Balance of Competences Review
Free Movement of Services

Discussion Events
Paris, 11 December 2013

NB: the following views were expressed by meeting attendees.

The right of establishment as part of free movement of services has made a huge difference by enabling businesses to establish a network of branches in different Member States rather than setting up individual national companies. One international business established their European operations in the UK with branches in other Member States and wouldn't have done so, had it not been for the right of establishment across the EU. This has several benefits; firstly it enables capital to be pooled across countries, rather than requiring separate pots of capital for each country. It gives a benefit of diversifying markets easily, reducing market risk. It also reduces operating costs by providing a single set of rules with which a business needs to comply and, in financial services, a single prudential regulator. However, there remain individual national regulators for the conduct of business with different expectations and discrepancies in approach (for example, different expectations on notifications). There is scope to improve inter-regulator processes on technical issues – getting national regulators in different Member States to talk to each other is difficult.

There is a perception that the UK gold-plates EU requirements, especially on financial services. The UK tends to much more rule-driven than the French government, and while the rest of the EU is operating under Solvency 1 requirements, the UKPRA has introduced ICA+, which mirrors the requirements of Solvency 2, even though implementation of Solvency 2 has been delayed until 2017. Again, on the stubble-burning directive, the UK implemented immediately and stopped stubble-burning, and yet this continues in France to this day, suggesting greater flexibility in implementation by the French authorities. As a diligent, aggressive regulator the PRA and the regulatory regime in the EU gives confidence to clients and confidence in the UK financial system is an attractor to establish in the UK, but offset by increased regulatory and compliance costs.

French business organisations have pressed for maximum harmonisation in EU legislation as a means of constraining tendencies of the French Government to gold-plate EU Directives – maximum harmonisation gives Member States much less ability to add additional regulatory requirements to EU legislation. On consumer protection, EU action brings benefits to businesses in principle but the reality of regulations and directives may well be more difficult. The General Product Safety Package is welcome as a single set of rules make it easier to sell and market goods across the whole EU. Consumer information and market surveillance should be at EU level to enable products from different Member States to be compared on the

same basis; the EU should bring forward a methodology that enables the green claims of different products to be compared.

A moderate EU law is better than a bad French law; for example, the Consumer Rights Directive was gold-plated in France on consumer information requirements. On competition law, EU action on merger cases was very welcome, particularly on larger cases as the Commission has the ability to handle complex cross-border cases both in technical expertise but also in making judgements without territorial bias. There is, however, room for improvement on procedures and substantial tests between national competition authorities, for example on myferrylink/Eurotunnel. There was no appetite for more powers for the Commission to handle smaller cases, as businesses know their own national authorities who are more likely to listen to business representations than the Commission. In summary, there was scope for greater co-ordination within the EU framework but not for greater powers for the Commission. From time to time, there were conflicts as to which national competition authority had jurisdiction on cases, and there should be a 'court of conflicts', an independent three-person court to decide which Member State had jurisdiction.

There was an opportunity cost associated with EU action – effort was directed towards intra-EU processes that could otherwise have been expended on a more global stage, but working through the EU was more efficient for cross-border businesses than having to comply with different national requirements. The direct effect of EU judgements was also considered very important – other international fora such as the WTO or ECHR would love to have direct effect for their judgements. Since 2004, national competition authorities have had to implement judgements by direct effect on competition law which helps to counter potential fragmentation in the single European competition regime arising from increased devolution within Member States.

EU legislation helps France to be more reasonable but does result in a loss of ambition in the outcomes that France is able to secure; for example, on public procurement French companies want greater reciprocity of market opening in third-country markets but are constrained by the need to find agreement between Member States. In the same way, on consumer protection, the need for agreement between EU Member States constrains more expansionist legislation in France. On data protection, an EU framework facilitates trade, supporting offshoring to other Member States to have call centres (for example) without having to prove equivalence of regimes for data handling and protection, as is the case if offshoring outside of the EU.

There was a traditional reluctance from UK law firms to open up in other EU countries, but this has changed given the opportunity to establish branches in other Member States, enabling companies to realise synergies across the EU. Outside of the EU, law firms may use 'best-friends' affiliates but there is a risk to their corporate reputation, and using such affiliates is much more risky and costly in managing the relationship compared to the ability to operate as a single company within the EU. There are greater barriers in establishing an office in Monaco compared to offices within the EU.

There is still scope to improve the process of access to professions. Whilst lawyers from other Member States can practice in France without having to be registered, they cannot go before a French court without equivalence. Estate agents still need a French national in order to run an estate agency, although they can practice as an estate agent without registration. Taxi drivers need a qualification and each municipality sets rules on the requirements needed to set up a taxi firm – many taxi drivers use their licenses as a pension fund, selling their licenses on retirement for up to €150k.

VAT was not seen as an issue, as establishment was not required in order to pay VAT in France (where services are zero-rated), and there was scope to harmonise further VAT requirements, such as exemptions, between Member States. In the competition sphere, there are a couple of areas where further EU action could be considered. Firstly, actions for damages in competition cases could make the competition regime more effective (in addition to the current Commission ability to fine), and there is currently considerable volatility in potential damages leading to a high level of out-of-court settlements. Whilst a Directive on action for damages could give greater clarity and reduce the volatility in current levels of damages awards, it could reduce the number of cases settled out of court. Secondly, there is an increase in class actions being brought and there is a need for EU action in order to resolve some of the issues of jurisdictional competition. However, it is not clear what the treaty base for any EU action would be.