



Public Affairs Commission

Balance of Competences Review

Free Movement of Goods – Response to Consultation

A. Preliminary Remarks

Founded in 1973, COBCOE is an independent non-profit association with a network that links over 80 British overseas chambers of commerce and business groups across the world. COBCOE represents a core membership of 40 British bilateral chambers of commerce and over 10,000 businesses across 38 countries in Europe, working together to advance international trade and business with the United Kingdom. Through the founding of the global British business network, British Business Worldwide and its Affiliate membership programme, COBCOE links its members and their business members to a further 50 partner chambers of commerce and other like-minded business organisations across the world. We also have a working links with the CBI, the IOD and the British Chambers of Commerce in the UK.

COBCOE's main office is situated in London but its Public Affairs Commission, which is tasked with collating responses to this consultation, is based in Brussels.

We welcome the Balance of Competences review established by the British government. We believe that it can make a serious contribution to the on-going debate as to how the EU operates and how it should work in the future. Unlike most of the respondents to this consultation, since most of its members are located outside of the UK, COBCOE's response is from the perspective of businesses based outside of the UK and trading bilaterally with affiliates or independent companies in the UK and in other parts of the EU.

In taking opinions from our members, we have circulated to all of our member chambers the report and questionnaire provided to us as part of this consultation. The number of written responses back to us have been limited because, in the current economic climate, few businesses can spare the time to answer these detailed questions. We also know that consultations by email have a very limited response rate and that it is preferable to consult through discussions in person. With our assistance and encouragement, some of our member chambers have participated in local workshops and have fed back comments directly to HMG. Notes of these meetings have been sent back directly to HMG and we do not replicate these here.

## B. Introduction

Before answering the specific questions, we should like to make some preliminary remarks:

About 50% of British external trade is with member states of the EU. What goes on in the EU matters, as has been clearly demonstrated by the knock-on effect in the UK from the Eurozone crisis and from the subsequent economic contraction within many parts of continental Europe. This comes at a time when it is vitally important for Britain to increase its export performance.

The internal market for goods and services within the EU is not only a key achievement of the European Union, but also its perfection is of vital interest to the UK. COBCOE fully supports the development and deepening of the internal market and shares HMG's concern that close integration in some parts of the EU, particularly the Eurozone, should not impact adversely the operation and development of the internal market.

It is also important to recognise that an efficient and seamless internal market within the EU, and Britain's unrestricted access to this market, is a highly significant factor in attracting inward investment into the UK from outside of the EU, as Britain is often regarded as a friendly business gateway into this market of 500 million citizens.

There are two other important points to make at the outset:

Firstly, the rules of the internal market cannot be viewed in isolation. For example, the operation of taxation, both direct and indirect, across the EU has an impact on the internal market. The ability to enforce commercial contracts in an efficient way and even on rules on insolvency also have an impact on intra-EU trade.

Secondly, it is difficult to analyse the operation of the internal market without at least addressing in outline some of the institutional issues which need to be considered in the context of how the EU works (and should work in future). New rules, intended to simplify, may sometimes result in more bureaucratic burdens for businesses.

The tendency of the EU to operate through Directives rather than Regulations, aside from complaints of local "gold plating", can result in uneven application of the rules intended to create a level playing field. We recognise that Regulations are more difficult to agree on at an EU level than Directives since, as a matter of EU law, they become directly applicable in each member state, and that there could be arguments for member states to have the freedom to implement EU decisions taking into account local legal structures and local circumstances. But we fear that much of the time member states use Directives since it is a way to disguise genuine disagreements between member states. If that is the case, then resorting to Directives can be counter-productive in the context of establishing a level playing field by actually creating opportunities for individual states to exacerbate and arbitrage differences in applicable rules.

At the same time, we consider that sunset clauses should be incorporated more frequently in new legislation so that policymakers and businesses have an opportunity to review the operation of particular legislation on a regular basis.

Lastly, any comment on the operation of the internal market cannot ignore the clear choice that has to be made within the EU between mutual recognition and harmonisation. In practice, it can be very difficult to ascertain which is the best solution. To the extent that the EU is visualised as a seamless internal market, this would argue for harmonisation with common rules applying across the entire economic area but then only where these implemented predominantly through Regulations and not Directives as otherwise business has to bear a significant compliance cost without any certainty of the objective of a common standard being achieved. If this is not realistic, we would strongly argue for a system of mutual recognition of national standards.

With these preliminary remarks, we now turn to the individual questions raised in the consultation.

### C. Responding to the Consultation

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?

*It results in a more competitive market, cheaper prices and better quality. "EU action" (meaning either legislative or enforcement actions from the European Commission or decisions from the European Court of Justice) supporting and enhancing the free movement of goods within the EU (and the EEA/EFTA) is very positive for business. Generally explicit or obvious barriers to the movement of goods across the EU, subject to the general public policy constraints under national law, have been eliminated so the primary focus today is on hidden barriers. Inevitably, these can be very subtle relating to intra-EU supplies of goods due to local contacts and linguistic and cultural sensitivities.*

*Inevitably, the biggest concern relates to standards. Industry associations are often working hard behind the scenes to ensure that EU standards are adopted and applied in a fair way but for businesses generally, including industry associations, this can mean engagement and negotiation at a high level which can, in itself, create a substantial cost and real burden on various industries.*

*It is, of course, an advantage for there to be action at an EU level to ensure common standards but there can be disadvantages if these standards become too rigid. We would encourage, as much as possible, a minimalist approach to standards to ensure that goods*

*being supplied are safe and are fit for their specific purposes. There can be real benefits in agreeing a common standard for goods which go beyond those basic requirements. Our concern here would be to avoid placing too much power in the hands of the larger companies across the EU that have the resources to argue for specific standards and which can create barriers to entry to markets within the EU for other, smaller, companies.*

*In terms of trade within the EU, we do not see any great advantage in engaging with the WTO. Indeed, where there are common standards adopted at an EU level, then a common EU position makes it easier to argue subsequently at WTO negotiations for a similar application of such standards worldwide which, in turn, could create competitive benefits for EU-based businesses. Similarly, EU representation of a European position on free movement of goods at such multinational fora such as the WTO can be beneficial to British interests as long as there is a clear consensus at an EU level bearing in mind also that any argument for free movement of goods with countries outside of the EU will usually be reciprocal.*

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

*British business is, on the whole, very well served by the EU determination to uphold free movement of goods. As a key trading nation within Europe and with approximately 50% of its exports going to the remaining member states of the EU and EEA/EFTA states, Britain has a clear interest in a fluid and unrestricted market within the EU. The elimination of tariffs and minimal administration in relation to dispatch of goods within the EU are tremendously helpful to the business community.*

*There are, however, some practical issues that probably still need to be addressed more efficiently. The speed of freight across the EU, particularly on the rail system, is far too slow and can sometimes represent a competitive disadvantage for British businesses looking to compete with local suppliers in other parts of the EU working on a “just in time” basis as with perishables. The business to consumer market can also be restricted through differing local consumer rules, the complexity of applying different VAT rates on supplies as well as on-going difficulties in enforcing supply contracts in other countries. On a more general level, local rules can still hamper British suppliers offering finance options and we suspect that public procurement programmes are subtly adapted to enforce local norms to the disadvantage of UK business. Nonetheless, in general, the actions by the EU to uphold the free market for goods across the EU is very helpful to British business not just in relation to direct exports to other EU countries but also in making Britain an attractive location for non-EU companies as a base for manufacturing and distribution of non-EU products across the EU.*

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?

*Generally, the free movement of goods has been beneficial to business in relation to finished products and components. It has, therefore, opened up the possibilities for manufacturers to tap into local expertise across the EU relying on the goods or components manufactured there to be supplied across the EU. This, in turn, will facilitate British business trading on a more competitive basis both inside and outside of the EU taking advantage of local available conditions across the EU in terms of cost of labour and capital. But there can be additional costs when it comes to compliance with common standards and, more practically, participation in EU programmes to fix those standards, in turn taking up significant management time and requiring more financial support for coordinated actions within specific industries. But we will still argue that the benefits outweigh the costs.*

*For the consumer, the free movement of goods has generally brought additional benefits by lowering prices as the single market gradually becomes a reality.*

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

*In general, we are concerned about over-bureaucratising the market. There is a tendency of the European Commission to get involved in everything on the basis that “there has to be a level playing field” but this sometimes can be counterproductive. On the other hand, there is clearly a need for more transparency, particularly in relation to public tenders, as well as to how the EU itself works in enforcing the free movement of goods. So, for example, EU-wide tenders for supply of goods seem to be biased towards a host (tender-issuing) country. There is no guaranteed transparency as to who has won the tender and basic criteria for awarding the tender. To look at a specific example, in the case of supply of electrical goods to various electricity boards (public utilities), it is nearly impossible for a UK company to win a tender in Germany against a German competitor. The same seems to occur in France. Yet German and French manufacturers do not face such nationalistic obstacles when tendering with UK electricity boards.*

*The EU needs to be monitoring these soft barriers more diligently. Moreover, there does appear to be an unwillingness of the European Commission to enforce internal market rules by taking infringement procedures against member states when this seems “politically difficult” for the Commission. Unenforced rules are bad rules and the Commission should take a more vigorous role in policing the internal market. Alternatively, the enforcement section should be operating much more independently of the Commission as a whole, possibly even as a separate agency, thereby eliminating the risk of political interference.*

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 consumer in the Internal Market? In your experience, do Member States take a consistent approach to implementing and enforcing EU rules? Please give examples.

*On the question as to whether it is better to harmonise national laws through EU legislation compared to international treaties, EU legislation should be easier to agree, as it is a smaller group of countries with generally common interests. Nonetheless, difficulties arise when harmonisation is prescribed through directives rather than regulations where there is then much scope for member states to spin the legislation in a way most favourable to their own industries. This creates a real disadvantage for the more open economies within the EU (of which Britain is surely one).*

*More generally, it is open to question as to whether harmonisation really does work in practice. Recognition of acceptable minimum standards in member states can, at times, be a much more effective mechanism to ensure an open market without being over-prescriptive. And there has to be a sensible delineation between what needs to be harmonised and what can operate perfectly well under the rules of individual member states. So, for example, the recent case of trying to harmonise electrical plugs and sockets would create considerable expense for both industry and the consumer without significantly improving the market as a whole. In other words, there needs to be a principle of proportionality applied by the EU before imposing cross EU legislation. Then, if standards are to be harmonised, they have to be acceptable both as minimum and maximum standards. "Gold plating" by member states effectively will defeat the objective of struggling to find a common position.*

*Another example is the British and European standard for cable joints. At a European level, it has been decided that all national standards in this field should be "harmonised" under the banner of CENELEC (European Committee for Electrotechnical Standardisation). In the process, British Standards BS6910 was replaced with a new BS7888 and then further replaced with CENELEC EN 50393 (in UK, BS EN 50393). Many committees sat on that process which lasted from 1989 till 2006 and yet the basic text did not change much. 90% was copied from Engineering Recommendation C.81/3 from October 1986 issued by the then UK Electricity Council. For Germans and French, this standard is not good enough to replace their own norms and that is what they prescribe in their tenders, ignoring the harmonised documents.*

*In terms of enforcement of EU rules at a national level, we note the tendency of member states continuously to enforce rules where it is in its national interest, but to be more reluctant to do so when this is not the case. This also needs to be monitored carefully.*

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

*This question can only be understood in the context of regulating trade to and from the EU itself since there should not be any regulation of imports and exports intra-EU. On that basis, we do not support a generally protectionist EU regulating imports and exports between the EU and third countries. On the contrary, we very much support the EU initiatives to develop bilateral networks of free trade agreements between the EU and third countries and specifically support the EU's actions in attempting to conclude free trade*

*agreements with Japan and the United States. So we think that the EU should look more positively at facilitating international trade, should not be actively involved in regulating exports, and apply a light touch in relation to regulation of imports into the EU.*

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.

*It is correct that the UK needs to regulate cross-border movement of goods where there are public policy issues involved (for example safety, pornographic materials, narcotics, counterfeit goods or contraband). Subject to that, the UK should not be regulating cross-border movement of goods and the more the EU directly enforces the open market across the EU in goods, the better this will be for the British business community. This will both reduce internal UK administration and bureaucracy as well as apply pressure from the most powerful source in terms of ensuring recalcitrant member states complying with EU law. Again, however, this is premised on EU legislation being primarily through regulation and not through directives for reasons given above. A more uniform regulatory system across EU member states should make it easier for British business to export across the EU.*

### **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?

*We are concerned that increased bureaucracy and regulation may raise costs and reduce profitability for companies within the internal market. In principle, if national rights are enforceable, then it should not be necessary to call on the EU itself to provide supplementary certification across the EU with all the time and expense that could incur for business.*

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?

*There is no question that community-wide rights are beneficial to the British business community generally as they access the internal market and, we would argue, equally beneficial to the consumer. The UK has a commitment to interpret UK legislation in line with EU legislation. It is unclear whether all member states have or are willing to make this same commitment.*

10. To what extent do wider EU rules (e.g. on the 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?

*The issue here for us is principally one of enforcement. With free movement of goods across the EU, it is essential that intellectual property rights in those goods may be protected efficiently and, if necessary, summarily through the local courts. If not, this can put British business specifically at a competitive disadvantage to other companies within the EU and also, in turn, complicate and confuse EU business with countries outside of the EU.*

### **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?

*The principal challenge will be to resist unnecessary legislation at an EU level. In our view, the first question that needs to be asked is whether such legislation is necessary (as opposed to being “nice to have”), whether involvement of the EU substantially improved the common good rather than legislating to cover every perceived lacuna in the open market. Unnecessary regulation will not only affect free movement of goods by creating too many restrictions; it can also restrict innovation where it cannot comply with rigid or outdated standards and be a cost burden on businesses generally as standards are put in place and afterwards revised. A second challenge will be to detect and prohibit subtle protective measures by some EU member states favouring their own industries.*

*In this context, and this is a general remark of course, we question as to whether it should always be for the European Commission to enforce the proper implementation of directives or whether it should also be open for business directly to be able to enforce its rights where individual member states have taken an unduly restrictive approach in adapting EU legislation into local law.*

### **General**

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

*COBCOE has been arguing for many years for the implementation of a common EU system in relation to registration and enforcement of patents. We regret that, when finally implemented, this will not apply to all EU member states and, in particular, although it is obviously self-serving to argue this, there is no doubt that English is the business language globally and it should not be open for individual member states to restrict or refuse to participate in specific initiatives, including in this case relating to intellectual property, because of local parochial linguistic concerns.*

*We also think that there is a general tendency of EU legislation to just build another layer on existing legislation rather than revisiting the legislation as a whole in the light of*



*experience and changed commercial circumstances. Moreover, because the market is changing far more quickly than individual member states can react legislatively, generally, and this even less likely at an EU level, the approach should be to facilitate businesses securing their contractual rights, where necessary supported by national legislation, as long as it is compatible with the basic requirement of free movement of goods, and then only where absolutely necessary through EU legislation.*

*COBCOE strongly supports an open and free market. There is a fundamental conflict between a laissez-faire approach, allowing the market to function on its own, subject to the obvious public policy constraints and insistent focus on legislating every step of the way for a “free market”. A business community constrained by detailed and invasive regulation is not a true free market and, again, there is an enormous risk that innovation will be stifled by overbearing legislation, bureaucracy and the cost of compliance.*

*Lastly (and it is appreciated that this is beyond the direct scope of this consultation), different fiscal rules, particularly in relation to the application and interpretation of VAT legislation, can have the effect of distorting the free market.*