always been taken. If a similar option existed elsewhere, the outcome might be similar.

The democratic merits of a 'repatriation' of powers

A common critique of the EU is that it wields substantial power without possessing democratic legitimacy. It is held that decisions taken at EU level are remote from the populations of the member states upon whom they impact. Eurosceptics in the UK hold that people and businesses in the UK are made subject

to intrusive EU regulations over which they have no meaningful say. If the power to produce such regulations returned to the UK, and came within the competence of UK ministers, it is argued, they could be more readily held accountable by the UK Parliament, which in turn represents the UK population.

There are a variety of difficulties with this broad thesis. First, the UK executive is one of the most centralised within the EU. There has been devolution of political power to Northern Ireland, Scotland and Wales since the late 1990s. But within England, where the bulk of the UK population lives, no devolution has taken place, and local government is constitutionally subordinate to central government. The tendency over a number of decades has been for the transfer of responsibilities in a variety of policy areas such as education, and tax-raising powers, towards central government. This characteristic arises because of the doctrine of parliamentary sovereignty, which allows for no other formally entrenched level of governance within the UK constitution (and serves to create a barrier in the UK to fuller acceptance of participation in European integration). Because of the vast range of powers exercised at UK level, meaningful parliamentary oversight of the totality of activity of the UK executive, including its introduction of secondary legislation, is already impossible. If a change in the position of the UK within the EU (or UK departure from the EU) meant the transfer of more responsibility to UK ministers, Parliament would struggle to hold them properly to account for their expanded functions.

A further democratic problem arises because, as noted above, it is unlikely that the EU as a whole would be willing to tolerate one of its member states, or an ex-member state which wanted to retain access to the single market, using exemptions from various regulations as a means of gaining significant competitive advantage. Consequently, it is likely that in many cases, the UK – and its Parliament – would be faced with a choice between

complying with EU decisions to which it was not party, or calling into question its EU membership and/or its access to the single market. Such a position does not seem an exemplar of democratic decision-taking.

It is true that models do exist for enhancing the extent to which the UK Parliament holds ministers to account for European policy within the EU as presently configured. Some reformers have advocated a system whereby departmental select committees in the House of Commons would meet with ministers before European negotiations and provide them with ‘soft mandates’ setting out the broad parameters of their bargaining position. The minister concerned could then report back to the committee on the negotiations after they had taken place, and provide an account of whether the mandate had been adhered to, and if not, why not.

But there are limitations on the extent to which soft mandating and other schemes designed to increase the input of the Westminster Parliament into executive action in Europe could enhance UK-level democratic accountability. It would only be possible within the UK to hold UK ministers to account, not the institutions in which those ministers participated with ministers of other member states. Yet it would be these institutions which took decisions collectively, beyond the reach of the UK Parliament. Furthermore, each EU member state that introduces these kind of enhancements to the remit of its legislature by implication reduces the overall flexibility of European decision-taking procedures. As a consequence the validity of the charge that the EU is ineffective or sclerotic would grow. Once again, weaknesses and contradictions in the eurosceptic narrative become apparent. It is through challenging premises rather than ceding ground that these flaws can be exposed, and the positive case for Europe advanced.

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