Review of the
Balance of Competences

Review of the Internal Market: Free Movement of Goods; including the EU Customs Union and Intellectual Property Rights

Call for Evidence

HM Revenue & Customs

Department for Business Innovation & Skills

Intellectual Property Office

1. Introduction

The free movement of goods is an aspect of EU membership that directly or indirectly affects all UK businesses and consumers. The EU's Internal Market (also known as the single market or common market) enables the 'free movement of goods' between EU Member States. This means that, in effect, border controls between Member States have been removed for legally traded or purchased goods. Therefore, most goods can be moved across the borders between EU Member States without the need to pay tax, make customs declarations or obtain customs clearance.

Around half of all the UK's trade is with other EU Member States, and this trade is worth hundreds of billions of pounds to the UK economy. Many of the goods bought and sold in the UK are either made in the EU or have some part of their production process in the EU.

The UK's annual import and export figures for EU and non-EU trade (Annual totals for 2012)

	£billion
Goods imported into the UK from other EU member states	206.2
Goods exported from the UK to other EU member states	150.6
	- 55.6

	£billion
Goods imported into the UK from non-EU countries	199.3
Goods exported from the UK to non-EU countries	146.7
	- 52.6

Source: HMRC

The table above shows the value of UK trade in goods with other EU Member States (both imports and exports), in comparison with the value of UK trade outside the EU. (1)

The ability to move goods freely within the Internal Market is therefore an important part of doing business in the UK. In 2010 over 132,000 UK companies imported goods from the EU and around 112,000 companies exported goods to EU destinations. (2)

Overall, around 15% of British businesses are involved in some form of international trade. Whether you are a large company, a small or medium sized business or a consumer, you are almost certainly affected by the free movement of goods within the EU.

2. Background to this review

The Foreign Secretary launched the Balance of Competences Review in Parliament on 12 July 2012. This takes forward the Coalition commitment to examine the balance of competences between the UK and the European Union.

The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It is not tasked with producing specific recommendations, and will not prejudge future policy or look at alternative models for Britain's overall relationship with the EU. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges.

The overall review will be broken down into a series of reports on specific areas of EU competence. This part of the review is being jointly led by HM Revenue and Customs, the Department for Business, Innovation and Skills and the Intellectual Property Office. It will look primarily at the free movement of goods within the Internal Market.

(1) Statistical note: Potential statistical inaccuracies can result from the misreporting of UK exports to non-EU countries as intra-EU trade. This can happen when goods intended for export to a non-EU destination initially travel via another EU Member State. Similarly, goods imported into the UK from outside the EU which first enter the EU in another Member State could be reported as intra-EU trade. Conversely, some goods imported into the UK from outside the EU could ultimately be destined for another EU Member State.

(2) Source: Office for National Statistics

More specifically, this review will consider EU competence in:

- **Trade in goods** within the Internal Market, as well as the way in which this trade is regulated, including through product regulation; product safety; quality labelling; market surveillance; and standardisation;
- **The EU Customs Union**, collection of taxes and duties at the EU frontier and customs' role in trade facilitation; and
- **Intellectual property**, for which EU legislation provides some uniform systems of protection for unitary rights, and also affects internal and external trade.

3. Competence

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

The EU's competences are set out in the EU Treaties. These provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties. Where the Treaties do not confer competences on the EU, they remain with the Member States. The free movement of goods, including the Customs Union and intellectual property, is specifically covered in Articles 28 to 37, and 118 of the Treaty on the Functioning of the EU (TFEU).

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the Internal Market or environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content

and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

4. Objectives of this review

The aim of the review is to consider:

(1) how and why EU competence has developed on trade in goods within the Internal Market; the Customs Union; and the protection of intellectual property;

(2) what the current balance of competence is between the UK and the EU in these areas;

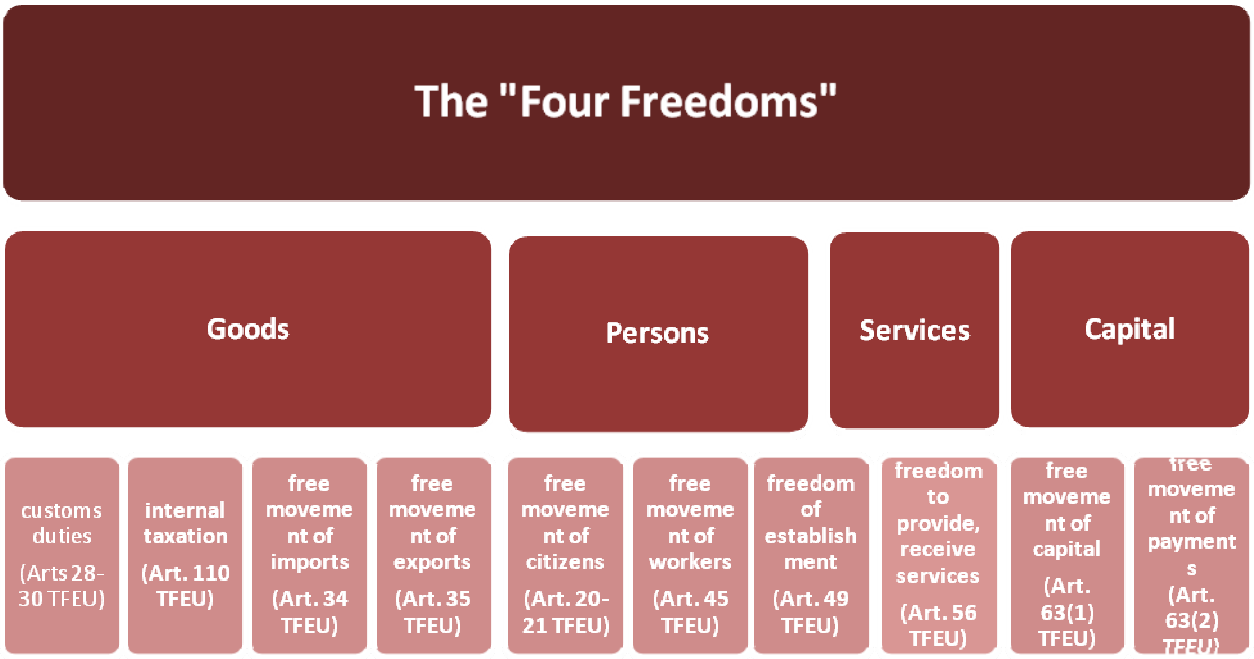
(3) how this competence is exercised in practice, including whether it is working in the UK's national interest; and

(4) the EU's current direction of travel in these areas, including the potential future development of the Internal Market, Customs Union and intellectual property rights policy, and future challenges and opportunities for the UK.

This review will seek to address the issues in a comprehensive, evidence-based, and analytical way. Whilst it is being led by the Government, it will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners, and the EU institutions, are also invited to contribute. The progress of the review will be transparent, including in respect of the contributions submitted to it.
This part of the Balance of Competences review will explore the current state of EU competence on the free movement of goods within the Internal Market, setting out areas of exclusive EU competence; areas outside EU competence (and therefore reserved to Member States) and where the boundary currently sits in areas of shared competence.

Links to other reviews

The free movement of goods is just one of the 'Four Freedoms' that make up the EU's Internal Market (see diagram below). The other three 'freedoms' will be covered in separate reports, and there will be an overall Synoptic Review to examine the Internal Market as a whole.



Trade with non-EU countries will be covered in the Trade and Investment review (the 'Calls for Evidence' for the Trade and Investment and Free Movement of Goods reviews are running in parallel). Provision of services within the EU will be covered in the Internal Market: Services review, which is due to launch in the Autumn of 2013. Provision of services outside of the Internal Market will be covered in the Trade and Investment review.

Customs law enforcement activity will be dealt with in the Police and Criminal Justice review. Collection of customs duties will be discussed in this review, however, all other taxation matters are dealt with in the report on Taxation to be published shortly. Customs duty, which is paid into the EU budget, will also be dealt with in the EU Budget review.

Links will be made to other reports where relevant. Where evidence submitted is relevant to other reviews, we will share submissions with the other reviews as appropriate. Full details of the review programme as a whole can be found at:

https://www.gov.uk/review-of-the-balance-of-competences

5. EU Competence on the Customs Union

Purpose of the Customs Union

Since internal border controls between EU Member States have largely been removed for legally traded or purchased goods, the EU needs to create an

external frontier of its own, so that goods entering and leaving the Internal Market are taxed at the same rate and go through the same processes and procedures before entering the Internal Market. This requires Member States' customs services to apply a common customs tariff and standardised customs procedures to goods entering and leaving the EU.

This standardisation of customs procedures is the basis of the EU Customs Union. It is essential for the functioning of the Internal Market. Furthermore, customs controls need to strike the right balance between facilitating import and export trade while at the same time regulating and controlling the importation and exportation of goods.

All EU Member States are part of the EU Customs Union. A customs union has also been established between the European Union and Turkey, Andorra, San Marino and Monaco. Additionally, the four EFTA countries (Norway, Iceland, Lichtenstein and Switzerland) have agreements with the EU that allow them to participate in the Internal Market and benefit from the free movement of goods. These arrangements expand the area within which goods can move freely beyond the territory of the EU.

Scope of EU Competence on the Customs Union

The Customs Union is an area of exclusive EU competence, meaning that virtually all legislation in this area is EU legislation that has been initiated by the European Commission. Most of this legislation is contained in EU Regulations and is therefore 'directly applicable', which means it is law in all EU Member States. However some legislation is needed at national level in order to implement EU customs law.

The current EU Customs Code and its Implementing Provisions set out the rules for importing and exporting goods and impose legal requirements and obligations on importers and exporters. Businesses that engage in international trade, or individuals that import or export goods privately, must comply with both European Union and national legal requirements. A new EU customs code (the Union Customs Code) is currently being negotiated.

Scope of UK National Competence in Customs Matters

EU Member States are responsible for managing their own customs services and implementing and enforcing EU customs legislation. The UK decides which government department or agency is the competent authority in the UK responsible for implementing and enforcing particular Regulations. The UK also decides the nature and level of penalties that will be applied in the case of a breach of EU customs regulations that occurs in the UK. Customs criminal

offences are dealt with under national legislation and the powers available to customs officers to enforce compliance with customs regulations also remain a matter for national legislation. However, EU customs authorities do work closely together and meet regularly to share best practice.

The UK is a major trading nation, and among the top ten importers and exporters of goods.[1] The port of Felixstowe alone handles the equivalent of 3.4million twenty-foot shipping containers annually, containing goods arriving from and departing to both EU and non-EU destinations.[2] The UK's largest airport, Heathrow, handles around 1.5 million tonnes of air cargo annually.[3] These are large and fast-moving logistical operations. Making the movement of goods across international borders as smooth as possible reduces costs for both businesses and consumers.

1. Source: World Trade Organisation
2. Source: Port of Felixstowe
3. Source: Heathrow Airport

6. EU competence on Free Movement of Goods

The EU treaties set out a basic legal framework that allows for the free movement of goods in the Internal Market. In particular, Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU) ban any quantitative restrictions on the import or export of goods between Member States, except under specific exceptions set out in Article 36. These exceptions include:

'on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.'

This legislative approach is usually known as negative integration because it is designed to prevent Member States from having in place barriers to the free movement of goods, persons, services and capital. However, when things go wrong, these treaty rights may have to be asserted through court action, which is often costly and involves considerable delay.

As a result, the EU also makes laws to remove barriers to the Four Freedoms created by diverging national laws. This process is known as positive integration. These laws clarify the detail of broad Treaty provisions and jurisprudence in a way useful to economic operators; allows policy choices that would otherwise have to be left to the courts; and ensures, in theory at least, similarity of application across Member States.

There are circumstances in which the UK restricts the free movement of goods where it is in the national interest to do so. These include drugs, firearms, issues that affect national security, and parallel imports (non-counterfeit goods imported from another country without the permission of the intellectual property holder).

One of the main areas where the EU legislates to ensure the free movement of goods is on product regulation and market surveillance. EU action on product regulation seeks to remove potential barriers to trade arising from different national regulations by harmonising health & safety or other public protection requirements across the EU. Market surveillance means the activities carried out and the measures taken to ensure that products circulating on the EU's Internal Market are compliant with relevant EU legislation. EU legislation on Product Regulation and Market Surveillance is designed to ensure a level playing field for businesses whilst ensuring that the products they bring on to the market are compliant with EU legislation and are safe to use.

There is a significant body of legislation regulating products – much dating in its original form from the big drive to complete the Internal Market for products known colloquially as "1992". Since then, the New Legislative Framework (NLF) for community harmonisation legislation for products has been established through Regulation 765/2008/EC and Decision 768/2008/EC on a common framework for the marketing of products. The latter is a toolkit of provisions to harmonise and modernise the key generic features of product legislation.

The existing body of product regulation is being brought into line with this New Legislative Framework through a rolling programme of legislative "alignment". At this early stage the largest piece of work pursuant to this is the NLF "Alignment Package" of nine pieces of sectoral product legislation, which is at an advanced stage of negotiation in Brussels.

It is currently proposed that the provisions of the General Product Safety Directive (2001/95/EC) should be replaced by two measures usually referred to as the "Product Safety Package". The Market Surveillance Regulation Proposal

will take the GPSD's market surveillance provisions and combine them with those of the Regulation on Accreditation and Market Surveillance (765/2008/EC) to create a coherent set of market surveillance requirements. The Consumer Product Safety Proposal will modernise - and extend - GPSD's other provisions.

The General Product Safety Directive (2001/95/EC) usually referred to as the Product Safety Package, is currently being revised to modernise and regroup the market surveillance provisions both of the Directive and of the separate Regulation on Accreditation and Market Surveillance. It will also modernise and extend part of the scope of the remaining provisions of the General Product Safety Directive.

Some of the current product regulations are EU 'New Approach' legislation (often referred to as the 'CE marking Directives'), which are often very wide-ranging in scope – covering, for example, machinery and low voltage electrical goods. 'New Approach' legislation is comparatively light-touch in approach as it sets goals, or Essential Requirements, for health and safety or other public protection objectives and then leaves the development of technical specifications to be made through standards (known as European Norms).

Standards enable products to be readily traded whilst ensuring that technical barriers to trade between Member States are not unduly erected. Around one thousand new or revised standards are issued each year, around 90% of which originate as European or international standards and they cover products and services in a wide range of sectors. Though standards are voluntary and market-led, in many cases the relevant European standard is an effective and efficient way to demonstrate compliance with European product regulation. The European Standardisation system is regulated by Regulation 1025/2012.

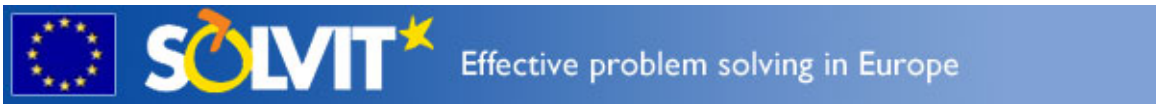
The Technical Standards and Regulations Directive 98/34/EC (as amended by Directive 98/48/EC) sets out EU notification requirements for goods and electronic services. The directive applies to all industrially manufactured products and agricultural products, as well as to 'information society services' (i.e. services supplied at a distance by electronic means and at the individual request of a recipient of services). It aims to prevent new technical barriers to trade being created through a procedure for providing information on technical standards and regulation. It applies to all Member States, the European Economic Area (Norway, Iceland and Liechtenstein), EFTA (Switzerland) and Turkey. On

average the UK submits around 50 notifications a year out of a total of approximately 750 notifications from all participating states.

Due to the size of the Internal Market, the EU regulatory and standards framework for products is commensurately powerful and is increasingly setting the agenda for the global market, which gives the EU a powerful edge in international trade negotiations. As an example, the European Norm for lifts (EN81) is now a point of reference for lifts manufacture throughout the world (except North America). This influence means that major trading partners take a very close interest in the EU standards and regulatory environment for products.

There are three primary mechanisms to ensure the free movement of goods within the Internal Market: the SOLVIT network, Product Contact Points and the Strawberry Regulations:

- **SOLVIT** was set up as an initiative of the European Commission and is designed to be a free, informal dispute resolution mechanism for both businesses and citizens where they believe EU rules have been misapplied by public authorities. For businesses, SOLVIT deals mainly with complaints involving VAT refunds, incorrect customs formalities, restrictions on the provision of services, and excessive technical requirements.



- **Product Contact Points** were established under Regulation 764/2008 and under the Construction Products Regulation (EU) No 305/2011 (CPR). These enable free access to information about national regulations applicable to products to be sold in the EU market, where these may exceed what is harmonised at EU level, or where there is an absence of harmonisation at EU level and products may be subject to national requirements as notified through the 98/34 procedure.

- **The Strawberry Regulations** 2679/98 put in place an information and monitoring network for any temporary, but significant, barriers to the free movement of goods. Member States are required to circulate details of any major events (such as demonstrations or road works) that involve routes that could potentially impede trade but which may not be known to businesses outside of that particular Member State.

7. EU competence on Intellectual Property Rights

Intellectual property (IP) rights are essentially territorial: they are set and governed at national level. However, over time, a large number of international conventions, agreements and treaties have developed that provide for a degree of global harmonisation over IP rights and policies. Both the EU and the UK are party to many of these. The EU itself holds some competence at various levels over each of the four major IP rights (copyright, patents, trade marks and designs), as well as over key related Internal Market and external trade policies. In all the areas in which the EU holds some competence, decisions made by the Court of Justice of the European Union (CJEU) continually add to the body of case law that affects or guides decisions made in national jurisdictions.

As a result, while national IP rights subsist and remain very important, UK businesses often need to operate within a European context in order to maximise the value of their IP in EU and global markets.

Although there is no single (unitary) European **copyright** title, national copyright systems are broadly similar across the EU. Harmonisation has been achieved through a collection of EU Directives and Regulations, as well as by the requirements of international copyright law. However, not every element of copyright is fully harmonised with some areas being left to national governments to decide.

In **trade marks and designs**, there are parallel EU and UK (national) systems. Businesses who are seeking protection for their trade mark or design in Europe can opt to register with one (or several) national IP registry or can apply for a single trade mark or design that covers the whole of the EU. National trade mark and designs rules are subject to a degree of harmonisation, e.g. on what may be registered as a trade mark, but there remain considerable variances in procedural and substantive law.

In addition to EU harmonisation, national laws on trade marks and designs are subject to international treaties on IP. The relevant EU laws regarding trade marks are due for revision and plans published by the European Commission in March 2013 propose greater harmonisation and alignment of rules for both the national and EU wide regimes to improve access for business. There are also ‘unregistered’ design rights at national and EU levels, which are automatic if certain criteria are met. The national unregistered design right is not mandated by EU law.

There is also a dual system for **Plant Variety Rights**. These are a form of IP protection specifically designed for new varieties of plant species. The EU wide scope of Community Plant Variety Rights means that almost all plant breeders use it in preference to the UK system. Both systems are based on the International Convention for the Protection of New Varieties of Plants. This

established the Union for the Protection of New Varieties of Plants (UPOV), based in Geneva.

Patent law remains largely defined through national law and some international treaties such as the European Patent Convention (EPC). However, certain rules regarding biotechnological patents in Member States are harmonised through EU legislation. EU legislation also provides for a system of national Supplementary Protection Certificates, which grant an additional term of protection, after an underlying patent has expired, to specific medicinal or agrochemical products which have obtained a marketing authorisation in the EU.

Recently EU Regulations providing for a unitary patent have been adopted under enhanced cooperation. (1) Implementation of the system depends on the establishment of a unified court under an international agreement. Unitary patents will be delivered by the European Patent Office (EPO) which is not an EU organisation but was set up under the EPC in the 1970s. It currently grants patents for 38 countries.

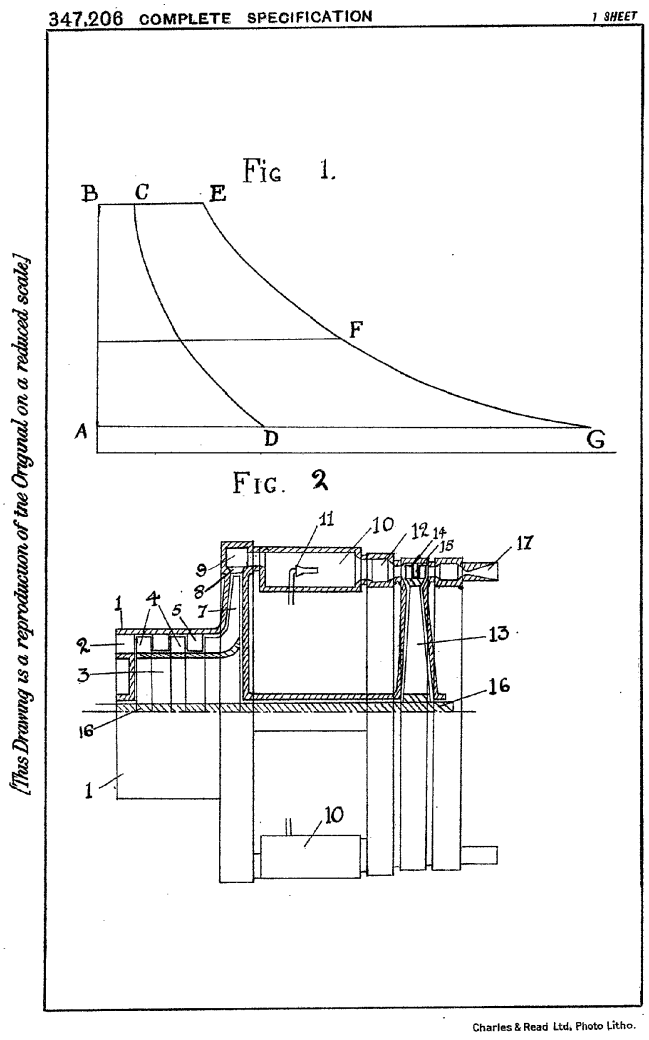
Currently individuals or businesses seeking to protect their inventions across Europe can either apply separately to each national patent office for a national patent or they can apply to the European Patent Office (EPO) for a "bundle" of national patents; one for each country specified. The process is typically subject to costly translation provisions and, in some countries, additional validation charges which apply before the EPO granted patent can take effect.

An EPO bundle of patents (for the same invention) does not necessarily offer uniform protection in each state, as different national rules apply. Thus, obtaining patent protection across Europe is not only costly (compared with, for example, the US), but the protection provided is not uniform, and enforcement must be separately initiated in each country.

The Unified Patent Court (UPC) Agreement is part of a package of measures designed to establish and enforce unitary patent protection within Europe. The other measures include two EU regulations which establish the unitary patent and the associated translation arrangements. When the unitary patent system comes into operation, alongside the existing mechanisms for patent protection, the unitary patent will be granted by the EPO and the patentee will be able to enforce his patent through the unified patent court rather than through separate national courts.

(1) Enhanced cooperation allows those countries of the Union that wish to continue to work more closely together to do so, while respecting the legal framework of the Union. The Member States concerned can thus move forward at different speeds and/or towards different goals.

Original patent application for the jet engine: Frank Whittle Patent GB347206



A European registration system has been in place since 1992 for **geographical indications and designations of origin** for certain types of foodstuff and agricultural products intended for human consumption. This regime protects the identity of products which have traditionally been produced in a particular geographical location or region. UK Geographical Indications registered via the EU system include Scotch Whisky, Melton Mowbray Pork Pies and Wensleydale Cheese.

Each Member State is responsible for the legal systems within its own territory that allow for owners of IP to enforce their rights. An EU Directive ensures a minimum level of protection in the civil courts. Enforcement is normally through national courts for both civil remedies and criminal sanctions. In the case of EU-wide rights for trade marks and designs, the designated national courts act as Community courts and rule for the whole EU in relation to civil procedures and remedies. An EU Directive provides some element of harmonisation in relation to civil procedures and remedies.

In the field of online infringement of copyright, Member States such as the UK, France and Spain share best practice and new approaches to the problems they all face. The European Observatory on Counterfeiting and Piracy also brings together Member States' administrations, private industry and consumer organisations to improve efforts to combat counterfeiting and piracy through joining forces, exchanging experiences and information and sharing best practices on enforcement.

EU customs rules allow customs authorities to intervene where goods suspected of infringing an IP right are detected at the external border of the EU. The Regulation covering IP enforcement is due to be updated on 1 January 2014. Separate arrangements are in place for handling counterfeit medicines and medical devices under health legislation and have been covered in the Call for Evidence for the Health review.

The EU is able to negotiate internationally on areas of IP that fall into the above areas of competence. For example, a number of EU Free Trade Agreements with non-EU countries have allowed recognition of EU Geographical Indications in those countries' markets, and vice versa. Where areas of IP that fall outside EU competence are discussed in trade negotiations, Member States take the lead, usually via the rotating Presidency. (1) The same applies in multilateral fora such as the World Intellectual Property Organisation (WIPO), where competence is shared: the UK works within the EU context to ensure coherence, but still engages directly on most topics.

There is little EU competence in the management and exploitation of intellectual property, including licensing, although the Commission's recent proposals for trade marks includes some high level provisions in this area. The exception is where the exercise of intellectual property rights may fall foul of EU competition rules. The EU has exclusive competence in the area of competition and this will be considered in a separate report in semester 3, which will be launched in autumn 2013.

(1) The rotating presidency of the European Council sees each a new EU nation take responsibility for the functioning of the Council of the European Union, the upper house of the EU legislature, the "presidency" changes every six months.

Trade secrets are not generally considered as IP rights, although they are covered by the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). The European Commission is considering possible general measures on trade secrets. Some existing measures cover, for example, the protection of data needed for regulatory approval of medicines.

UK IPR activity – general statistics

The following table presents an overview of general statistics on UK and European IP rights. The table, which presents headline figures of UK applications, broken down by domestic applications and applications abroad, gives context. All figures are rounded to the nearest thousand.

	Patents	Trademarks	Registered Designs
Applications received in 2011 by UK IPO (1)	22,000	36,000	5,000
Percentage from UK applicants	69%	88%	92%
Applications abroad in 2011 by UK applicants (2)	30,000	282,000	47,000
UK-based applications in 2011 to EPO and OHIM (3)	5,000	10,000	5,000
Percentage of UK applicants' international applications (above row) filed with EPO or OHIM	16%	3%	10%
Copyright (4)			
Copyright is an unregistered, automatically-assigned right and is measured differently from other IPR. In 2008, there was £26 bn of investment in copyright-protected assets by the UK market sector. Of this, approximately £5.1bn (2009 figure) was investment in artistic originals and the remainder is software.			

Source: Statistics from OHIM, EPO, WIPO and IPO (for patents, trademarks, and registered designs). (1) "Applications received in 2011 by UK IPO" denotes total applications received from all countries from which the UK IPO receives applications, and is sourced from IPO data.

(2) The "Applications abroad in 2011 by UK applicants" data is sourced from WIPO data. (3)The "UK-based applications in 2011 to EPO and OHIM" row shows UK-based applications received by EPO and OHIM (trademarks and registered designs) and is sourced from EPO and OHIM data respectively. The final row in the table is intended to indicate the relative importance of the European level rights to the UK. OHIM is the Office of Harmonisation in the Internal Market which issues EU wide trademarks and designs. Note that the EPO is not an EU body.

(4) Copyright statistics from 2 IPO reports '*The Role of Intellectual Property in the UK Market Sector*' (July 2011) and '*Updating the Value of UK Copyright Investment*' (June 2012).

8. Call for Evidence: what we are asking for

We are requesting input from anyone with relevant knowledge, expertise or experience. We would welcome contributions from individuals, companies, civil society organisations including think-tanks, and governments and governmental bodies. We welcome input from those within the UK or beyond our borders.

Your evidence should provide us with information and judgements about the impact or effect of EU competence in your area of expertise. Where your evidence is relevant to other balance of competences reviews, we will pass your evidence over to the relevant review teams.

Please base your response on answers to any of the questions set out below that you feel able to answer or contribute to. In responding, it would be helpful if you could indicate whether you are responding as an individual, a business, a trade union, a civil society organisation or a research institution.

We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that even if you ask us to keep your contribution confidential we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included.

Please submit your evidence to HM Revenue and Customs by 6th August 2013.

Evidence can be sent by e-mail to:

hmrc.balance-of-competences@hmrc.gsi.gov.uk

You can also submit your evidence by post to:

HM Revenue and Customs
Balance of Competences Review, 3E10
100 Parliament Street,
London. SW1A 2BQ

Discussion events

As part of the Call for Evidence process we will be holding a number of discussion events, to which you are invited. The events will take place on 26 June, 1 July and 10 July in the BIS Conference Centre, 1 Victoria Street, London SW1H 0ET.

Attendance at these events is free and places will be allocated on a first come, first served basis (although we may need to restrict representation to one attendee per organisation to ensure a breadth of participation).

To book your place at one of these discussions, please email balanceofcompetences@bis.gsi.gov.uk with details of which event you wish to attend.

9. Key questions

The key questions to be addressed in this review are:

1. What do you see as the advantages and disadvantages of EU action on the free movement of goods? How might the national interest be served by action being taken in this field at a different level (for example, at the WTO), either in addition to or as an alternative to EU action?

2. To what extent do you think EU action on the free movement of goods helps UK businesses?

3. To what extent has EU action on the free movement of goods brought additional costs and /or benefits to you when trading with countries inside and outside the EU? To what extent has EU action on the free movement of goods brought additional costs and /or benefits to you as a consumer of goods?

4. What types of EU action would be helpful or unhelpful for your activities as a business and/or as a consumer in the Internal Market?

5. To what extent do you think the harmonisation of national laws through EU legislation (as opposed to international treaties) is helpful or unhelpful to your activities as a business and/or as a consumer in the Internal Market? In your experience do Member States take a consistent approach to implementing and enforcing EU rules? Please give examples.

6. Do you think that the EU strikes the right balance between regulating imports and exports and facilitating international trade?

7. Do you think the UK's ability to effectively regulate cross-border movements of goods would be better, worse or broadly the same as the result of more or less EU action? Please provide evidence or examples to illustrate your point.

Intellectual Property Rights

Questions to help guide responses from stakeholders with a particular interest in Intellectual Property Rights:

8. To what extent are specific national rights provided through EU legislation (e.g. Supplementary Protection Certificates) helpful or unhelpful to your activities as a business and/or as a consumer in the Internal Market?

9. To what extent are specific Community-wide rights provided through EU legislation (e.g. Community Trade Mark, Community Design, Geographic Indicators and Community Plant Variety Rights) helpful or unhelpful to your activities as a business and/or as a consumer in the Internal Market?

10. To what extent do wider EU rules (e.g. on free movement of goods or services) impact helpfully or unhelpfully on the conduct of your business or your experiences as a consumer in relation to intellectual property rights?

Future Challenges

11. What future challenges/opportunities do you think will affect the free movement of goods and what impact do you think these might have?

General

12. Do you have any other general comments that have not been addressed above?

Legal Annex

The Free Movement of Goods

I. Introduction

1. The free movement of goods is the cornerstone of the Internal Market, a central aim of what is now the EU since it was founded in 1958 by the EC Treaty (also known as the Treaty of Rome and now called the Treaty on the Functioning of the European Union (or "TFEU")). The Internal Market became fully-fledged in 1993 with the Treaty on European Union (or "Maastricht Treaty"), which aimed to remove all remaining barriers to trade between the Member States. Among other things, it abolished systematic border controls, and all discriminatory charges (including, in particular, customs duties) levied by Member States on goods originating in other Member States. A common customs tariff was to be applied to all third country goods. Domestic VAT and excise regimes were partially harmonized to facilitate the free movement of goods. All the relevant provisions are now to be found in TFEU and, where we refer in this document to Articles, they are Articles of TFEU. While the relevant Articles of TFEU are expressed to apply only to trade between Member States of the EU, the effect of the EU's free trade and customs union agreements with the EFTA countries (Norway, Iceland, Lichtenstein and Switzerland) and with Turkey is that the rules contained in those Articles apply also to those countries.

II. Main principles and 'directly effective' treaty articles

2. There are two main limbs to the free movement of goods. They are (as outlined above):

- the establishment of a customs union (Articles 28-29) which in turn requires:
    - the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect (Article 30));
    - the adoption of a common customs tariff for goods entering the EU from third countries (countries outside the EU) (Article 31);
    - the elimination of discriminatory and protectionist taxation (Article 110);
- the removal of quantitative restrictions (for example bans and quotas) and all measures having equivalent effect on imports (Article 34) and exports (Article 35) between Member States. Restrictive measures are, however (pursuant to Article 36), permissible if they are justified on the grounds of public morality, public policy, public security, public health, the protection of cultural assets, and the protection of industrial and commercial property (the Article 36 'derogations'). Charges do not have 'equivalent effect' for the purposes of Article 30, even where they are levied upon the crossing of a frontier, so long as they apply equally to domestic goods (which is

why it remains proper for the UK to apply excise duties to excise goods imported from other Member States). They will, however, fall foul of Article 30, even where applied indirectly, for example where charges are passed on to port users to offset the costs of providing customs services (see the cases of Dubois[1] and Aprile[2]).

3. The free movement of goods also requires goods from other Member States to be accorded equal treatment. So, for example, a requirement that imported (but not domestic) goods be inspected is directly discriminatory and breaches Article 34.[3] The prohibition extends to 'Buy National' campaigns such as the 'buy Irish' campaign that formed the subject of *Commission* v. *Ireland*[4]. The Treaty also prohibits indirect discrimination, that is, measures which appear to be 'nationality-neutral', but have a greater impact on goods from other Member States. For this reason, a Member State may not, generally impose restrictions which would result in the exclusion of products lawfully produced and marketed in another Member State (see the leading case of Cassis de Dijon[5] and, more recently, Commission v. Italy[6]). This is known as the principle of mutual recognition (to which the BIS synoptic report also refers).

III. The EU's legislative competence

4. With the exception of Article 31, all the Treaty articles cited in paragraphs 2 and 3 above are directly effective. That is, they are in themselves law in all the Member States and national courts must not only apply them but give them priority over any conflicting provisions of domestic law. In addition, the EU has power to legislate both on the Internal Market and on the Customs Union. The EU's power to legislate on the Customs Union is 'exclusive' (Article 3) while its power to legislate on the Internal Market is 'shared' with the Member States (Article 4). An account of the relevant legislative treaty 'bases' (the Articles that confer legislative powers on the EU) follows.

IV. The main legislative treaty bases

5. Articles 114 and 115 give the EU power to legislate for the harmonisation of Member State provisions which either have as their aim (in the case of Article 114), or directly affect (in the case of Article 115), the 'establishment and functioning of the Internal Market'. These are the treaty bases for the bulk of EU

[1] Case 1994/16 Édouard Dubois & Fils SA and Général Cargo Services SA v Garonor Exploitation SA[1995] ECR 2421

[2] Case 1994/125 Aprile Srl, in liquidation, v Amministrazione delle Finanze dello Stato [1995] EC 2919

[3] Case 251/78 *Firma Denkavit Futtermittel GmbH* v. *Minister für Ernährung* [1979] ECR 3369.

[4] Case 249/81 *Commission* v. *Ireland* [1982] ECR 4005.

[5] Case 120/78 Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon') [1979] ECR 649

[6] Case C–110/05 [2009] ECR I–519.

legislation on product and technical standards and other forms of market regulation. In addition, Article 113 gives the EU power to legislate for the harmonisation of legislation on indirect taxation (including VAT and excise duties) where 'necessary to ensure the establishment and the functioning of the Internal Market and to avoid distortion of competition'. Article 118 provides for legislation for the protection of intellectual property rights throughout the EU. Legislation under articles 113 and 115 is proposed by the Commission and adopted by the Council 'acting unanimously', which means that all the Member States enjoy a veto. In contrast, legislation under Articles 114 and 118 follows the 'ordinary legislative procedure', in which the European Parliament and the Council legislate together and voting is by way of a qualified majority (no veto, therefore).

6. The main treaty bases for legislation in the field of the Customs Union are Article 31 (which provides for the EU to fix the common customs tariff) and Article 33, which provides for the EU to legislate 'to strengthen customs cooperation between Member States and between the latter and the Commission'. Article 87 makes equivalent provision for 'police cooperation' involving customs authorities. Legislation made under Articles 31 and 33 follows the ordinary legislative procedure. Article 325 provides for the adoption of measures (also in accordance with the ordinary procedure) for fighting fraud 'affecting the financial interests of the Union', which includes measures for the protection of import duties.

7. The Common Commercial Policy (introduced in Article 206) governs such things as changes in tariff rates, the conclusion of tariff and trade agreements, intellectual property, and trade protection. Accordingly, it plays a significant part in the operation of the Customs Union. Article 207 provides for legislation (under the ordinary procedure) to be made for the purpose of implementing the common commercial policy. It is the legal base for a number of measures in the customs union field. Article 352 (a residual legal base which provides for legislation to be adopted in furtherance of EU policies where the relevant powers are not be found elsewhere) has also (in some cases, controversially) been invoked for the adoption of measures in the Internal Market.

8. EU law on intellectual property, mainly stemming from the above treaty Articles (114, 115, 118 and 207) covers the full range of intellectual property rights and associated activities such as enforcement, but not all to the same extent. Key Directives cover the provision of exceptions and limitations for copyright (2001/29/EC), the approximation of national laws on trade marks (2008/95/EC), biotechnological inventions (1998/44/EC), the legal protection of designs (1998/71/EC), the enforcement of intellectual property rights (2004/48/EC) and 1998/84/EC Directive on the legal protection of services based on, or consisting of, conditional access. A larger number of Regulations covers specific areas including Supplementary Protection Certifications and Geographical Indications. This wide variety of EU action is reflected in UK law by appropriate Statutory Instruments (SIs), and where necessary updates to the Copyright, Designs and Patents Act 1988 (CDPA).