HM Government

Review of the Balance of Competences between the United Kingdom and the European Union

Single Market: Free Movement of Goods

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Contents

Executive Summary

This report examines the balance of competences between the European Union and the United Kingdom in the area of the free movement of goods within the Single Market, and is led by HM Revenue and Customs, the Department for Business, Innovation and Skills and the Intellectual Property Office. It is a reflection and analysis of the evidence submitted by experts, non-governmental organisations, businesspeople, Members of Parliament and other interested parties, either in writing or orally, as well as a review of relevant literature. Where appropriate, this report sets out the current position agreed within the Coalition Government for handling these policy areas in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

This report encompasses product regulation and standards, the customs union, and intellectual property rights (IPRs). It follows the Single Market report, published in July 2013, and is closely linked to the report on Trade and Investment being published in parallel with this report.

Chapter One sets out the development of the Free Movement of Goods in the Single Market, from its beginnings in the Treaty of Rome, the establishment of the Customs Union in 1968, and the impact of European Court of Justice (ECJ) Jurisprudence. A major acceleration in Single Market integration took place through the '1992' programme, including the Single European Act which introduced the 'New Approach' to Single Market legislation. This chapter also describes the establishment of a framework for Community rights, including unitary, EU-level IPRs for trademarks and designs.

Chapter Two sets out the legal framework that underpins the free movement of goods in the Single Market. Articles 28-37 of the Treaty on the Functioning of the European Union (TFEU) set out the Treaty provisions for the free movement of goods, including the establishment of the Customs Union. EU competence on Intellectual Property (IP) usually derives from the Single Market provisions in TFEU Articles 114 and 118.

Chapter Three considers the impact of the free movement of goods on the UK's national interest. The majority of respondents to this review, including most respondents from business organisations and individual firms, supported the current balance of competence on the free movement of goods and felt that, on balance, EU action was beneficial to the UK's national interest. They felt that the advantages of European action – for example, a level playing field for UK businesses and a single transparent set of rules with scope for legal redress – outweighed the costs arising from administrative burdens, regulatory costs or policy trade-offs. This judgement was based on recognition that the counterfactual to EU action – namely, 28 national regimes – would lead to a regulatory result that was similar to the present position. Because there is a broad consensus between Member States on customs controls, product safety

requirements and the need to protect IP, which in many cases are also governed by international rules, businesses would face broadly the same regulatory requirements arising from 28 different national regimes as they would have with a single uniform regime, yet without the benefits of dealing with a single regulatory framework.

A small number of respondents, predominantly from think tanks and lobby groups, offered an alternative view, arguing that the single market in goods is no longer very relevant to the UK's national interest. This argument was based on the view that the importance of trade with the Single Market is diminishing compared to other global markets and that the Customs Union is redundant, as the low level of most tariffs make them not worth collecting.

Chapter Four considers the future direction of the single market in goods. Alongside support for the current state of EU competence on the free movement of goods, there was also support for retaining the voluntary approach in certain areas, such as the ability for individual businesses to adopt European standards, the option for IP holders to register and protect community rights, and national approaches to trade facilitation. These areas give important scope for flexibility to businesses in making use of EU systems, and in the case of trade facilitation, to governments in implementing EU mechanisms to reflect national circumstances and policy priorities. With regard to the future development of the free movement of goods, there was support for more uniform approaches, for example, in the areas of implementation and enforcement. A large majority of business representatives felt that this could be delivered by more effective use of existing mechanisms, greater co-operation between Member States, 'enhanced co-operation', or further use of voluntary systems, rather than necessarily through greater harmonisation.

Introduction

This report is one of 32 reports being produced as part of the Balance of Competences Review. The Foreign Secretary launched the Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the European Union. It will provide an analysis of what the UK's membership of the EU means for the UK national interest. 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. It has not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

The Review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. More information about the Review, including a timetable of reports to be published over the next year, can be found at https://www.gov.uk/review-of-the-balance-of-competences.

The Objectives of This Report

The objectives of this report are to consider:

- How EU competence over intra-EU trade in goods, the customs union and the protection of IP has developed;
- What the current balance of competence is between the UK and the EU on intra-EU trade in goods, the Customs Union, and IPRs;
- How competence is exercised in practice in these areas, and whether it is working in the UK's national interest; and
- The current direction of travel in these areas, including the potential future development of the Single Market, Customs Union and the IPRs framework, and future challenges and opportunities for the UK in these areas.

Chapters 1 and 2 of this report set out the essential background: the development of the free movement of goods within the Single Market and the current nature of the EU's powers on the free movement of goods. Chapter 3 considers the first three areas set out above. Chapter 4 looks to the future and considers the fourth objective, identifying trends and possible policy options for the UK.

The Nature of This Report

The analysis in this report is based on a range of evidence gathered following a call for evidence. It draws on written evidence submitted, notes of seminars and discussions held during the call for evidence period and existing material which has been brought to our attention by interested parties, such as past Select Committee reports or reports of the European Commission. These sources of material are listed in the Annexes.

Chapter 1: The Development of the Free Movement of Goods

Beginnings in the Treaty of Rome

1.1 As discussed in the Single Market Report published in July 2013, the Single Market has its origins in the Treaty of Rome that established the European Economic Community. The first page of that Treaty set out a programme of activities to create a free trade area between the Members of the Community and a customs union to govern imports and exports with non-EU countries.[1] This included:

- The elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; and
- The establishment of a common customs tariff and of a common commercial policy (CCP) towards third countries.

1.2 These objectives accompanied and supported a range of other, wider economic and political objectives in establishing the European Communities.[2] After the Treaty of Rome came into effect on 1 July 1958, there was gradual progress towards delivering the aims of a customs union. The Customs Union eventually entered into force on 1 July 1968 with the abolition of Member States' separate national customs tariffs, replaced by a common external tariff.

1.3 On 22 April 1970, the Member States signed a Treaty in Luxembourg allowing the European Communities to be financed increasingly by Own Resources -the EU's own revenue – instead of direct contributions from Member States. Customs duties and agricultural levies were the first of these revenue streams, now referred to as Traditional Own Resources. European Coal and Steel Community customs duties have also been included since 1988. The use of customs duties as Own Resources distinguishes the EU from other customs unions and is indicative of its place in a more ambitious, wider agenda.

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[1] A customs union is an association of nations which promotes free trade within the union and establishes a common external tariff on trade in goods with countries outside the union. Internally, Member States agree to remove any customs duties, charges having equivalent effect or quantitative restrictions on each other thereby allowing the free movement of goods, regardless of their origin. By agreeing to a common external customs tariff, members ensure that goods enter the union are subject to the same rates of customs duty.

[2] The European Communities included the European Coal and Steel Community and the European Atomic Energy Community (Euratom), as well as the European Economic Community. The European Communities made up Pillar 1 of the European Union (with Community Foreign and Security Policy and Police and Judicial Co-operation making up pillars two and three respectively) until the pillar system was abolished under the Lisbon Treaty and the European Union was designated as the legal successor body to the European Community.

1.4 The Accession Treaty for the UK was signed on 22 January 1972, and the UK joined the European Communities on 1 January 1973.

The Impact of Jurisprudence

1.5 Despite the creation of the Customs Union in 1968, with the abolition of financial and quantitative restrictions (such as quotas) on the free movement of goods between Member States, other barriers to trade remained. These restrictions were considered measures having equivalent effect and the ECJ handed down key judgements prohibiting such restrictions. In the *Dassonville* case in 1974, the Court prohibited 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.[3] The *Cassis de Dijon* case extended the prohibition on measures having equivalent effect, introducing the concept of mutual recognition – where goods had been lawfully manufactured and marketed in a Member State, other Member States could not request additional requirements for the product to be sold on their national market.[4] [5] These two landmark cases led to an avalanche of cases to the ECJ, challenging national restrictions on the free movement of goods.

The Single European Act and the Single Market Programme, '1992'.

1.6 The next major development affecting the customs union was the completion of the Single Market to deliver free movement of goods as well as people, services and capital. A Commission White Paper set out the vision for this in 1985, and was followed by legislation to facilitate progress in the form of the 'Single European Act', which entered into force on 1 July 1987. This made a series of important changes to the founding Treaties, for example using Qualified Majority Voting (QMV) to speed progress for much legislation. It launched a series of changes to promote completion of the Single Market, including removal of many national measures that restricted the free movement of goods between Member States.

1.7 With a swelling number of cases before the Court, Lord Cockfield, the Commissioner with responsibility for the Single Market in the Delors Commission (and a former Trade Secretary in the Government of Margaret Thatcher) proposed a 'New Approach' to Single Market legislation that was agreed through a Council of Ministers' Resolution in 1985.

1.8 The new approach radically overhauled the European legislative process by basing itself on four principles:

- Legislation (mainly EU directives) would confine itself to identifying essential health and safety requirements, or other kinds of protection depending on its purpose. This had two effects that stimulated the Single Market. Firstly, legislation could be negotiated more quickly. Secondly, it could be much broader in scope, because it did not need detailed technical specifications, and could therefore cover a much wider range of goods.
- The technical specifications themselves were now prepared by the European standardisation bodies. This had two key advantages. It meant that all key stakeholders had direct involvement in devising the specifications through the standards-making process, most notably industry. It was one of the original forms

[3] *Dassonville*, Case C-8/74[1974] E.C.R 837.

[4] Under mutual recognition, Member States agree to recognise each others' regulations and goods or services authorised under them. For example, if a particular good meets the requirements of one Member State, it has in principle to be accepted onto the market in all other Member States. Mutual recognition can be provided for directly by the Treaty or by the ECJ's jurisprudence, or it can be set out in legislation.

[5] *Rewe-Zentral (Cassis de Dijon)*, Case C-120/78, [1979] E.C.R 649.

of 'co-regulation' or 'better regulation'. It also meant that the specifications could be revised more easily through the standards-making process than through the legislative process (when innovation made this necessary).

- If products were manufactured to these European Standards (European Norms or 'EN'), they would gain the 'presumption of conformity' with the essential requirements of the legislation itself.
- Manufacturers could still manufacture in their own non-standard way if they wished, but were required to explain how their products met these requirements, if called upon to do so by the Market Surveillance Authorities of the Member States.

1.9 The new approach resolution of 1985 was complemented by a Global Approach Resolution by the Council of Ministers in 1989, which laid down the means by which conformity with the essential requirements of EU legislation was to be demonstrated before goods could be placed on the market and put into service.

1.10 As part of this programme, Lord Cockfield identified some of the 300 product areas or product characteristics in need of harmonisation. This has led to a set of around 25, depending on how they are counted, harmonising new approach Directives being adopted by the end of 1992 or subsequently.

1.11 The Single Market became fully-fledged in 1993 with the Treaty on European Union (TEU), 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 harmonised to facilitate the free movement of goods.

1.12 The development of the Single Market also led the European Community to exercise its competence into IP for the first time. In the late 1980s, most Member States already shared similar IP systems deriving from international law. Around this time, the EU began to exercise its competence in relation to specific technological developments, for example the Computer Programs Directive of 1991.

1.13 This is partly a reflection of the state of innovation among EU Member States during the period: it was during the 1980s, for example, that the possibilities of biotechnology began to attract global attention and policy responses. Also around the same time, the strong link between IP and trade was acknowledged in the World Trade Organisation (WTO) Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which was concluded in 1994. This agreement set out minimum standards for IP rights protection and all EU Member States at the time signed up.

Beyond 1992

1.14 Whilst the Single European Act and the Single Market programme leading up to the Maastricht Committee was celebrated as the completion of the Single Market, the free movement of goods has continued to develop. In 2002, on the tenth anniversary of the Maastricht Committee, the European Commission saw an opportunity to build on the new approach to enhance the free movement of goods in the Single Market. Following a wide-ranging and deliberative review, the Commission proposed in 2007 to extend the new approach to most other EU product harmonisation legislation through the new legislative framework.

1.15 The customs union has developed strong links with several non-EU countries over the years. On 31 December 1995, a customs union was formed between the EU customs union and Turkey. This was intended as a step towards Turkey's eventual accession to the EU. Turkey gained access to the EU Single Market and became responsible for applying the common external tariff (from EU trade agreements) for industrial goods (but not agricultural goods), in its dealings with non-EU countries. Other non-EU countries participating in the Customs Union are the micro-states of Andorra (since 1991, and excluding agricultural products) and San Marino (since 2002).

Free Movement of Goods in the Present Day

1.16 The EU is a major world trading bloc, party to numerous trade agreements around the world, and has a significant influence in multilateral negotiations in international bodies such as the WTO and the World IP Organisation (WIPO).

1.17 Article 28 of the TFEU establishes the Customs Union, building on the essentials as first set out in the Treaty of Rome, and setting it in a deeper and wider context of trade facilitation.

Map Showing the Territory of the EU Customs Union and the Customs Union Between the EU and Turkey:

1.18 The EU now has the world's most developed customs union, with free movement of goods within the EU; a single tariff; and common customs procedures for imports and exports to and from non-EU countries. EU customs officials deal with huge volumes of goods which are imported and exported to and from the Single Market under common customs procedures. According to the European Commission, EU customs administrations handle 17% of world trade, and the EU is at the centre of global trade and supply chain logistics, and is the number one trading partner for the United States, China and Russia.[6]

1.19 Customs duties are still a source of Traditional Own Resources revenue for the EU. However, their revenue importance has gradually declined as other sources of EU funding have increased, duty rates have reduced and a quarter of customs revenue collected is now deducted to pay Member States' collection costs.

IP Rights in the Present Day

1.20 Today there are two core areas of IP – trademarks and designs – for which it is possible to be granted unitary, EU-level rights, alongside national rights as part of a dual and complementary system offering choice for businesses about where and how they protect their rights. These Community rights are registered and administered by the Office for Harmonisation in the Single Market (OHIM – a self-financing EU agency), and go beyond the usual national boundaries to cover all Member States at once. Enforcement is at national level in designated courts with EU-wide effect. In the next few years the Unitary Patent will fulfil a similar function for patent rights in the majority of EU Member States.

1.21 The international framework for IP has continued to develop through successive international agreements.[7] The two most significant early agreements which remain in force today are the Paris Convention for the Protection of Industrial Property first signed in 1883, and the Berne Convention for the Protection of Literary and Artistic Works first signed in 1886. Between them these two agreements set out the basics of modern national IP systems around the world. Both have been refined a number of times since their first versions, as trade has expanded across the globe and supply chains have become more complex. In 1994, TRIPs built on both Paris and Berne to establish a further updated set of global norms. These international agreements have influenced national systems and, consequently, the development of the EU's IP policies.

1.22 From a policy perspective, the mix of national, EU and international action on IP makes for a dynamic process that requires careful coordination. The changing nature of IP-rich products and services, such as the internet, continue to inspire policy development and to influence the law at national, EU and international level. For example, the WIPO Beijing Treaty on audiovisual performances, agreed in 2012, strengthens the rights of actors around the world over use of their work in films and broadcasts. Without close cooperation between EU Member States and the European Commission there is a risk that new IP initiatives could introduce barriers to the free movement of goods within the EU. For this reason, the UK works with other EU Member States and the European Commission to ensure new policy developments meet the objectives of the Single Market.

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[6] Commission Communication to the Council and the European Parliament, *the State of the Customs Union*, COM (2012) 791, December 2012.

[7] Please see a list of international agreements at: http://www.wipo.int/treaties/en/index.jsp, accessed on 15 January 2014.

Chapter 2:
The Current State of Competence

2.1 The Single Market report published in July 2013 sets out a high-level overview of the current state of competence in the Single Market and what follows draws on that report. It looks in more detail at the operation of the Single Market, with respect to the free movement of goods, customs procedures and IPRs.

2.2 The basis for EU action on the free movement of goods, and on the Single Market more widely is Article 3(3) of the TEU which requires the EU to 'establish an internal market'.[1] The TFEU requires the EU to 'adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'. Articles 28-37 TFEU then set out the provisions for the free movement of goods, including the establishment of the customs union, which will be described in more detail below.

2.3 There are two main limbs to the free movement of goods. They are: 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 countries outside the EU customs territory (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.

2.4 Quantitative restrictions may take the form of quotas or a total ban on the import or export of goods between Member States. In effect, free access for goods from other Member States to national markets is assured by these articles and goods from other Member States must be accorded the same treatment as goods produced nationally. So, for example, a requirement that imported, but not domestic, goods be inspected is directly discriminatory and breaches Article 34. The prohibition extends to 'buy national' campaigns such as the 'buy Irish' campaign that formed the subject of *Commission v. Ireland* case.[2] The TFEU also prohibits indirect discrimination, that is, measures which appear to be nationality-neutral, but have a greater impact on goods from other Member States than on domestic goods.

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[1] Also known as the 'Single Market' – the terms are interchangeable.

[2] *Commission v. Ireland*, Case 249/81 [1982].

2.5 The ECJ has made it clear that the prohibition of measures having equivalent effect to quantitative restrictions extends to national regulatory requirements that act in such a way as to restrict or ban the import or export of goods from another Member State. In the Dassonville ruling, the Court ruled that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' constituted quantitative restrictions and were therefore prohibited by Articles 34 and 35.[3] The *Cassis de Dijon* case extended this principle in two important ways.[4] Firstly, it set out the principle of mutual recognition: where a good was lawfully manufactured and marketed in one Member State, another Member State could not impose additional requirements. In the specific case, German national legislation banned the sale of liquor with alcohol content of 15-25% and argued that this provision was not a prohibited restriction as it applied equally to goods regardless of their country of origin. The Court however found that this was an unlawful restriction on trade as the product in question had been lawfully manufactured and marketed on the French market. However, the Court set out additional grounds, beyond the justifications set out in Article 36 TFEU, on which imports and exports could be restricted:

> Obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[5]

2.6 Whilst these mandatory requirements are an open category of legitimate aims, for example, being extended through case law to include environmental protection), any mandatory requirement is still subject to a restrictive interpretation and must meet the requirement to be proportionate. For example, in the *Reinheitsgebot* judgement, the Court found that German beer purity laws had the legitimate aim of protecting German consumers, but were disproportionate, as that aim could have been achieved in a less restrictive manner – through labelling requirements.[6]

2.7 The combination of the *Dassonville* and *Cassis de Dijon* rulings led to a significant increase in ECJ cases as further clarification was sought on a case-by-case basis, including the *Walter Rau Lebensmittelwerke* case regarding packaging requirements for margarine on the Belgian market, and the Torfaen Borough Council case on Sunday trading restrictions.[7] [8] Responding to the perceived ambiguity created by this case law, in the joined case *Keck and Mittouard*, the Court sought to limit the meaning of measures having equivalent effect by introducing a rigid distinction between product requirements and certain selling arrangements.[9] Product requirements were defined as 'rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging)', and these were considered to be measures having equivalent effect, and therefore fell within the scope of Articles 34 and 35. In contrast, certain selling requirements were no longer to be considered measures having equivalent effect if those requirements applied equally to all relevant traders operating within a Member State and did not discriminate between domestic and foreign products.

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3 *Dassonville*, Case 8/74, [1974] E.C.R 837.

4 *Cassis de Dijon*, Case 120/78,[1979] E.C.R 649.

5 Article 36 TFEU.

6 *Commission v. Germany* (Reinheitsgebot), Case 178/84, [1987] E.C.R 1227.

7 *Rau v. De Smedt*, Case C-261/81, [1982] E.C.R 3961.

8 *Torfaen*, Case C-145/88 [1989] E.C.R 3851.

9 *Keck and Mithouard*, Cases C-267/91 and C-268/91, [1993] E.C.R I-6097.

2.8 The free movement of goods draws on Articles 34 and 35 which prohibit any quantitative restrictions on the import or export of goods between Member States, subject to the provisions of Article 36. Article 36 allows restrictions: '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'. Article 36 is a closed list of justifications and makes clear that such justifications are to be interpreted restrictively; they may not be used as 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

2.9 In practice, very few goods are now subject to import or export restrictions on these grounds solely under UK law. This is because EU Member States have tended to reach agreement on which goods should be subject to restrictions on their movement for reasons of public security and protection of life and health. Where consensus has been achieved, these controls have largely been regulated at EU level. Most goods that the UK would have unilaterally decided to prohibit or restrict in the past have subsequently been prohibited or restricted throughout the EU. The UK has often played a leading role in this.

2.10 However, some goods are subject to restrictions on their movement under UK law and need a UK licence, permit or certificate to be imported or exported. The Government uses the systems for granting or denying licences to regulate trade where necessary. For example, firearms controls tend to be stricter in the UK than in other EU Member States. Whilst the EU has regulated the movement of firearms throughout the EU in an EU Directive, and has introduced a European Firearms Pass, companies importing firearms into the UK commercially still require a UK Government import licence and EU citizens visiting the UK with a firearm will need a British Visitor's Permit in addition to their European Firearms Pass.

2.11 Goods which may require a licence under UK national legislation for import or export to and from other EU Member States include:

- Certain objects of cultural interest, artwork, antiquities and archaeological material;
- Controlled drugs;
- Firearms;
- Animals; and
- Military goods.

Scope of EU Competence on the Customs Union

2.12 The customs union is an area of exclusive EU competence (Article 3(1)(a) TFEU), meaning that virtually all legislation in this area is EU legislation that has been proposed and initiated by the European Commission. Most of this legislation is contained in EU Regulations and is therefore 'directly applicable', meaning it is law in all EU Member States. Member States cannot introduce their own customs laws or customs procedures, except for legislation that is needed at national level in order to implement EU customs law.

2.13 As well as having sole right to initiate customs legislation, exclusive competence also means that the Commission enters into agreements on customs union matters with non-EU countries, such as agreements to extend preferential duty rates to goods originating in those countries, and imposes protectionist measures against goods originating outside the EU, such as anti-dumping and countervailing duties.

2.14 The current EU Customs Code and its Implementing Provisions set out the rules for importing and exporting goods to and from non-EU countries, and impose legal requirements and obligations on importers and exporters.[10] [11] Businesses that engage in international trade, and individuals who import or export goods privately, must comply with both EU and UK legal requirements. A new EU customs code (the Union customs code) is currently being negotiated (this is discussed further in chapter 3).

2.15 EU Member States are responsible for managing their own customs services and for implementing and enforcing EU customs legislation. This gives Member States the flexibility to have different agencies operating at their borders carrying out customs functions. The UK decides which government department or agency is the competent authority responsible for implementing and enforcing customs law in the UK. Within the last decade, the UK has seen various customs functions performed by HM Customs and Excise, HM Revenue and Customs, the UK Border Agency and Home Office Border Force. Currently customs functions are performed by HM Revenue and Customs, and Home Office Border Force.

2.16 Since the UK retains competence over its criminal justice system, the UK also decides the nature and level of penalties that apply for breaches of EU customs rules 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.

2.17 In summary, the current balance of competence means that customs procedures are agreed at EU level, whilst the UK Government manages and organises its own customs administration and sets its own penalties for customs offences.

Scope of EU Competence on IP

2.18 The competence of the EU to act within the Union in the field of IP has so far always been enacted within the context of the Single Market, and normally on the basis of TFEU Articles 114 or 118 (or their antecedents). This is because IP laws in Member States, while often derived from international Treaties, continue to differ quite significantly from one another as a result of national contexts such as legal systems, and the territorial nature of IP rights. The Single Market basis for EU action in this area has meant that measures can only be taken where there is a cross-border issue to address. It is still therefore possible for Member States to retain their own IP laws and policies, where these do not affect cross-border trade or have not yet been subject to EU action.

2.19 The way in which the EU has taken action on IP varies, as does the level of flexibility afforded by harmonising legislation. In some areas there is very little room for Member States to take advantage of flexibilities, for example, throughout the EU copyright is protected for the lifetime of an author and 70 years following their death. In other areas, Member States retain considerable leeway to act at national level, albeit subject to

[10] Council Regulation 2913/92 *Establishing the Community Customs Code*, 1992.

[11] Commission Regulation 2454/93 *Laying down provisions for the implementation of Council Regulation 2913/92* Establishing the Community Customs Code, 1993.

relevant international agreements – for example, whether or not to enforce IP rights using criminal sanctions, or the detail of patent validity criteria. Therefore, businesses trading within the Single Market need to be aware of differences in the ways different Member States approach particular aspects of IP law and enforcement.

2.20 However, uniform rights such as the Community trade mark are a different matter, because they apply across the whole Union at once, so there is no variation between Member States. National trade marks, on the other hand, remain valid only in the country of registration. It is the same for Community design rights versus national design rights, whether registered or unregistered.

2.21 In addition to the key Articles of the TFEU, in analysing the balance of competences it is important to bear in mind the objectives of the EU, found in the TEU, since these often act as a means to interpret competence questions. The three objectives most relevant to IP are: the establishment of a Single Market; the promotion of the Union's values; and respecting cultural diversity.

2.22 The first objective has been discussed in detail already, but it is worth adding that the TEU's vision of the Single Market encompasses social goals as well as economic goals.[12] This reflects the view raised during the call for evidence that there is a public policy dimension to IP that can be demonstrated by the link between patents on medicines and public health.[13]

2.23 The second objective, the promotion of the European Union's values, brings into play respect for fundamental rights such as the right to property. There are a number of qualifications to this in different parts of the Treaties, perhaps most importantly several rulings of the ECJ that there must be a balance between the interests of the rights owner and the public interest.[14]

2.24 The third objective, cultural diversity, particularly affects EU action in the field of copyright. Since the EU does not have competence in the field of culture, it is particularly important that any EU action on copyright does not negatively impact cultural diversity within the Union.[15]

The Role of ECJ Case Law in Interpreting Competence

2.25 As noted above, the ECJ plays a major role in interpreting and applying EU measures. It does this by defining certain terms as autonomous concepts of EU law, which then become part of EU law unless modified or removed by the legislature. In this way the ECJ may establish and develop principles of EU law. For example, starting with the Infopaq case, the Court has begun to develop a new concept, 'originality', means in relation to copyright works.[16] There are a number of other significant examples of ECJ decisions which have affected EU and UK policy on IP matters, some of which are described later in this report.

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[12] A Ramalho, 'European Union Competence in the Field of Copyright' (2013).

[13] Oxfam and Dr Sven Bostyn, Liverpool University, *submissions of evidence*.

[14] A Ramalho, 'European Union Competence in the Field of Copyright' (2013).

[15] Idem.

[16] *Infopaq v Danske Daglbades Forening*, Case C-5/08 [2009] E.C.R I-6569.

The EU's Legislative Competence

2.26 With the exception of Article 31, all the Treaty articles cited above have direct effect. 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 Single 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 Single Market is shared with Member States (Article 4). An account of the relevant legislative Treaty bases, that is, the Articles that confer legislative powers on the EU, can be found in Appendix 3.

2.27 The CCP, Article 206 TFEU, governs such things as changes in tariff rates, the conclusion of tariff and trade agreements, the commercial aspects of IP, and trade protection. Accordingly, it plays a significant part in the operation of the customs union.

2.28 Article 207 provides for legislation (under the ordinary procedure) to be made for the purpose of implementing the CCP.[17] It is the legal base for a number of measures in the customs union field. Article 352 is 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. Article 352 has been invoked for the adoption of measures in the Single Market.

2.29 The territory of the customs union (defined in Article 3 of the Community customs code) comprises the territories of the Member States. There are certain exceptions, Gibraltar is outside of the customs union, as are the Faroe Islands and the French overseas territories, and there are certain additions, such as the Channel Islands and the Isle of Man. There are several non-EU countries which have strong links to the EU's customs union. Though the members of the European Economic Area (EEA): Iceland, Liechtenstein and Norway have adopted EU law as regards free movement of goods, neither they nor Switzerland, which has many bilateral agreements with the EU, are part of the customs union, and they negotiate and apply their own rates of duty with third countries. Monaco is a part of the EU customs territory through a bilateral agreement with France. As explained in chapter 1, Turkey does participate in the EU customs union, applying the common external tariff, from EU trade agreements, for industrial goods, but not agricultural goods, in its dealings with non-EU countries since 31 December 1995. Other non-EU countries participating in the customs union are the micro-states of Andorra, since 1991, except for agricultural products, and San Marino since 2002.

[17] The ordinary legislative procedure is the legislative process which is central to the European Union's decision-making system. It is based on co-decision; joint agreement by the European Council and European Parliament, and QMV. It is based on the principle of parity and means that neither the European Parliament nor the Council) may adopt legislation without the other's assent. Any differences between the European Parliament and Council may be resolved within a conciliation committee where both sides seek to agree a joint text.

Crown Dependencies

Some aspects of EU law apply to the Crown Dependencies: the Isle of Man and the Bailiwicks of Guernsey and Jersey, as set out in Protocol 3 to the UK's Treaty of Accession to the European Communities. By virtue of Protocol 3, the Crown Dependencies are essentially within the Single Market for the purposes of trade in goods and are part of the EU customs union. This means that exports of goods from the Crown Dependencies to the EU and from the EU to the Crown Dependencies are treated as intra-EU trade.

Through being a part of the customs union, the Crown Dependencies apply the Common External Tariff (CET) to imports of goods from third countries. The Isle of Man is also within the EU common system of VAT, by virtue of the 1979 Customs & Excise Agreement with the UK, making all trade in goods subject to the EU Principal VAT Directive.

EU legislation in the area covered by Protocol 3 is directly applicable. However it should be noted that the concept of trade in goods has evolved significantly within the EU since 1973, when Protocol 3 was negotiated. There are now a range of flanking measures relating to technical standards, consumer protection, and animal welfare and so on. Determining what is and what is not covered by Protocol 3 is not always straightforward.

Chapter 3:
The Free Movement of Goods and the UK's National Interest

Introduction

3.1 This chapter will consider the impact of EU competence over the free movement of goods and how it affects the UK's national interest. This has been divided in two areas:

- The impact of EU competence over the free movement of goods, including the advantages and disadvantages of the EU having competence in a particular field and whether it is working in the UK's interest; and
- The effectiveness with which EU competence has been exercised.

3.2 The chapter has been divided into two sections, where each of these two areas will be dealt with in turn. A number of respondents also raised important ancillary issues that are also discussed in this chapter.

Impact of EU Competence Over the Free Movement of Goods

3.3 A broad range of views were expressed on whether the free movement of goods within the Single Market works in the UK's national interest – and indeed what was in the UK's national interest – and whether it was beneficial that the customs union was an area of exclusive EU competence. However, the majority of business representatives who responded to the call for evidence, including the major trade associations, recognised the benefits of EU action, and saw it as necessary to facilitate trade and provide a level-playing field for businesses.[1] Business representatives also argued that the Single Market provided greater choice for consumers, and that EU action promoted greater competition, which in turn resulted in better prices for consumers.[2]

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[1] See for example: ADS; British American Tobacco; British International Freight Association; British Ports Association; the CBI; DHL; Diageo; Federation of Small Businesses (FSB); UK Music; National Farmers Union (NFU); Sanofi; The Scotch Whiskey Association; The Tile Association; UK Chamber of Shipping; UK Trade Facilitation; UK Weighing Federation; and The Wine and Spirit Trade Association, *submissions of evidence*. See also the records of Stakeholder Events.

[2] See for example: the CBI; the Council of British Chambers of Commerce in Europe (COBCOE); and Sanofi, *submissions of evidence*.

3.4 The Scottish Government argued that the Single Market and the customs union provide social, as well as economic, benefits and should not just be viewed as a free trade area that improves prospects for business.[3] The European Commission also argued that EU action on the customs union, for example, provided enhanced protection for EU citizens. A number of lobby organisations and some small businesses provided dissenting views, arguing that the importance of the Single Market to the UK economy has been overstated.[4]

Easy Access to the EU Single Market

3.5 Many respondents, including MEPs and those from large businesses and a variety of trade associations argued that the free movement of goods was broadly beneficial to UK business. Many of the benefits identified for the free movement of goods reflect views previously expressed in the Single Market Report. The Single Market Report considered the different economic studies on the impact of the Single Market and concluded that 'integration has brought to the EU, and hence to the UK, in most if not all observers' opinions, appreciable economic benefits', even if those benefits have fallen short of those envisaged in the 1988 Cecchini report.[5] [6] Business representatives cited ready access to an internal market of 500 million consumers, without either financial or quantitative barriers, as a key benefit to the UK. The Law Society of England and Wales stated that 'EU action on the free movement of goods is a necessary precondition of the Internal Market, membership of which is of enormous benefit to UK businesses'.

3.6 Analysis provided by Business for New Europe (BNE) suggested that if the UK was not a party to the free movement of goods within the Single Market, over £40bn of UK exports to other EU Member States could be liable to import duties of between 4.5% and 10%. These included goods in some of the UK's key export sectors such as motor vehicles, electronics, machinery and mechanical appliances.[7]

3.7 The Federation of Small Businesses (FSB) argued that it is an advantage to small businesses that there are no physical or customs barriers when trading within the single market. The FSB made the point that the free movement of goods allows small firms to buy and sell their products in 31 countries – EU and EEA – with well over 500m consumers and over 20m businesses. A fifth of FSB members are involved in some form of international trade and Europe is their main market. Approximately 15% of their members export goods, mostly to the EEA.[8]

3.8 IPRs are territorial and usually set at national level, so differences in protection can in theory be a barrier to trade within the Single Market. A UK patent is not valid in France, for example, although there may be a French patent covering the same invention. Where there is no patent, goods can be traded freely. Where there is a patent on the same invention in all states, goods are in theory prevented from free movement. The case is similar for trademarks and design rights. Copyright is recognised in all EU countries, but its governance varies by territory.

3.9 The barrier created by an IPR, assuming a fully harmonised set of rules, is therefore only to identical or near-identical competing goods. Equally, the need to register separate

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3 Scottish Government, *submission of evidence*.

4 Bruges Group; CIVITAS; and the Freedom Association, *submissions of evidence*.

5 HMG, *The Balance of Competences between the UK and the EU: Single Market Synoptic Report* (2013).

6 P Cecchini and A Jacquemin, *The European Challenge 1992: The Benefits of a Single Market, for the Commission of the European Communities*, (1988).

7 BNE, *submission of evidence*.

8 FSB, *submission of evidence*.

IPRs in different territories may be a barrier to trade from the rights-holder's perspective. However, when this point was discussed during the consultation events, it was recognised that a balance needs to be struck between a system that is flexible enough to facilitate the free movement of goods and one that is robust enough to protect rights-holders' IPR across multiple territories. There was a broad consensus amongst IPRs stakeholders that current EU action achieved this balance.

A Single Set of Rules

3.10 Other benefits of the free movement of goods, besides tariff-free access, were also identified. These included the creation of a level-playing field between UK exporters and their European competitors.[9] A common set of rules between Member States reduces the compliance costs for their members, when compared with the costs of having to deal with a number of different national regimes.[10] The common set of rules removes many of the non-tariff barriers to trade, enabling exporters to reap the benefits of economies of scale, and is cheaper to administer than having to demonstrate compliance with multiple regulatory frameworks. It also enables exporters to benefit from reduced costs, shorter delivery times and less risk of interruption to goods movements at the border .[11] The Scotch Whisky Association argued that a single regime is 'immeasurably simpler' than separate national systems.[12] Diageo also identified the importance of the legal certainty provided by a single, clear set of common rules. This certainty enables them to invest in new products with the knowledge that a new product will be subject to the same food and safety standards across the whole EU market.[13]

Case Study on Toy Safety

The European Directive on the safety of toys sets out the essential safety requirements which must be met before toys can be sold in Europe, wherever they are made. These include the physical, mechanical and chemical properties of the toys, age information and appropriate warnings. All toys meeting these requirements must carry the CE marking. This then allows them to be circulated freely across Europe. These requirements allow the consumer to be confident that toys they purchase in the EU meet a satisfactory standard, regardless of where they were made.

3.11 Legal certainty and the value of a common set of rules were also identified as beneficial for IPR owners and consumers within the EU. Due to the fact that the rules governing IP rights are often set at national level, this means they are also challenged at national level. The exception is with EU Community rights, which are enforced in designated courts with EU-wide effect. Given Member States and the EU subscribe to the same international laws on IP, the systems – while different at an operational level – are broadly predictable in policy terms. EU-level action has also approximated or harmonised specific factors, for example, the EU-wide doctrine on exhaustion of IPRs. Dr Sven Bostyn of Liverpool University commented that 'harmonised or even unified IP regimes are beneficial to EU citizens and businesses and bring the EU up to par with other trade blocs such as the US

[9] See for example: ADS; British American Tobacco; British International Freight Association; British Ports Association; the CBI; DHL; Diageo; FSB; the Law Society of England and Wales; the NFU; Sanofi; The Scotch Whisky Association; The Tile Association; UK Chamber of Shipping; UK Trade Facilitation; UK Weighing Federation; and The Wine and Spirit Trade Association, *submissions of evidence*.

[10] FSB, *submission of evidence*.

[11] Diageo, *submission of evidence*.

[12] Scotch Whisky Association, *submission of evidence.*

[13] Diageo, *submission of evidence*.

and China'. He also argued that the EU's relatively harmonised system of IP is a key factor in attracting foreign direct investment into the Single Market. These views were echoed by participants in a number of workshops. However, there is an obvious disadvantage (or perhaps tactical advantage) for those seeking to defend or challenge IP rights in the multiplicity of legal systems among EU Member States.[14]

3.12 Other respondents felt that the ability, under EU law, to seek enforcement of EU regulations through EU mechanisms and/or national courts made enforcement much easier than a system based on WTO rules alone.[15]

Supply Chain Integration

3.13 The conduct of global business and the need for just in time delivery of goods makes reliable and predictable supply chains increasingly important. Supply chains that minimise the possibility of delays, such as customs checks at international borders, enable goods to move more quickly and increase the likelihood of goods being delivered on time. Many respondents involved in logistics and transport argued that the free and unimpeded movement of goods enabled by the Single Market and the customs union has helped to reduce journey times for goods moving internationally, benefitting the wider supply chain and improving the predictability of delivery schedules.[16]

3.14 The principle of free movement of goods within the Single Market means there is little or no interference from customs and therefore less chance of delays to goods crossing the borders between Member States. Consequently the cost of moving goods is reduced.[17] Customs agents and businesses involved in supply chain logistics expressed the view that removing the need for customs declarations on goods traded between EU Member States in 1992 was a major breakthrough.[18] For goods entering and leaving the Single Market, having common customs rules in all Member States makes the movement of goods through these procedures more predictable, regardless of which Member State they enter and exit through.

3.15 Fiona Hall MEP argued that the free movement of goods within the Single Market allowed efficient pan-European supply chains and pan-European businesses to develop.[19] ADS, an aerospace and defence trade association, stated that 'the UK's supply chain relies on the ease of ability to move its goods around the EU. ADS believe that any change to the UK's capacity to participate in the internal market for goods would harm companies throughout the UK's defence, aerospace and security sectors'.[20]

Is the Single Market Still Relevant to the UK?

3.16 Some respondents, particularly from lobby organisations arguing for a looser relationship between the UK and the EU, argued that the importance of the single market in goods was overstated.[21] Citing Lea and Binley, the Freedom Association argued that the EU is declining as an export destination compared to other markets, and that the dependence

[14] Dr Sven Bostyn, Liverpool University, *submission of evidence*.

[15] FSB and the Law Society of England and Wales, *submissions of evidence*.

[16] DHL, *submission of evidence*.

[17] See for example: ADS; British Ports Association; DHL; Diageo; and Fiona Hall MEP, *submissions of evidence*.

[18] *Record of 9 May stakeholder event*.

[19] Fiona Hall MEP, *submission of evidence*.

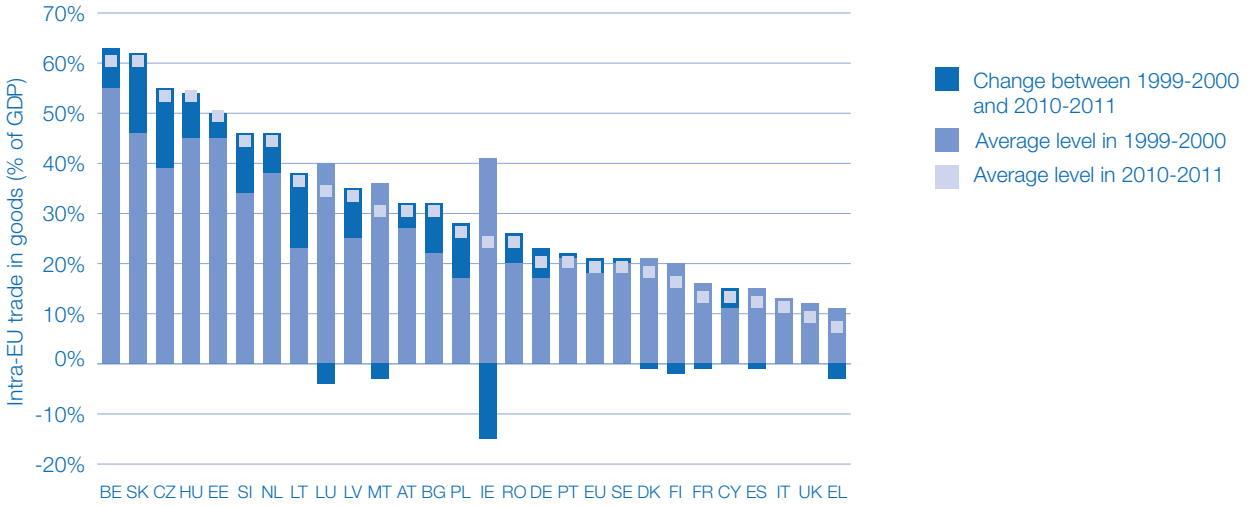
[20] ADS, *submission of evidence*.

[21] Freedom Association and Civitas, *submissions of evidence*.

of the UK economy on the Single Market – BNE highlighted that the EU represented 54% of UK exports and 52% of UK imports – was overplayed.[22] Small business owner Barry Jones suggested that the proportion of UK exports going to Europe has remained broadly constant around 40% since the 1930s, despite the establishment of the Single Market and the resulting economic integration.[23] A fuller consideration of the arguments over actual levels of UK trade in goods with the EU can be found in Appendix 1 on the 'Rotterdam-Antwerp Effect'.

3.17 The European Commission's Single Market Integration report recognises that the integration of the single market in goods has slowed over the past decade, with the UK showing a relatively low increase in intra-EU trade over that period, whilst extra-EU trade has increased at a faster rate.[24] The Commission observe that the relatively low rate of growth in EU trade for some countries such as the UK may reflect their more open economy and therefore there may be less scope for significant gains from further integration compared to other countries, particularly those who joined the EU during the past decade.

Intra-EU trade (in % of GDP)



3.18 Analysis of export figures from the UK to the then EU27 over the period 2001-2011 shows that UK exports to the EU27 as a proportion of total exports has fallen from 54% to 47% over the period, but that the total value of the UK's exports to the EU27 has increased by around 85%, from £130bn to £240bn. This apparent disparity shows that whilst the UK's trade with the EU has increased, trade with other markets, particularly emerging markets, has increased at an even faster pace, reflecting the faster rate of economic growth in some emerging economies than in more mature markets. The Trade & Investment report being published in parallel with this report will consider these trade trends in greater detail.

3.19 Recent Organisation for Economic Cooperation and Development (OECD) research on trade in value added (TiVA), the value added by individual countries in global supply chains, shows that the EU is still the UK's biggest export market, probably accounting for around 40% of the UK's exports in value added terms. In some cases the UK is supplying inputs into products being produced in other Member States, which are then

[22] BNE, *submission of evidence*.

[23] Barry Jones, *submission of evidence*.

[24] European Commission, *Single Market Integration Report* (2013).

exported to non-EU markets such as the US. Such supply chains rely on our relationship with Europe, even if the final destination for the products is the UK.

3.20 Fresh Start, whilst calling for revisions to the EU Treaties, recognised that being part of an EU customs union facilitates UK trade in goods in 'the most important market for UK business'.

3.21 CIVITAS and the Bruges Group argued in their submissions that the EU customs union is completely redundant, because the amounts of customs duty collected at the border are relatively small.

3.22 However, the European Commission saw the benefits of the customs union as being much wider than the simple collection of customs duties, which do contribute a significant amount to the EU's revenue as Own Resources. They argued that the customs union provides a range of other benefits, including providing useful services to businesses and to wider society. These benefits include:

- Protecting the level playing field for businesses trading in goods within the Single Market; ensuring consistent of treatment for importers and exporters moving goods in and out of the Single Market, regardless of which Member State they are trading in; and
- Ensuring co-operation between customs administrations, leading to better protection of EU citizens from threats to their health and safety; and enhanced protection from cross-border crime and terrorism.[25]

3.23 The Scottish Government made the point that 'access to the Single Market provides Scottish firms with easy access to more firms with whom to trade, and more potential customers to sell to. The EU is therefore, not surprisingly, the main destination for Scotland's international exports – accounting for around 46% of Scotland's international exports in 2011'.[26] Similarly, the Northern Ireland Executive stated that the ability to move goods freely within the Single Market is 'vital' to Northern Ireland, pointing out that the EU accounts for half of Northern Ireland's manufacturing export sales, and highlighting the particular importance of the Republic of Ireland market to Northern Ireland businesses.[27]

3.24 The Confederation of British Industry (CBI) argued that the free movement of goods within the Single Market has greatly benefitted British business, enabling businesses to operate more easily in non UK markets and provide goods to all of Europe's 500m citizens. At the same time it has made it easier to purchase goods from the 28 Member States, boosting competition and giving consumers greater choice.[28]

3.25 The Council of British Chambers of Commerce in Europe (COBCOE) argued that '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.' COBCOE also made the point that EU action 'results in a more competitive market, cheaper prices and better quality', which also benefits consumers.[29]

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[25] Commission Communication to the Council and the European Parliament, *The State of the Customs Union*, COM (2012) 791, December 2012.

[26] Scottish Government, *submission of evidence*.

[27] Northern Ireland Executive, *submission of evidence*.

[28] The CBI, *submission of evidence*.

[29] COBCOE, *submission of evidence*.

3.26 The FSB also argued that the Single Market offers easy access for first-time exporters with a market of over 500m customers and over 20m businesses on their doorstep.

3.27 Of the businesses and trade associations that submitted written evidence to the review, the vast majority, including all the trade associations and large businesses, felt that EU action was beneficial to varying degrees. Only three small businesses that responded to the call for evidence were generally opposed to EU action.

Regulatory Burdens on Business

3.28 The evidence suggests that some businesses benefit from the Single Market in goods more than others. The FSB argued that 'small and micro-businesses have more difficulty complying with regulation than big businesses and suffer more from the cumulative effect of legislation.' The FSB further argued that the cumulative burden of regulation falls disproportionately on small and medium sized enterprises.[30]

3.29 However, SMEs involved in import and export (up to 20% of UK SMEs) were generally thought to benefit more from the Single Market and customs union than those who did not import or export and only trade within the UK. Large businesses with a presence in several EU Member States were seen as the main beneficiaries.

3.30 Three small and medium business owners argued that the free movement of goods did not benefit their businesses, and the burdens of EU membership outweighed the benefits.[31] For example, Stuart Dockar, a small business owner, argued that business should thrive on transparency and the basic fundamentals of offering quality products, good price and good service, without the need for EU intervention.[32] CargoWise argued that many consumer goods (such as clothing and manufactured goods) come from outside the EU, therefore British consumers do not benefit from reduced import costs on these goods.[33] The Freedom Association also argued that the Single Market imposes a significant regulatory burden on all UK businesses, whether involved in trade with the Single Market or not.[34]

3.31 However, a number of other respondents, particularly those from trade associations, argued that UK businesses would need to comply with EU standards and regulations whether or not the UK was part of the Single Market, in order for UK goods to be accepted in Member States' markets. The UK Weighing Federation pointed out that 'any [national] legislation that may potentially replace that which governs the single market would be effectively the same as that to which we presently adhere. It is likely that UK manufacturers would continue to produce products to the EU harmonised standards to ensure access to both EU and other markets'.[35]

3.32 The experience of the Channel Islands and the Isle of Man illustrates this point. Whilst part of the Single Market, large elements of EU regulation do not directly apply to the Crown Dependencies under the terms of the UK's accession to the EU. However, the jurisdictions choose to implement EU regulations in many areas to ensure ready access to the Single Market. Furthermore, the UK is able to influence the development of EU regulations and standards, not only through participation in Council negotiations, but also

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30 FSB, *submission of evidence*.

31 B M Jones, *submission of evidence*.

32 Stuart Dockar, *submission of evidence*.

33 CargoWise, *submission of evidence*.

34 Freedom Association, *submission of evidence*.

35 UK Weighing Federation, *submission of evidence*.

through representation in the European Parliament, an increasingly important part of the policy development process post-Lisbon.

3.33 Similarly, the counterfactual to EU regulation is not an absence of any regulation, but rather regulation at a national level. Given free rein, it is likely that the UK would adopt laws and procedures that are similar to those currently set at EU level. Indeed, in the engagement events for this review, a number of business representatives argued that if harmonised customs rules and product regulation did not exist at EU level, in most cases the UK would need to adopt similar or identical laws, and it is a fallacy to believe the UK could easily free itself of regulations. This point is also made in the Single Market Report.[36] In the area of IP the UK would remain subject to international agreements in the same way as all other EU Member States. EU customs laws and product regulations would need to be replaced by similar national legislation and product safety would still need to be regulated, whether at national or European level.

Case Study: the UK Car Industry and the Single Market

3.34 BNE, Fiona Hall MEP, Civitas and the Freedom Association discussed the importance of the free movement of goods for the automotive industry in their submissions. BNE stated that the UK exported over 1.2m cars and commercial vehicles in 2012, of which 51% went to the EU market. The automotive industry is the UK's largest sector in terms of export by value and generated £27bn of revenue for the UK in 2011, employing 720,000 people. [37] [38] [39] UK exports of motor vehicles could face export tariffs of 10-22% without free access to the Single Market.

3.35 However, the Freedom Association questioned whether the significant non-EU foreign direct investment into the UK automotive industry was dependent on membership of the Single Market, given the history of production in the UK; investment decisions are also influenced by engineering expertise and workforce flexibility. Their evidence did recognise the close integration of the UK automotive sector into the Single Market.[40]

3.36 Over the past 20 years the first tier supply chain has come to be dominated by global corporations, supplanting smaller local businesses. These global corporations have regional manufacturing locations serving a continental market. The resulting consolidation of the supply chain has mostly concentrated supply chain manufacturing in Continental Europe, and UK vehicle makers are increasingly integrated in this EU supply chain.

3.37 Recent work has allowed the scale of this integration to be fully understood for the first time (depicted in the map shown below).[41] Between 1995 and 2009, the UK transport equipment sector sourced around 90% of its motor vehicle components from within the EU. This figure is broadly stable throughout the period but the UK's own share within this has tended to fall, increasing the share accounted for by the rest of the EU.

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[36] HMG, *The Balance of Competences between the UK and the EU: Single Market Synoptic Report* (2013).

[37] BIS analysis suggests auto is the third largest manufactured export after Chemicals and electronics.

[38] SMMT analysis, believed to include automotive retail and manufacture. BIS analysis of ONS ABS data indicates Automotive manufacturing generated £11.1bn GVA in 2011.

[39] SMMT analysis, including Automotive retail. BIS analysis of ONS ABS data indicates 129,000 Automotive manufacturing employees in 2011.

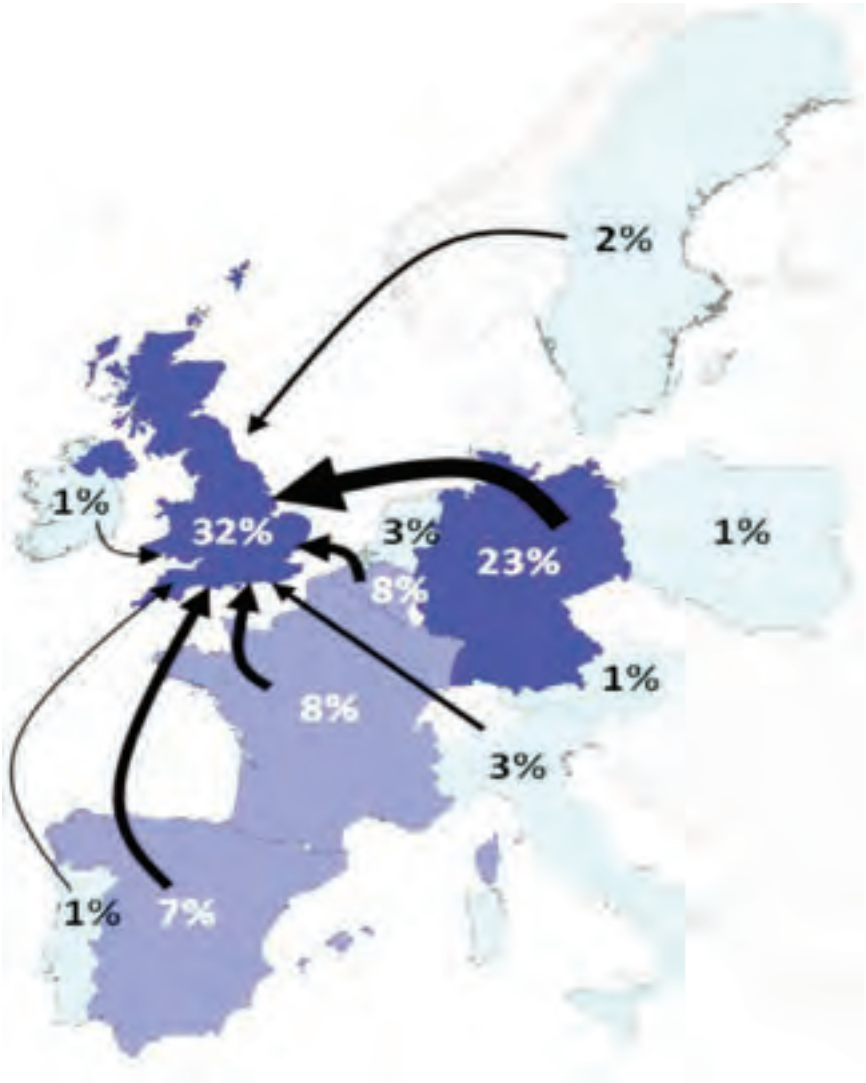
[40] Freedom Association, *submission of evidence*.

[41] World Input Output Database, Groningen Growth and Development Centre, April 2012. Source for both charts depicted in this section.

3.38 The UK sources around 23% of its motor vehicle components from Germany and 7-8% each from Spain, France and Belgium. Although not depicted here, Germany, France, Spain and Italy also source significantly from other EU countries. Similarly, the USA sources a number of components from the rest of the North American Free Trade Agreement (NAFTA). In contrast, Japan and South Korea which are not part of any equivalent free trade area source more than 90% of their components domestically.

3.39 The UK Government's Automotive Strategy, published in July 2013 also set out the extent to which European markets are a major source of demand for UK finished products.[42] This evidence is reproduced in the chart below, showing the top destinations for UK motor vehicle sales to final consumers.

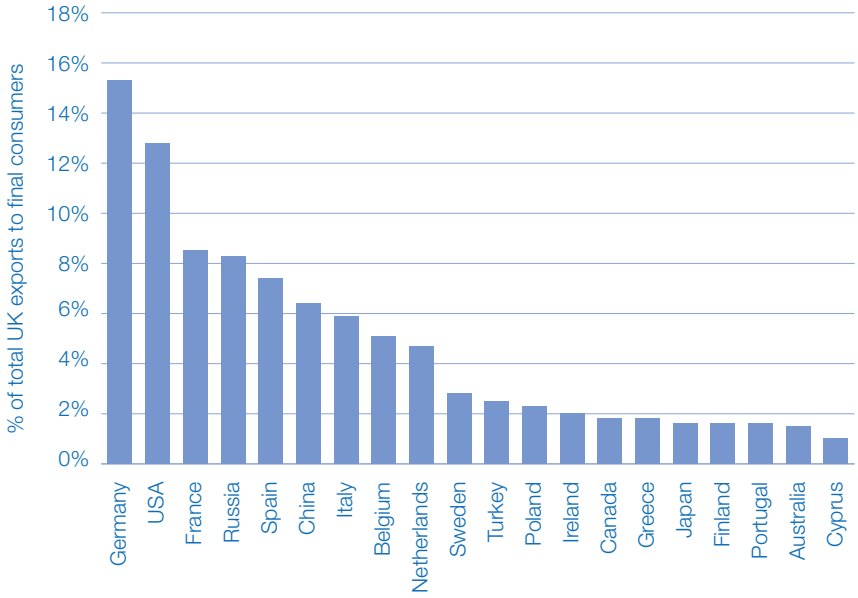
Sources of Components Used in Motor Vehicle Manufacture in the UK[43]



[42] HMG in partnership with Automotive Council UK, *Driving Success – a Strategy for Growth and Sustainability in the UK Automotive Sector* (2013).

[43] UK Transport equipment sector (which contains automotive manufacturing) purchases of component parts, i.e. the UK transport equipment sector sources 32% of intermediate components of motor vehicles domestically and 23% from Germany. Average between 1995 and 2009.

UK Export Sales to Final Consumers for Top Destinations[44]



Intra-EU Movement of Military Goods

3.40 Regulation on the movement of military goods is primarily a matter of Member State competence.[45] In the stakeholder events held in July 2013, some representatives from the defence industry expressed the view that regulations on trade in military goods within the Single Market hindered their free movement. Also, having to deal with slightly different export licensing systems in different Member States could create costly administrative burdens. However, it was also acknowledged that export licences are rarely denied for exports to other Member States, and the rules are far more relaxed for exports to EU countries than they are for non-EU countries. For example, there are several systems of open licences, which make it easier for businesses to move some military goods within the Single Market.

3.41 Others, in particular civil society groups, argued that this regulation was necessary. In order to have complete free movement of arms and military equipment in the Single Market, it would be necessary for the EU to have its own coherent foreign policy, to ensure that arms export licence decisions are consistent. This is because, whilst EU Member States have agreed to abide by common criteria for arms export control, there is still a degree of national discretion in the system. In effect, this means that licence decisions made by other EU Member States may not be entirely consistent with the UK's foreign policy. The House of Commons Committee on Arms Export Controls also argued that it is important for the UK to retain competence over its arms exports, including to other EU Member States.

[44] UK export sales of motor vehicles to final consumers by destination country, i.e. of all the motor vehicles the UK exported 15% (by total value) went to Germany and 13% went to the USA.

[45] Competence boundaries relating to arms transfers are considered in more detail in HMG, *The Balance of Competence between the UK and the EU: Foreign Policy Report* (2013).

3.42 For example, the UK Government recently decided for its own policy reasons that no export licences will be granted for any military goods and technology being supplied to military end-users in Argentina. Since it is unlikely that other EU Member States would choose to impose a similar restriction, the UK could not guarantee that other EU Member States might not export UK military equipment to Argentina, illustrating the need to retain controls on exports of such equipment to other EU Member States.

3.43 The Submission from the Committees on Arms Export Controls summarised the importance of these controls as follows:

> Goods on the Government's Military List and Dual-use List are fundamentally different from other traded goods. They are potentially lethal and are designed accordingly. For the UK Government to have no right to approve either the military goods or the military technology being exported from the UK to other EU Member States, or to approve the bodies or persons to whom they were being exported, would create a significant national security risk as well as making Parliamentary accountability ineffectual.
>
> The present balance should ensure that the UK arms exporters are not put at a competitive disadvantage by other EU Member States operating laxer arms exports controls and policies than those of the UK Government. Equally, the present balance does not prevent the UK Government from adopting tighter controls and policies where it considers it is right and responsible to do so as is the case with regard to arms exports and internal repression. These factors suggest that the present balance of competences is satisfactory for the UK Government and UK arms exporters at the present time.[46]

3.44 This view was also supported by evidence received from independent international security consultant Malcolm Russell, who argued that the balance of competence in this aspect of the UK's Strategic Trade controls are clearly in tension with, on the one hand, the EU's undisputed competence on free trade across the Union and, on the other hand, the Member State's competence over its defence and security policies acknowledged as sacrosanct. This could have resulted in continuous stalemate and stagnation but an accommodation has been found within the current balance in which both areas of competence are acknowledged and observed. This could be viewed as a real advantage for the UK because it provides unhindered wide market access for its defence industry to form strategic alliance across the EU, simplifies bureaucratic procedures on routine transfers to trusted partners, but retains the national level right and facility to maintain a Strategic Trade Management control policy'.[47]

Consumer Benefits from the Free Movement of Goods

3.45 A number of respondents highlighted the benefits of the free movement of goods for consumers in giving much greater consumer choice in products, making pricing more competitive and allowing consumers to make more informed choices, for example, through energy efficiency labelling, for example.[48]

3.46 In their evidence commissioned for the Single Market Report published in July 2013, Europe Economics compared the average ex-manufacturer prices for pharmaceuticals for the USA and key European markets, finding materially different price patterns and generally lower prices in European markets.

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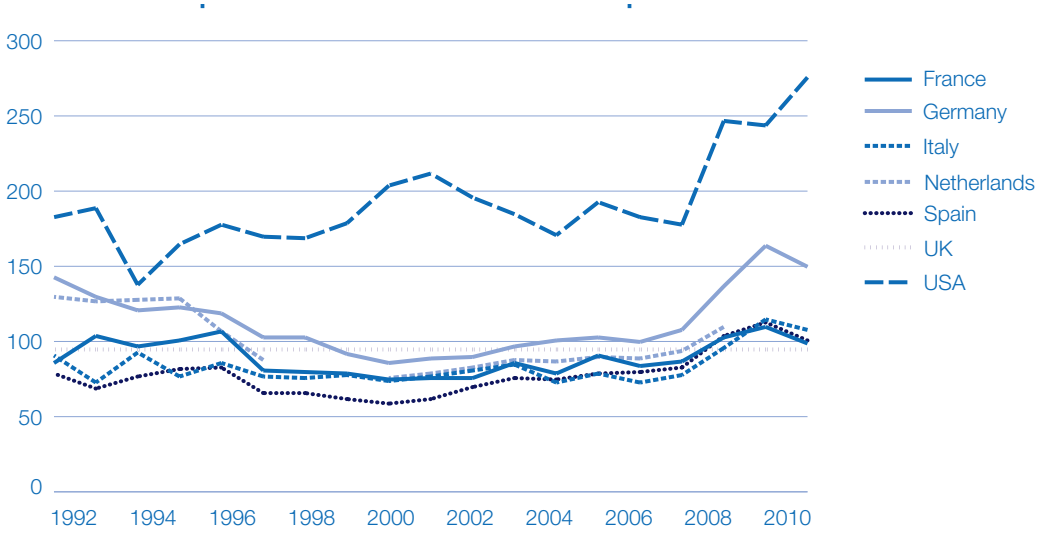
[46] Committees on Arms Export Controls, *submission of evidence*.

[47] Malcolm Russell, *submission of evidence*.

[48] Catherine Bearder MEP and Sylvie Goulard MEP, *submissions of evidence*.

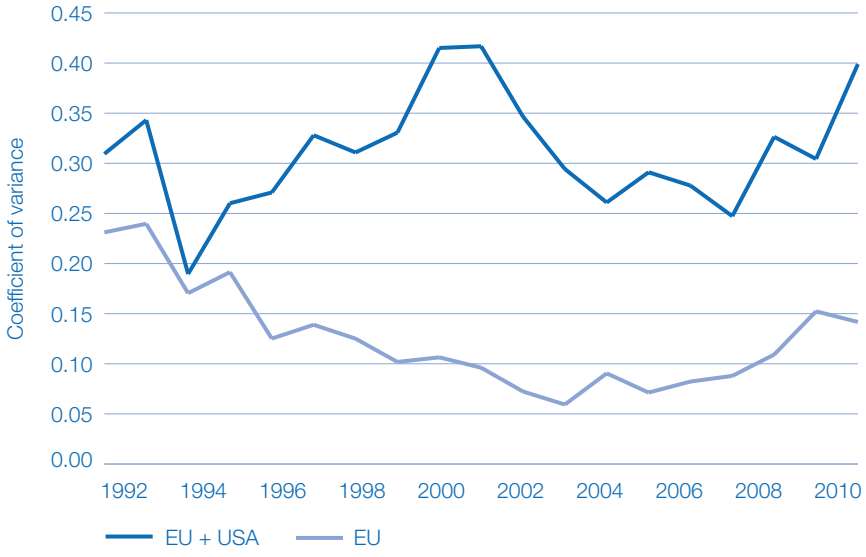
Index of Average Ex-Manufacturer Prices of Pharmaceuticals. Prices are significantly lower on average in the EU Member States shown than in the US (UK = 100)



Source: Europe Economics (2013) quoting Department of Health, Pharmaceutical Price Regulation Scheme: Reports to Parliament, 1998-2012. Price index constructed using a sample of branded products among the top-250 sellers in England. Base price: UK price set to 100. The European countries represented in the sample are: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Netherlands, Spain and the UK.

3.47 They also assessed the price dispersion – the extent to which prices vary between countries – identifying decreasing variation and increased market integration since 1992, although there has been an increase in recent years.

The Dispersion of Pharmaceuticals Prices Within the EU (coefficient of variance):



Source: Europe Economics (2013) quoting Department of Health, Pharmaceutical Price Regulation Scheme: Reports to Parliament, 1998-2012. Price index constructed using a sample of branded products among the top-250 sellers in England. Base price: UK price set to 100. The European countries represented in the sample are: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Netherlands, Spain and the UK.

Constraints on National Policy-Making

3.48 The Freedom Association argued that the single market in goods diverted UK trade away from the Commonwealth or other international trading partners, leading to inefficient resource allocation. Membership of the Single Market, it argued, removed the ability of the UK to set its own external tariff and prevented the UK from adopting a genuinely free trade attitude, without tariff or quota, and as a result EU consumer prices are inflated through the customs tariff applied to imports from non-EU countries.[49]

3.49 Trade-offs between national interests, such as differences of opinion on the appropriate tariff levels, was argued to be one of the downsides of the Single Market. Being part of the Single Market inevitably requires the UK to reach agreement with other Member States and sometimes make compromises. This argument will be considered in the Trade and Investment Report.[50]

3.50 One disadvantage to the free movement of goods between EU Member States is that it can make it harder to detect certain types of transnational crime such as VAT and excise fraud. As well as making it easier for legitimate businesses to move goods around the EU, smuggling goods between Member States is easier if there are no customs controls and no need for a customs declaration. For example, the smuggling of tobacco products and alcohol from other EU Member States is a particular problem for the UK, due to the relatively higher excise duty rates on these goods in the UK.[51] The risk posed by the introduction of dangerous goods (such as illegal pesticides) can potentially be greater if they are not properly controlled at the EU's external frontier, because once goods have entered the EU they can circulate freely and are not ordinarily subject to controls when crossing borders between EU Member States.[52]

3.51 However, the UK Chamber of Shipping argued that EU-level action usefully prevents a UK Government from developing a more protectionist approach, or introducing strict controls over the cross-border movement of goods for law enforcement or security reasons, arguing that EU action is vital in preventing a UK Government from putting protectionist barriers or other measures in place that might pose a threat to the free movement of goods.[53]

3.52 The Road Haulage Association took a different view of the importance of EU action, speculating that, given the 'economic necessity [of reducing trade barriers] one wonders whether multilateral arrangements could not have achieved the same objective. It has through the WTO process, although there is much left to do, and the Benelux nations worked towards closer economic co-operation for years before the EU was created. Our Commonwealth preference system once showed what could be done at a multilateral level if the political will existed. The EU is not the only template and given its slowing rate of liberalisation, may fall short of its vision'.[54]

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[49] Freedom Association, *submission of evidence*.

[50] HMG, *The Balance of Competences between the UK and the EU: Trade and Investment Report* (published in parallel).

[51] British International Freight Association, *submission of evidence*.

[52] Crop Protection Association and the Hungarian National Tax and Customs Authority, *submissions of evidence*.

[53] The UK Chamber of Shipping, *submission of evidence*.

[54] Road Haulage Association, *submission of evidence*.

3.53 However, Fiona Hall MEP argued that, 'if the UK were instead to seek free movement of goods through action at another level, such as the WTO or the Commonwealth, the advantages of being part of the EU's fully integrated single market would be lost. The free movement of goods within the EU is not solely based on trade agreements, as is the case with the WTO, but is underpinned by a customs union and harmonised products'.[55]

The Effectiveness of EU Action Over the Free Movement of Goods

3.54 Whilst the majority of respondents believed EU competence was necessary to enable the free movement of goods, many expressed concerns about the way that competence was exercised. Product regulation, IP rights and customs procedures are technical areas, and formulating and effectively implementing policy and drafting legislation in these areas is often challenging.[56] It is also often the case that the European Commission has limited influence over the practical implementation of these policies and laws by Member States. The British Chambers of Commerce concluded that 'we believe that while the balance of competences between the EU and Member States in this area is broadly appropriate, more must be done to ensure that Member States take a significantly more consistent approach to implementing and enforcing EU rules'.[57]

3.55 Some evidence suggested that inconsistencies in implementation derive from the quality of the drafting of EU measures in the first place. This may be due to the price of political compromise among Member States.[58] The Law Society of England and Wales explained that 'the implementation of Directives inevitably leads to different approaches, not deliberately so as to favour one nation against another, but because directives are couched in general terms and will inevitably be interpreted, and thus implemented, differently by each Member State according to existing systems and measures in place'.[59]

3.56 It was also suggested that some differences between Member States' enactment of EU rules are harder to harmonise because they are cultural rather than legal (or both). For example, achieving a genuine single market in books is hampered by consumer demand being significantly influenced by language.

Impact of Jurisprudence at EU Level

3.57 The role of the ECJ in interpreting EU law was a controversial topic for a number of respondents, particularly with regards to IP. For some, the ECJ has a key role to play in improving a consistent approach among Member States by clarifying details that are often for good reason missing from Directives and Regulations. One example of this is the recent ECJ rulings on what constitutes a communication when content is broadcast in a public place (see box below):

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55 Fiona Hall MEP, *submission of evidence*.

56 Record of 26 June stakeholder event.

57 *The British Chambers of Commerce, submission of evidence*.

58 Dr Sven Bostyn, Liverpool University, *submission of evidence*.

59 Law Society of England and Wales, *submission of evidence*.

Società Consortile Fonografici (SCF) v Marco Del Corso (Case C 135/10)

SCF (a collecting society) brought action against Marco Del Corso, a dental surgeon, concerning the playing of a radio in his dental practice. The radio could be heard by his patients. The court considered whether the playing of music on a radio in such circumstances constituted a "communication to the public", within the meaning of article 3(2)(b) of the Copyright Directive (2001/29/EC). If it did then the owners of the rights in the sound recording (composer, lyricist, performer, record producer, music publisher) would have been entitled to a licence fee. The court referred to its recent cases on the issue of communication to the public and considered whether or not:

- There is a communication to a new public not intended by broadcaster/copyright owner;
- The communication is to an indeterminate number of people;
- The communication is to a fairly large number of persons;
- The use of the communication is of a profit making nature;
- The people who receive the communication are targeted by the user of the broadcast, and not merely caught by chance.

In this particular case, the Court found that these criteria were not met, so there was no "communication to a new public", and therefore no licence fee was required. By contrast, in another case the Court applied the same criteria and found that hoteliers who made broadcasts available to people in their hotel rooms were communicating those broadcasts to the public, and therefore had to hold an appropriate copyright licence. This developing line of case law is useful in setting out the parameters of 'communication to the public' in a uniform way.

3.58 For others, however, the ECJ can be seen as making law through the back door, over-interpreting the original or even reducing a consistent approach by ruling that Member States should implement as they see fit. An example raised in discussion was the UsedSoft v Oracle case in 2012, which interprets the Software Directive (2009/24 EC) to rule that the purchase of a licence to use a piece of software could, depending on the circumstances, amount to a sale of the product, regardless of the terms set out in that licence.[60] This decision enabled the original licensee to sell on their licence to a third party. In this way the ECJ treated the sale of a licensed copy in a similar way to a physical sale, even though the Software Directive does not explicitly state that this should be the case. In doing so, the ECJ may have pre-empted future legislation on this issue; it is not yet clear whether this decision has implications for the sale of licences for other products such as music and videos.

3.59 Another example of the challenges the ECJ can pose to UK businesses is evident in the large number of cases heard on Supplementary Protection Certificates (SPCs). An article entitled 'Judgments leave uncertainty over value of SPCs' by Diana Sternfeld and Nicole Jadeja of Rouse Legal points out that there have been 25 referrals by national courts to the ECJ of cases dealing with aspects of the SPC Regulations. Though some judgements have been helpful, the authors assert that significant areas of uncertainty remain.[61]

[60] *UsedSoft GmbH v. Oracle International Corp*, Case C-128/11, [2012] E.C.R..

[61] Article available at www.managingip.com. D. Sternfield and N. Jadeja, 'SPC Cases before the ECJ', (2013).

3.60 Regardless of whether or not the Court's role is viewed in a positive light, it is important that its effectiveness is not limited by the expertise and number of its judges. With increasing caseloads, due in part to EU enlargement, and a wide range of policy areas to cover, some respondents felt that a technical subject such as IP could present difficulties, 'users of IP systems have come to realise that the ECJ has not always been a very reliable partner in the quest for legal certainty'.[62]

Implementation and Enforcement

3.61 Related to the role of the ECJ and differences in Member States' implementation of EU law, IP enforcement was another topic raised by some respondents to the call for evidence. Different judicial and administrative practices are challenging to navigate and often entail a range of specific costs such as fees and translation requirements.

3.62 An IP rights-holder needs to make a judgement on whether the benefit of enforcing the right outweighs the cost of doing so. This may be a more difficult decision for small businesses faced with a complicated process. For example, the E-Commerce Directive (2000/31/EC) states that an Internet Service Provider (ISP) has to swiftly remove or disable access to information that it has been notified is illegal, in order not to be found liable for the illegal content. A small business can issue a notice for take-down of content that infringes its IP, for example copyrighted text. But the process for notice and take-down varies across Member States and can require considerable resource. This is because the Directive provides for voluntary, sector-led processes rather than a harmonised system.

3.63 Some participants in the IP workshops suggested that variances in enforcement practices could lead to forum-shopping by infringers – although this applies beyond the EU as well'.[63] However, some respondents felt that enforcement in the EU was generally efficient and certainly easier than in other parts of the World.[64] In particular, enforcing a community right such as a Community trade mark, through the designated court with EU-wide effect, can be more efficient from a business perspective than going through different procedures in different Member States.

3.64 As has been discussed, the customs union is an area of exclusive EU competence, but EU customs laws and procedures are implemented by Member States. Therefore, it is important to distinguish between problems arising from the laws and procedures themselves, and problems that arise from the way they are implemented by Member States. The Commission suggests that there should be better integration of customs administrations, and also acknowledges that the customs union needs to adapt to meet the challenges of globalisation. Many business representatives complained about the inconsistent approach in the treatment they get from customs administrations in different Member States, who are working to the same EU customs laws.

3.65 Dr Andrew Grainger, from the University of Nottingham has argued that, 'a significant element of the economic prize that a customs union offers is compromised by the fragmentation of trade and customs systems. Despite common legislation, differences in practical control and enforcement procedures between Member States cause avoidable additional transaction costs. In an international business environment, such waste harms the competitiveness of European based businesses'.[65] This is particularly

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62 Dr Sven Bostyn, Liverpool University, *submission of evidence*.

63 *Record of 14 June 2013 copyright stakeholder event*.

64 The Law Society of England and Wales, *submission of evidence, and record of Patents stakeholder event*.

65 Andrew Grainger, *A Paperless Trade and Customs Environment in Europe 1: Turning Vision into Reality* (2004).

important for large multinational businesses which have a presence in more than one EU Member State. Such operators want certainty of treatment in their dealings with Customs authorities, in whichever Member State they happen to be established.

3.66 The British Ports Association received positive feedback from its members on the harmonisation of customs regimes within the EU and would encourage further customs alignment through initiatives such as the European Commission's Blue Belt initiative, which is intended to reduce regulatory burdens on the shipping industry. Other businesses also called for stronger enforcement of legislation.

3.67 Catherine Bearder MEP argued that, 'if there is a problem […] it is the erratic enforcement of the legislation and that whilst the European Commission could tighten up on this, Member States are reluctant to allow them the competence/funding to do so, which in turn brings harmonisation into disrepute'.[66] One large business representative went so far as to suggest there should be a 'single EU border force' to deal with customs matters, such as checking customs declarations, collecting customs duties and giving customs clearance to import and export freight.[67] However, he was careful to differentiate these core customs activities from those law enforcement activities that are also undertaken by HMRC and Home Office Border Force officers in the UK.[68]

Administrative Burdens

3.68 The UK Chamber of Shipping, while generally content with the balance of competences and the state of the customs union, nevertheless made the point that some administrative burdens from customs requirements disproportionately affect the shipping industry and this implicitly has a disproportionate effect on the UK, as an island nation. The FSB also told us that some small exporters mentioned that bureaucracy around customs paperwork was a problem for them, in particular EUR1, EC Sales List and Intrastat returns.[69] The British International Freight Association (BIFA) also described Intrastat as 'an unnecessary administrative burden' whose purpose could be served through accounting techniques and commercial evidence of the movement of goods. An explanation of Intrastat can be found in Appendix 2 'An explanation of Intrastat'.

3.69 However, others argued that the administrative burdens are relatively light and that EU competence has in fact improved the bureaucratic process.[70] It was further argued that the creation of the customs union has substantially reduced customs paperwork, by removing the need for British businesses to complete import and export documentation for goods moving to and from other EU Member States. The British Ports Association evidence further supported this view, suggesting that, 'the main benefit of the customs union has been to increase the efficiency of the transport network through developing compatible systems and regimes so that movement from one member state to another is not subject to delay and excessive bureaucracy'.[71]

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66 Catherine Bearder MEP, *submission of evidence*.

67 *Record of 10 July stakeholder event*.

68 Idem.

69 EUR1 documents are the customs paperwork necessary to show the origin of goods and enable businesses to benefit from EU preferential rates agreements with certain countries. EC Sales Lists and Intrastat returns are documents required to provide the Government with trade statistics for trade with other EU Member States.

70 See for example: BIFA; Fiona Hall MEP; Goulard MEP; British Ports Association; and Diageo, *submissions of evidence*.

71 British Ports Association, *submission of evidence*.

3.70 According to the Law Society of England and Wales, this reduced administrative burden also extends to legal procedures where, 'greater uniformity of rules increases legal certainty […] the simplicity of complying with one system rather than one system for every Member State where they wish to offer goods, means it is easier for lawyers to advise them. This in turn reduces legal costs along with other ancillary expenses caused by complying with multiple systems'.[72]

The Remote Nature of EU decision making

3.71 Whilst many thought that it might be more effective to take action at an EU level, there were still concerns that the decision making process 'can be cumbersome'.[73] Both BIFA and CargoWise pointed out that negotiating the new Union Customs Code has taken a very long time. Furthermore, some argue that the legislative process is distant and opaque, consultation with industry is rare, and lobbying difficult, particularly for individuals or SMEs.[74]

3.72 'There is a general view that in particular for SME enterprises that it is extremely difficult for them to have their voices heard in Brussels. Our perception is that the EU legislative process is not as structured and transparent as for instance in the UK. Too many processes appear to take place in ill publicised committee meetings and contact is too often via trade contact Ggroups. The main failing of the EU is that due to its size and diversity is that the law making process simply takes too long'.[75]

3.73 Diageo similarly thought that 'there is scope for reform of the decision making process for EU legislation. Because of the need to take account not only of Member States' views but those of the European Parliament it can be cumbersome. This applies not only to new law but changing existing ones, where the process can be lengthy. The quality of consultation with industry can also be variable, as is the use of impact assessments. The industry's engagement on the rules of compound terms is one such example'.[76]

Community IP Rights

3.74 The existing Community-level IP rights are a significant example of the EU exercising its competence over IP in the context of the Single Market, that attracted praise from a number of respondents to the call for evidence.[77] [78] Workshops revealed strong support for the Community trade mark and Community Design Right in particular. The CBI said that these 'are best practice examples of EU wide protection for IPRs. They both support creativity and investment in non-tangible assets'.[79]

3.75 Broadly these Community rights are seen as beneficial due to reduced costs of application and enforcement compared to individual national rights, when protection in more than one or two EU Member States is required, the calculation of value will

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[72] The Law Society of England and Wales, *submission of evidence*.

[73] Diageo, *submission of evidence*.

[74] BIFA and Diageo, *submissions of evidence* and *records of stakeholder events*.

[75] BIFA. *submission of evidence*.

[76] Diageo, *submission of evidence*.

[77] These are trademarks, designs, Geographical Indications and community plant variety rights, which are referred to as community-level IP rights, rather than EU-wide IP rights, because this was the protocol at the time these rights were created. As part of current trade mark reforms it is proposed to rename the community trade mark as the EU Trade Mark. No change for designs is imminent.

[78] See for example: Diageo; Scotch Whisky Association; National Farmers' Union; the Law Society of England and Wales, *submissions of evidence*, and *record of 25 June 2013. trademarks stakeholder event*.

[79] The CBI, *submission of evidence*.

depend on the specific product involved. The reduction in costs can be quite significant when translation requirements are taken into account. Beyond trademarks and designs, Diageo explains that 'we benefit from EU rules defining scotch whisky as a Geographical Indicator, which preserve the distinctiveness of scotch against competing whiskies from America and Japan for example'.[80]

3.76 It is important to remember that it is not only EU nationals that can apply for Community-level IP rights.[81] Any business or citizen of any other country also enjoys access to the system, and from an external investor's perspective it may be more attractive to gain a right that covers all EU Member States at once, than to go through multiple national systems. For example, over the last two years, almost 30% of applications for Community trademarks and just over 25% of applications for Community Designs were from outside the EU. The top 25 applicant countries for both rights include the United States, Japan, China, Canada and South Korea.[82] [83]

3.77 Implementation was also the main issue with regards to the forthcoming Unitary Patent and Unified Patent Court (see box below). Two respondents, both from a legal perspective, felt that enhanced cooperation – the method used to agree the Unitary Patent among less than the full number of EU Member States – could in the longer term lead to fragmented systems which would reduce the overall integrity of the Single Market.[84] [85] Others, all business stakeholders, commented that the effectiveness of the Court would depend very much on the detail of how it is set up, and that if not successful it may increase the possibilities for forum-shopping rather than reduce them. At the same time, other respondents welcomed the Unitary Patent and Unified Patent Court, in the expectation that these will help small businesses and facilitate quicker commercialisation of research in the EU.[86] [87]

3.78 The EU has also taken action on two infrequently mentioned but economically significant areas of IP: database rights and semiconductor topographies. Both of these rights remain national, not Community-wide. The former, database rights, are similar to copyright in that protection is automatic – it does not require registration. The EU Database Directive of 1996 (96/9/EC) harmonises the treatment of databases under copyright law and creates a new sui generis right for databases which do not qualify for protection under copyright law.[88] Stakeholders during the engagement event on patents felt this was beneficial to businesses in the EU. Semiconductor topographies are also protected by a Directive (87/54/EEC) which obliges Member States to adopt legislation to protect topographies in so far as they are the result of their creator's own intellectual effort and are not

[80] A geographical indication is a sign that identifies a product originating in a particular country, region or locality that possesses qualities, a reputation or characteristics that are essentially attributable to that place of origin.

[81] *Record of the trademarks stakeholder event*.

[82] Approximate figures for 2011 and 2012, from the OHIM SSC009, *Statistics of Community Trade Marks* (2013). http://oami.europa.eu/ows/rw/resource/documents/OHIM/statistics/ssc009-statistics_of_community trade marks 2013.pdf, accessed on 15 January 2014.

[83] Approximate figures for 2011 and 2012, from the OHIM SSC007, Statistics of Community Designs.

[84] The Law Society of England and Wales and Liverpool European Law Unit, *submissions of evidence*. COBCOE also expressed regret that the Unitary Patent would not apply to all Member States.

[85] 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.

[86] Johnson Matthey, *submission of evidence* and *record of patents stakeholder event*.

[87] Universities UK (UUK) and Scottish Government, *submissions of evidence and record of patents stakeholder event.*

[88] Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, 1996.

commonplace in the semiconductor industry.[89] Participants in the workshop on copyright felt that both these Directives have brought benefit to UK businesses.

3.79 Supplementary Protection Certificates (SPCs) are also economically significant in that they benefit two sectors: pharmaceuticals and plant protection products, in which the UK has particular strengths.[90] Like database rights and semiconductor topographies, although mandated at EU level through the SPC Regulations (469/2009 and 1610/96), SPCs remain national rights.[91] Several respondents commented on the benefits of SPCs, although the Law Society of England and Wales and Hungarian National Tax & Customs Administration noted that consumers may take a different view.[92] [93]

3.80 Competition and consumer rights are important considerations in the management of IP. While the EU and its Member States define the legal framework for IP, rights management (in the form of licensing and using IP) is carried out by businesses, licensees and users. How it happens varies depending on the sector and the innovation environment: cutting edge technologies such as 3D printing are breaking new ground in this area, while existing ones such as online music services are being delivered through a range of business models. Competition and consumer policy will be considered in more detail in a later report.

The European Patent Office and the Unitary Patent

The European Patent Office (EPO) was created in 1973 by the European Patent Convention (EPC), a patents treaty agreed by a number of states, but not the European Union. There are now 38 contracting states. The EPC allows applicants to file a single patent application at the EPO rather than at each national office. If the European patent is granted, this results in what is, in effect, a bundle of national patents which apply in those countries of the EPC in which the applicant wishes to have patent protection. The treaty therefore simplified the process of obtaining patent protection across Europe.

The forthcoming Unitary Patent will be a single patent providing uniform protection in 25 EU Member States, granted by the EPO in accordance with the EPC. This does not replace the existing European patent system but will operate in parallel. At the same time, a new specialist patents court, known as the Unified Patent Court (UPC), is being established as a common court for the participating Member States. It will have jurisdiction to hear disputes on European patents as currently granted by the EPO, often known as bundle patents, as well as the new unitary patent. This means that it will be possible to settle disputes on infringement and validity of European bundle patents and unitary patents in a single action covering all relevant States.

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[89] Council Directive 87/54/EEC on the legal protection of topographies of semiconductor products, 1986.

[90] Supplementary protection certificates: are provided to compensate patent-holders for delays experienced in gaining regulatory approval to market medicinal or plant protection products. The additional protection granted depends on the length of the delay, up to a maximum of 5 years. The supplementary protection granted comes into effect only when the patent expires, and provides the same level of protection for the authorised product that the patent does.

[91] Regulation 469/2009/EC of the European Parliament and the Council concerning the supplementary protection certificate for medicinal products, 2009.

[92] See for example: Crop Protection Association; Johnson Matthey; the Law Society of England and Wales; and the Hungarian National Tax and Customs Administration, *submissions of evidence and record of patents stakeholder event*.

[93] Regulation 469/2009 of the European Parliament and of the Council Medicinal Products; and Regulation 1610/1996 of the European Parliament and of the Council Creating a Supplementary Protection Certificate for plant protection products, 1996 O.J.L.

The Role of European Standards

3.81 A number of respondents welcomed the role of the European standards and product regulation framework in facilitating the free movement of goods within the Single Market. The Law Society of England and Wales supported the role of independent bodies in setting product standards, arguing that it enabled standards to be developed more quickly. The Law Society of England and Wales noted however that the competitions authorities have an important role in ensuring that these independent standards setting bodies are not unfairly influenced by powerful commercial interests.[94]

3.82 Catherine Bearder MEP and Fiona Hall MEP felt that the framework gave consumers greater confidence on the safety of products and the RAPEX system of product safety alerts enabled a much faster response by national authorities to safety concerns on specific products. Catherine Bearder MEP also felt that EU product standards had helped to raise international standards by setting a high threshold for access to the valuable EU Single Market.

3.83 However, Consumers for Health Choice argued that product regulation and standards harmonisation was unhelpful, and that greater use should be made of mutual recognition to reflect different national dietary habits.[95] The FSB reported a range of views from their members on EU standards. Whilst European standards could act as a quality mark to ensure market access and to support bids for public procurement, the standards themselves could be subject to frequent change, imposing additional costs on small businesses. The standardisation process could be onerous and not well suited to smaller businesses. On balance, the FSB supported the current voluntary approach to standards, rather than a mandatory approach, and felt that that greater effort could be made in adapting the standards frameworks to the capabilities and needs of small business.[96]

Balancing Trade Facilitation and Enforcement of Customs Rules

3.84 Customs administrations 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. It is widely recognised that it is very difficult for customs administrations to strike the right balance between trade facilitation and enforcement of customs rules. Many respondents believed that the balance between facilitation and enforcement was about right, lending support both to the current balance of competence and the way it is being exercised by the EU and Member States, with some pointing out that, with such a large and geographically diverse Customs Union where different States have different priorities, this balance is always going to be difficult to achieve.[97] [98] However, the evidence suggested that overall EU and UK action seemed to strike the right balance between facilitating trade and regulating it.[99]

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[94] The Law Society of England and Wales, *submission of evidence*.

[95] Consumers for Health Choice, *submission of evidence*.

[96] FSB, *submission of evidence*.

[97] See for example: UK Trade Facilitation; UK Weighing Federation; Fiona Hall MEP; Diageo; and National Farmers' Union, *submissions of evidence*.

[98] Fiona Hall MEP, *submission of evidence*.

[99] See for example: UK Trade Facilitation; UK Weighing Federation; Fiona Hall MEP; Diageo; and National Farmers' Union, *submissions of evidence*.

3.85 Fiona Hall MEP believed that 'in the UK, EU law laid down in the Union customs code provides the flexibility needed at large centres of import and export including Heathrow airport and Felixstowe sea port. The establishment of authorised economic operators allows UK customs to prioritise customs checks and therefore reduce burdens on customs officials.' She further argues that, 'the customs union and the controls laid down in[…] the Union customs code[…] get the balance right in terms of regulating imports and exports. Within a customs union as large as the EU customs union, achieving balance can be difficult due to the different challenges presented at the external borders of the Union: on the eastern border, the focus is on controlling smaller imports of illegal goods, whereas at large ports such as Rotterdam the focus is on efficient checks to ensure that both imports and exports are regulated to protect consumers from dangerous goods, and to protect businesses from IP rights infringements'.[100]

EU External Action on IP

3.86 The EU's competence over trade policy means that it represents Member States in the WTO TRIPS Council, and negotiates bilateral trade agreements with non-EU countries. Respondents to the call for evidence representing business organisations felt that the EU's negotiating weight helped to achieve successes in bilateral trade, for example with regards to the protection of Geographical Indications.[101] The Scotch Whisky Association emphasised that 'protection for EU spirits in line with TRIPS is critical', although the National Farmers' Union noted that the UK has fewer Geographical Indications than other EU Member States.[102] It is important to note, from Article 207(6) TFEU, that the external competence of the EU does not affect the balance of competences internally.

3.87 At the multilateral level, UK Music commented favourably on the value of the EU bringing a dispute against the US over royalties for music played in small restaurants, bars and grills (and on the potential for the bilateral EU-US negotiations helping to resolve the dispute). 'It is precisely because the EU Commission has competence for copyright in international trade discussions [...] that it can act clearly on behalf of all Member States'.[103]

3.88 However, concerns were raised by a civil society organisation, Oxfam, about the EU's representation of Member State interests in the TRIPS Council during the recent negotiations over an extension period for Least-Developed Countries regarding compliance with the TRIPS Agreement. Oxfam expressed concerns that the EU was acting against the interests of Least-Developed Countries.[104]

3.89 A similar mix of views was evident in responses to the call for evidence about the forthcoming revised EU regulation on customs enforcement of IPRs. The updated Regulation clarifies the circumstances in which goods in transit through the EU can be seized on grounds of IP rights infringement, and confirms that only if they are likely to be diverted into the Single Market should they be stopped. Business stakeholders see a need for stricter rules, whereas Oxfam believes there is a need to implement mechanisms that ensure goods genuinely in transit will not be seized.[105] The case about suspected counterfeit Nokia mobile phones described below illustrates that, where doubt exists, the

[100] Fiona Hall MEP, *submission of evidence*.

[101] See for example: Diageo; Scotch Whisky Association; and ABPI, *submissions of evidence*.

[102] Just 49 [UK] products have Protected Denomination of Origin or Protected Geographical Indication status at present, compared to 254 in Italy, 164 in Spain and 200 in France. Regulation 1151/2012/EU of the European Parliament and of the Council on quality schemes for agriculture products and foodstuffs, 2012.

[103] UK Music, *submission of evidence*.

[104] Oxfam, *submission of evidence*.

[105] *Record of stakeholder event* and Crop Protection Association, *submission of evidence*.

ECJ must provide a definitive interpretation of EU law to enable the UK courts to reach a judgment on a case put before them. A review of the EU Directive and Regulation covering trademarks, proposed by the Commission in spring 2013, may make further clarifications in this area.[106]

3.90 Given the divergent views of stakeholders in this area, it is important that Member States can influence EU positions on trade-related IP matters where the EU holds exclusive competence. Indeed, users stressed how crucial it is for the UK Government to provide strong representation of UK interests in EU institutions.[107]

3.91 More broadly there are opportunities to make use of available checks and balances in relations between the Commission, the Parliament and the Council, both internally and for external EU relations such as in WTO matters. For example, the European Parliament voted against the Anti-Counterfeiting Trade Agreement (ACTA) in 2012: this demonstrates how a check in the EU process may be used.

Free Movement, Customs and IP: Counterfeit Goods in Transit

In July 2008, UK customs officers inspected a consignment of mobile phones and accessories at Heathrow airport which had come from Hong Kong and was destined for Colombia. Suspecting that the goods were counterfeit, but aware the goods were in transit, customs officers contacted HMRC for advice concerning their power to detain the goods; in parallel, the rights holder (Nokia) was contacted who confirmed that in their opinion the goods were fake and asked that the goods be detained. However, as the goods were in transit to Colombia, and there was no evidence that they would be diverted onto the European Union market, HMRC therefore advised that they were not counterfeit goods within the meaning of Regulation 1383/2003 because they did not appear to infringe the trademark-holder's rights under Community law. Customs officials were therefore advised that they could not detain them under this Regulation and the goods must be released.

In response, Nokia took out an injunction preventing the release of the goods and went through the UK courts to challenge customs' intention to release them. The Court of Appeal referred the case to the ECJ In its judgement of January 2012 the ECJ specified the conditions under which goods coming from non-Member States that are imitations or copies of goods protected in the EU by IP rights may be detained by customs authorities. Such goods placed in customs warehousing or in transit through the EU can be classified as 'counterfeit' or 'pirated' goods only if it is proven that they are intended to be put on sale in the EU. The UK court took this decision into account in reaching its judgment that customs' original intention to release the goods was correct. In the event, however, the airline carrying the goods advised customs that the intended consignee in Colombia could no longer be contacted, the goods were therefore undeliverable and so they would be abandoned to the Crown for destruction.

[106] Regulation of the European Parliament and of the Council amending Council Regulation 207/2009/EC on the community trade mark and proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast), 2009.

[107] *Record of 10 July stakeholder event.*

Summary

3.92 There was a broad consensus amongst business representatives involved in the cross-border movement of goods that allowing the EU exclusive competence for the customs union is necessary to enable the harmonisation and standardisation of customs rules.[108] It was also noted that whilst customs procedures are agreed at EU level, the UK retains the flexibility it needs to prohibit and restrict the import and export of goods when necessary under Article 36 TEU. It was further noted that the UK retains control over its own customs administration, and sets the level of penalties for breaches of customs laws, within the UK's legal framework.

3.93 Similarly, evidence submitted to the review supported the current state of EU competence on IP as broadly effective and useful. The reasonably predictable nature of IP rights-granting and enforcement across all Member States; the choice of national or Community rights in a number of areas; the value of this high quality IP system to foreign direct investors; and the EU's perceived strong position in multilateral and bilateral negotiations on international IP rules were all perceived as beneficial. Most of those who attended discussion events recognised that the EU is unlikely to take action on IP in a way which would be significantly different to UK policy, due to Member States' common membership of international Treaties.

3.94 Dissenting views included arguments suggesting the Single Market is diminishing in importance and the customs union is redundant. This suggestion was also supported by some respondents from SMEs who believed the benefits of the free movement of goods were outweighed by the costs of EU membership. Conversely, representatives from one large business suggested that the EU should be given more competence over implementation of customs controls, so that the EU can make customs activities more consistent across the EU.[109]

3.95 Although the weight of evidence supported the view that, on balance, EU action relating to trade in goods within the Single Market is beneficial to British business and consumers, there were concerns about how competence is exercised in practice. This is consistent with the findings of the overarching Balance of Competences Single Market report.[110] These included those who believe that EU rules create too many administrative burdens for businesses, and the view from the Commission and some businesses that EU Member States are not consistently implementing EU rules.

3.96 There is evidence of a range of problems with the consistent approach to implementation and enforcement of EU measures on IP among Member States, which can significantly affect legal certainty and therefore business and consumer activity. However, responses did not suggest that this situation would be better in the absence of any EU action. Indeed, the CBI felt that 'a fully integrated Single Market for IPRs would be an important step in the right direction towards innovation, competitiveness, jobs and growth'.[111] At the same time, given the increasing importance of IP rights- protected products and ideas to the EU economy and society, EU action is therefore also likely to affect consumer and wider public interests.[112]

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[108] See for example: British International Freight Association; British Ports Association; DHL; UK Chamber of Shipping; and UK Trade Facilitation, *submissions of evidence*.

[109] *Record of 10 July stakeholder event*.

[110] HMG, *The Balance of Competences between the UK and the EU: Single Market Synoptic Report* (2013).

[111] The CBI, *submission of evidence*.

[112] Dr Sven Bostyn, Liverpool University, *submission of evidence*.

3.97 There was a broad consensus of opinion expressed by most business respondents which suggested that improvements to the free movement of goods can be made by working through and with the EU institutions.[113] This would inevitably require some compromises with other Member States, and it would also require the UK to remain engaged with business and to take a leading role in helping the EU to come up with workable solutions. The issue of reducing administrative burdens created by Intrastat provides an illustration of this challenge (see Appendix 2).

[113] ADS; British American Tobacco; BIFA; British Ports Association; the CBI; DHL; Diageo; FSB; the Law Society of England and Wales; NFU; Sanofi; the Scotch Whisky Association; Swedish Customs; the Tile Association; UK Chamber of Shipping; UK Trade Facilitation; UK Weighing Federation; and the Wine and Spirit Trade Association, *submissions of evidence*.

Chapter 4:
Future Options and Challenges

The Context

4.1 The context of the free movement of goods has changed significantly since the creation of the customs union and the establishment of the Single Market. In particular, technological change and the development of digital media have thrown up new challenges. The distinction between goods and services in the digital environment is sometimes contentious. A music CD is considered as a good, and a subscription streaming platform such as Spotify is a service, but there is some question over whether or not MP3 downloads are digital goods or are more service-like in nature, and the ease of copying and sharing digital media has increased the scope for piracy. The Single Market will need to continue to adapt and change to reflect new digital realities and the legislative process may struggle to respond with sufficient pace.

The Overlap Between Goods and Services

Increasingly there is a large amount of overlap between what might have previously been regarded as either a good or a service, particularly with the advent of high-speed broadband and the digital Single Market.

One example is the provision of an audio/visual product (audio/TV content or a computer/video game). Here the consumer or end user does not purchase a good, nor (historically) a service but a licence or right to use a particular product. Relevant EU legislation in this area is the Information Society Directive which deals with copyright and the Data Protection Directive.

Alternatively, in the digital age many online retailers provide a service which allows consumers to purchase physical goods electronically. This is covered by the EU e-commerce Directive and a number of secondary Directives dealing with consumer protection e.g. the Unfair Commercial Practices Directive and the Distance Selling Regulation which will be addressed in the Balance of Competences review on Competition and Consumer Policy published later.

4.2 The increasing value of IP to businesses and consumers operating in the EU's advanced knowledge economy means that finding the right balance between IP rights-owners and the public interest is essential. Consistent future policy at EU level and among Member States will be the key to ensuring that the EU remains a market of choice globally in new and innovative industries.

4.3 Despite the development of a European standards framework, respondents highlighted the need to address hidden obstacles that remain, and to resist the development of new

barriers to the free movement of goods.[1] In particular, respondents flagged the growth of private sector standards, for example through eco-labelling, as a potential risk to free movement. Other policy objectives could undermine the basis of free movement, for example, different local product labelling requirements which go beyond the minimum harmonisation required by EU legislation, in effect gold-plating of EU requirements, could act as an indirect obstacle for products imported from other Member States.

4.4 Whilst respondents highlighted the benefits of EU enlargement in creating a larger market and allowing greater diversification within the Single Market, concern was expressed about the ability of acceding Member States to implement and particularly enforce EU legislation to guarantee the free movement of goods. Enlargement could lead to more patchy implementation of the Single Market and undermine its integrity.

4.5 Current trends in international trade are likely to continue, with globalisation, emerging markets and population growth leading to increased global demand for goods. As well as putting existing customs systems and resources under pressure, this trade is likely to mean increased volumes of goods coming from or through unstable countries and regions, posing increased risks to EU border safety and security. The European Commission summarises the challenges as follows:

> Constantly growing trade flows, new and increasingly complex supply chains and business models (such as e-commerce), as well as new logistics and competitive pressures imply larger volumes, a faster pace and an increasingly complicated environment. Risks inherent in the international supply chains have also increased due to the globalisation of crime and terrorist activity. Furthermore, pressure from a rapidly growing number of tasks and expectations from stakeholders has added to the scope of customs activities and intensified the need for additional skills, tools and resources.[2]

4.6 The risk of a security incident at the border makes it increasingly important that the quality of the data that is presented to customs agencies enables then to identify and intercept high risk cargo.

4.7 Tax evasion and avoidance is becoming increasingly sophisticated in the UK business environment and beyond, and this might make fiscal controls more of a priority for customs. However, as was evident during this report, continuing pressure is likely to come from UK businesses to simplify procedures and reduce administrative burdens and costs on trade. Balancing these objectives (enforcement, trade facilitation and security) will therefore become increasingly challenging.

How Would the UK Gain From the EU Doing More?

4.8 Respondents highlighted the divergence over time of consumer protection between Member States that could act as an obstacle to the free movement of goods. The Law Society of England and Wales felt that 'one of the biggest supply-side barriers to cross-border trade...is the remaining divergences of consumer protection rules, although significant harmonisation already exists.' However, any further EU action should await the implementation of measures already in train, such as the Alternative Dispute Resolution and Consumer Rights Directives. Wolf-Rüdiger Bengs argued that 'from the consumer's perspective, action on the EU level would be useful to harmonise consumer protection rights.' The Law Society of England and Wales also highlighted other factors in cross-border trade, such as differing tax treatment, advertising rules and consumer redress that

[1] Liverpool European Law Unit, *submission of evidence*.

[2] Commission Communication to the European Parliament, the Council and the European Economic and Social Committee, *The State of the Customs Union*, COM (2012) 791.

could act as impediments to the free movement of goods. Similarly, the Scotch Whisky Association highlighted the potential for national labelling requirements to fragment the Single Market, pointing out that the UK has more national requirements on labelling spirits than any other EU Member State.[3]

4.9 Echoing a key theme in the earlier Single Market Report of July 2013, several respondents highlighted the importance on consistent implementation and enforcement of EU rules and regulations by other Member States.[4] Much of the evidence to that report suggested that there is 'a significant problem with enforcement across the Single Market, with standards being applied differently in different Member States.' As that report states, this forms a significant barrier to UK firms' ability in practice to take advantage of the Single Market's opportunities.

4.10 The customs reform agenda being put forward by the European Commission and new legislation could offer opportunities, such as modern IT systems with the potential to improve efficiency and effectiveness. The quality of data being captured by Member States could also be improved by Commission quality assurance. Safety and security in the supply chain could be enhanced thus protecting UK citizens from potential criminal and terrorist attack, spread of pandemic diseases, for example, from illegal meat imports, and fraudulent goods movements.

4.11 Many business representatives argued that customs administrations in different Member States interpret and apply EU customs law in different ways, and that these inconsistencies cause confusion and create difficulties for businesses that are importing and exporting goods in a number of different Member States, and receiving inconsistent treatment. These inconsistencies were attributed to cultural differences, and it was mentioned in a number of workshops that there was a difference of approach between customs administrations in northern Europe and those in southern Europe.

4.12 It was also noted that geographical factors shape the perspective of different customs administrations. For example, some EU Member States are landlocked, and do not need to be concerned about how customs procedures might be applied to sea freight, which would always be an important consideration for the UK. This becomes important when it comes to negotiating customs laws like the Union Customs Code.[5]

4.13 The sharing of IT components or developments between Member States could potentially reduce overall development and operational running costs as well as produce a greater degree of standardisation for business. The 2010 e-customs progress report highlights that the cost of safety and security systems implemented by the then 27 Member States between 2008-10 was just 124m Euros.[6]

4.14 In terms of the future strategic direction of customs, the EU has made clear its objectives to integrate and centralise customs services at the EU level, with recent working level proposals indicating that this trend is likely to continue.[7] Some of these proposals are likely to touch on competence issues if they continue to contain provisions on areas which the UK considers to be national competence, especially taxation and law enforcement. In terms of future options, the question is whether the UK is better able to

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3 See also Scotch Whisky Association, *submission of evidence*.

4 HMG, *The Balance of Competences between the UK and the EU: Single Market Synoptic Report* (2013).

5 See for example: UK Trade Facilitation, *submission of evidence and Record of 9 May stakeholder event*; and Brussels workshop.

6 European Commission, E-Customs Progress Report, (2010).

7 Commission Communication to the European Parliament, the Council and the European Economic and Social Committee, *The State of the Customs Union,* COM(2012) 791, 2012.

face the future challenges and grasp future opportunities as part of a more integrated customs union; or, whether current levels of integration and co-operation are sufficient; or whether the UK could benefit from having greater autonomy and flexibility.

4.15 There are a number of customs areas which might continue to cause disagreements about competence boundaries at the EU level. For example, the role of customs in law enforcement activity; customs co-operation; and supply-chain security are areas where EU competences touches upon UK competence in the fields of national security, criminal justice and law enforcement.[8] The EU's drive to integrate and centralise services could lead to further disagreements about competence, especially in the areas of risk management and centralisation of customs functions with greater levels of EU control.

4.16 The EU's proposed customs reforms could lead to more efficient and effective customs controls across the EU. Arguably, centralisation of customs functions , such as freight clearance, might assist large businesses operating in a number of different EU Member States, by providing a greater consistent approach in application of import and export procedures in different Member States and more consistent interpretation of customs law. Creating a unified EU Border Force/Single Customs Agency was one suggestion for bringing this about, although this could have disadvantages such as loss of national flexibility.[9]

4.17 One aspect of the new Union Customs Code which was highlighted as of particular concern to UK businesses is the introduction of mandatory financial guarantees for goods in customs procedures where duty is suspended. This was raised in several submissions and discussion workshops as a potential problem for business. Essentially this could cause cash flow difficulties for businesses and arguably create administrative burdens, since businesses must be prepared to produce all the documents required to show they have used the procedures correctly. The UK did not support the requirement for these guarantees in negotiations on the Union Customs Code, but this is likely to be agreed under QMV. However, it should be noted that the Union Customs Code does recognise the potential additional cost to business and Member States will be able to waive the guarantee for special procedures, subject to conditions being met, and will also be able to allow a reduction in the amount of the guarantee required for duty deferment purposes for trusted businesses.

4.18 While, generally speaking, the evidence received was positive about Community-level IP rights and approximation of national-level rights, respondents' views differed about the value of further work in this area.[10] Participants in some workshops and the Law Society of England and Wales's submission suggest that more harmonisation or approximation could be helpful, and in relation to copyright, for example, UUK called for further action at EU level to expand on exceptions to copyright for research purposes. However, not everyone agreed with the idea of more EU approximation: an interesting question raised during the copyright workshop, when considering the benefits of harmonisation, concerns the value of retaining market differentiation for copyright licensing.

4.19 It was argued during the workshop that an EU-wide copyright licence may not be able to take into account different consumer demand, affected by cultural tastes, language and to an extent purchasing power, in different Member States. At present, the ability of

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[8] Some of these competence issues will be considered in HMG, *The Balance of Competences Between the UK and the EU, Police and Criminal Justice Report* (published later in the Review).

[9] *Record of 10 July stakeholder event*.

[10] See, for example, COBCOE's submission of evidence, in which it is argued that community-wide rights are beneficial to both businesses and consumers in the UK.

businesses to negotiate different licences according to market conditions is argued to be particularly valuable to the UK, given the UK's strong creative sector, for example music, and therefore ability to attract premium prices for licensed content.

4.20 However, consumer perspectives on copyright licensing may be different, and there are also competition concerns to bear in mind. This is illustrated by the case of using a Greek decoder to screen Premier League matches in a UK pub (see text box below). Currently, businesses and consumers seeking to use content have to purchase different copyright licences on different terms in EU Member States. This results in increased costs. It was suggested during the workshop that a licence issued at EU level might be an effective solution.[11] Others felt that national level action or private contractual arrangements would be more efficient.[12]

Consumer Interests: the Use of Greek TV Decoder Cards in the UK

The Football Association Premier League (FAPL) makes exclusive agreements with broadcasters to allow them to televise Premier League matches. The agreements have prohibited broadcasters from supplying decoder cards to be used in other Member States. Under the agreements, each broadcaster had to encrypt its satellite signal and only transmit this to subscribers within the territory. However, a number of UK pubs were found to be using cheaper foreign decoder cards issued by a Greek broadcaster.

The ECJ found that granting territorial exclusivity of licences in relation to live football matches was in breach of the TFEU as territorial exclusivity constitutes a restriction on trade. The Court stated that this exclusivity eliminates all competition between broadcasters, and restricts the application of common market principles. However, the Court also stated that showing live football matches in a pub via a TV screen constitutes a 'communication to the public' and where the broadcast contains copyright works such as the Premier League theme tune and logo, the copyright owners' authorisation would be required. Therefore, the use of foreign decoder cards without a licence is only acceptable for private purposes. This decision has had a significant impact on business models used by rights holders that license their content on an exclusive territorial basis.

Specialist Judicial Expertise and Higher Quality Legislation

4.21 Participants in the IP workshops felt that some of the difficulties resulting from ECJ involvement in IP law would be remedied by boosting the expertise of judges in the more technical aspects of IP policy, and the ensuing impact of the law on the business environment. One option raised by participants was to institute a specialist IP track for cases, as exists in a number of EU Member States including the UK. Dr Bostyn commented that 'the ECJ, as a non-specialised court, has struggled over the years with the rather technical and often complex IP legislation, not helped by the at times unclear wording of the legislation it was called upon to interpret'. This chimes with the perspective, also from Liverpool University, that 'the goal [of deep harmonisation] is conditional... on efficient and effective legislation. Consequently [...] the UK should bargain for higher quality legislation'.[13] This point reflects comments from stakeholders on the future direction of other Single Market policies, such as product standards: quality legislation that is right-first-time, as a result of better regulation and consultation practices as well as improved technical accuracy, would be in everyone's interests.

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[11] *10 July 2013. Workshop hosted by Malcolm Harbour MEP in Brussels.*

[12] *Record of 14 June 2013, copyright stakeholder event.*

[13] Dr Sven Bostyn, Liverpool University, *submission of evidence.*

How Would the UK Gain from the EU Doing Less?

4.22 Whilst the free movement of goods has brought benefits in enabling just-in-time stocking and reducing the amounts of stock that have to be maintained, ADS, opposed any further integration of the defence sector. In their evidence, they stated that 'the defence industry should remain a member state competence and be protected from further EU integration across the internal market',[14] The Committees on Arms Export Controls and other respondents also concluded that the balance of competences is satisfactory for the UK Government and UK arms exporters at the present time, striking the right balance by allowing sufficient flexibility for the Government to exercise controls, whilst facilitating UK defence trade.

4.23 A number of respondents commented on reform of the EU legislative process for the free movement of goods. On the one hand, frequent changes in legislative requirements or European standards imposed additional burdens on small businesses.[15] On the other hand, the speed of EU decision making could be variable and unpredictable.[16] Legislation did not always consider the impacts on small businesses, with variable application of the SME test. There was scope for better consultation with business over proposed legislation and for a more consistent approach between different parts of the European Commission.[17] The EU is taking steps to reduce administrative burdens, for example on the shipping industry, through Blue Belt proposals, and for businesses trading in goods with other Member States, reducing the burden imposed by Intrastat returns. However, it remains to be seen how effective these reforms will be.

4.24 Those responding to the call for evidence supported the voluntary nature of some EU measures for businesses. There was support, for example, for a system of European standards that businesses could choose to use if they felt it was of value to them.[18] Similarly, there was support for EU-level IP measures that businesses could choose to use, such as EU trade marks (although choice only applies to the rights-holder in the case of registered rights: potential infringers, or innovators, have to work with this choice). Member States, though, do not have a choice about whether to engage in the systems governing these measures, as they are effective EU-wide.

Summary

Future Challenges and Opportunities for the Free Movement of Goods

4.25 It has been argued that the EU could exercise its competence over the Single Market more efficiently. Concerns were expressed about whether those working in the European Commission have the right level of expertise and knowledge to fully exercise its competence to best effect. It was also argued that there is inconsistent implementation and enforcement of Single Market law and procedures by Member States, a key theme from the earlier Single Market Report.[19] Many respondents also argued that it is difficult for UK businesses to have their views and experience heard by the policy and law makers in the European Commission.

4.26 Whilst some respondents advocated withdrawing competence from the EU, most respondents felt that it is better to work with and through the EU institutions. It was acknowledged that the European Commission has shown a willingness to reduce

[14] ADS, *submission of evidence*.

[15] FSB, *submission of evidence*.

[16] Sanofi, *submission of evidence*.

[17] Diageo, *submission of evidence*.

[18] FSB, *submission of evidence*.

[19] HMG, *The Balance of Competences between the UK and the EU: Single Market Synoptic Report* (2013).

administrative burdens in certain areas, for example for Intrastat and shipping industry requirements, although there are concerns about how effective these reforms will be. The European Commission and some business respondents argued that more action at EU level is required to make the free movement of goods more effective and efficient.[20]

4.27 Formulating standardised or harmonised laws and procedures inevitably require a compromise with other Member States. Generally speaking, the UK tends to favour simplified procedures that minimise the administrative burdens on businesses, whereas other Member States often tend to favour greater degrees of regulation and control. While in theory the UK could offer more facilitative procedures and lighter-touch regulation were it not bound by EU regulations, it was strongly argued that if the EU did not have competence in these areas, the UK would adopt quite similar, if not identical standards and regulations. The majority of business respondents thought that whilst there are pros and cons to EU action at this level, the pros outweigh the cons.

4.28 However, there was evidence to suggest that some UK businesses benefit from the free movement of goods more than others. Generally, large businesses that are operating in a number of Member States and SMEs that are involved in import and export were perceived to benefit more from the free movement of goods than SMEs who do not import or export. However, it was suggested that SMEs not directly involved in import/export may still benefit from being involved in a wider supply chain involving other companies who are involved in import or export, as illustrated by the case study on the automobile industry.

4.29 Some think tanks have argued that the UK would be better off outside of the EU customs union, with the UK focusing on global free trade, rather than prioritising free trade within the European Union.[21] However, the evidence from businesses representatives suggests that the EU customs union and the Single Market require common customs laws and standardised customs procedures. It was therefore considered necessary for the EU to be given competence in this area, because these laws need to be agreed and set at EU level, in order to ensure common standards are being applied throughout the EU; to ensure there is a level-playing field for businesses in different Member States; and to ensure appropriate levels of protection for all Member States and their citizens.

4.30 Some challenges have been identified in relation to IP policy, not competence: for example, how to deal at EU level with concepts of digital goods and services in copyright law, and how newer industries such as 3D printing should be treated. A potential operational challenge is how to increase expertise in the legislative and judicial bodies dealing with IP. Equally, there may be opportunities in further work on harmonisation or voluntary measures similar to the existing Community rights. Specific areas of concern on IP remain around the effective exercise of competence and its implementation by Member States (as for other policy areas), and around the future direction of harmonisation.

4.31 The majority of evidence and balance of argument presented suggests that the balance of competence for the free movement of goods and IP works in the UK's interests, but that more could be done to ensure EU competence is exercised effectively. The present choices facing the UK are about whether and/or to what extent the UK supports or resists an EU drive towards greater harmonisation of product regulation, customs activity and the IP framework, and further centralisation of customs functions.

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[20] *Record of 10 July Stakeholder Event*; and Commission Communication to the European Parliament, the Council and the European Economic and Social Committee on *The State of the Customs Union*, COM(2012) 791, 2012.

[21] CIVITAS; and Bruges Group, submissions of evidence.

Appendix 1: The Rotterdam-Antwerp Effect

Background

Some evidence submitted to the review questioned the accuracy of the UK trade statistics which show the value of the UK's trade with EU countries and non-EU countries.[1] This argument refers to the Rotterdam-Antwerp Effect, which is the theory that UK trade with the Netherlands and Belgium, and therefore the EU as a whole, is significantly over-inflated because many UK exports to the Netherlands and Belgium are destined for the ports of Rotterdam and Antwerp, for onward supply to countries outside the EU. Similarly, it is argued that goods shown in the trade statistics as imports from The Netherlands may also simply be goods from outside the EU that arrived in the port of Rotterdam from other non-EU countries on their way to the UK.

Official UK statistics for 2012 show that just over half (50.5%) of all UK exports of goods, by value, went to EU countries.[2]

A Global Britain briefing note claims that the Rotterdam Effect over stated the proportion of the UK's exports to the EU by approximately 11% in 2009, implying that the percentage of the UK's exports going to EU countries that year was actually 11% smaller in value than official statistics state.[3] [4] A separate analysis produced by Global Vision estimated due to the Rotterdam-Antwerp Effect UK trade in goods with the EU was over-exaggerated by approximately 6%, based on 2010 trade statistics.[5]

These arguments are based on the assumption that the value of UK trade with other countries is largely determined by the size of the countries' population, that is, a German consumer consumes on average the same amount of UK goods as a Dutch consumer. An average per capita consumption of UK goods by Germany and France, relative to population, has been used to estimate the impact of the Rotterdam-Antwerp Effect on UK trade statistics. However, the

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1 Ian Milne, *Time to Say No, Alternatives to EU Membership*, Appendix 64; Global Britain Briefing Note, *The Rotterdam-Antwerp Effect and the Netherlands Distortion* (2011), p53; and Ruth Lea and Brian Binley MP, *Britain and Europe: A New Relationship* (2011).

2 HMRC overseas trade statistics can be accessed at http://www.hmrc.gov.uk/statistics/trade-statistics.htm, accessed on 15 January 2013.

3 Ian Milne, *Time to Say No, Alternatives to EU Membership*, Appendix 64; Global Britain briefing note, *The Rotterdam-Antwerp Effect and the Netherlands Distortion*, p53.

4 The figures used for this calculation are taken from the Current Account "Credits" data, as defined for Balance of Payments purposes (Office for National Statistics; Pink Book 2010), which includes Services, Income and Current Transfers, as well as Trade in Goods. The Rotterdam Effect only relates to trade in goods (not Services, Income and Current Transfers). The correct percentage of UK Exports of goods to the EU reported in 2009 was just over 55% of UK exports, rather than the "48%" figure mentioned in the Global Britain Briefing Note.

5 Ruth Lea and Brian Binley MP, *Britain and Europe: A New Relationship*.

volume of UK trade with these countries is not simply determined by the size of those countries' populations in the way suggested. It is also assumed that half of any 'excess' trade is likely to be destined for export outside of the EU, which for the most commonly traded commodities such as oil, is unlikely to be the case.

There are other factors affecting the value and volume of UK trade with Belgium and The Netherlands, and some particular reasons why the value of UK trade with these countries appears high, relative to their populations. These are outlined below.

Natural Gas and Diamonds

The high value of trade between the UK and Belgium, attributed by some to the Rotterdam-Antwerp Effect, can be attributed to trade in certain key commodities. For example, a large amount of UK trade, by value, with Belgium consists of natural gas. A gas pipeline; the Interconnector pipeline, runs between the UK and Belgium, supplying natural gas. As well as being a major port, Antwerp is also the international centre of the diamond trade. A large proportion of UK trade with Belgium, by value consists of trade in diamonds.

Oil Refining and Other Forms of Processing

The Netherlands contains significant oil refining capacity and a large proportion of UK exports of goods to the Netherlands by value consist of crude oil and mineral fuels exports. These account for approximately 40-50% of UK trade with the Netherlands in any given month. Significant amounts of processing of goods takes place in the Netherlands, and the goods processed are mainly exported on to other EU Member States.[6] The Dutch Statistical Office reports that 'the Dutch economy can […] be characterized as one that turns cheap bulk materials into more expensive high-quality products […] Imports consist mainly of crude oil while exports consist of more expensive oil products, such as petrol […] Exports of energy carriers are destined for the European market and consist mainly of petroleum products […]'.[7] This suggests that the crude oil and mineral fuels exported from the UK to The Netherlands are likely to be processed into new products and subsequently exported to other EU Member States.

Summary

For 2012, UK trade statistics show that the total value of UK exports of goods to EU countries was £149.8bn, or 50.5% of the value of total goods exported. It is difficult to establish conclusively whether any inaccuracies in statistical recording have a significant impact on these statistics. Given the large volume of goods movements that occur each year, it is likely that some goods are declared as trade with the Netherlands and Belgium when the destination or origin of these goods is some other country, be it another EU Member State or a non-EU country. It is difficult to quantify this or to establish whether this is a serious problem. However, there is evidence to suggest that there are legitimate reasons why the value of UK trade with Belgium and The Netherlands appears high, relative to their populations, which are not related to the Rotterdam-Antwerp Effect.

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6 Reference: Statistics Netherlands, *Report on Material Flows (n.d.)* available at: http://www.cbs.nl/NR/rdonlyres/51F5893E-1A73-407E-A0BA-1E95AE53CFFD/0/hoofdstukmaterialflowsopdesite.pdf.

7 An 'energy carrier' in this context is a good that can be used to produce mechanical work or heat or to operate chemical or physical processes, for example petroleum, coal, wood or natural gas.

Appendix 2: An Explanation of Intrastat[8]

The UK's annual import and export trade statistics can be separated into EU and non-EU trade. Annual totals for 2012 are shown in the tables below.

The UK's Annual Import and Export Statistics for Non-EU Trade (2012)

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

The UK's Annual Import and Export Statistics for EU Trade (2012)

	£billion
Goods exported from the UK to other EU member states (EU Dispatches)	149.8
Goods imported into the UK from other EU member states (EU Arrivals)	207.0
	– 57.2

Source: HMRC.

[8] All statistics in Appendix 2 are taken or derived from HM Revenue and Customs' overseas trade statistics, which http://www.hmrc.gov.uk/statistics/trade-statistics.htm, accessed on 30 January 2014.

HMRC collects the UK's annual import and export figures from two different sources – customs declarations and Intrastat returns. Customs declarations are used when goods are exported to or imported from non-EU countries. The information in the first box (above) is derived from customs declarations.

When the completion of the Single Market took place on 1 January 1993, routine border controls were removed on goods moving between Member States. This removed the need to make customs declarations for imports from or exports to other EU Member States. However, customs declarations are the means for collecting trade statistics, so an alternative system was needed to collect statistics on trade between EU Member States. Intrastat returns are now the means for collecting statistics on the UK's trade with other EU Member States (the second box, above). To differentiate EU trade from non-EU trade, imports from EU countries are officially referred to as 'arrivals' and exports to other EU Member States are referred to as 'dispatches'.

The Intrastat system requires VAT registered businesses who reach set thresholds for the value of their trade with other EU Member States to submit Intrastat returns to the Government on a monthly basis. Member States are required to set their thresholds at a level which guarantees the coverage of the trade collected from Intrastat returns at 97 per cent of value for dispatches and 95 per cent for arrivals. This means only around 20 per cent of UK VAT registered businesses trading with other Member States are required to submit Intrastat returns.

Whilst Governments and the European Union recognise the burden this requirement imposes on businesses, the data collected is a key component of National Accounts and Balance of Payments statistics. Although some simplification has been achieved since its inception, this has delivered comparatively minor savings to date. The biggest saving for the UK arose from a reduction in the coverage of arrivals from 1 January 2010 from 97% to 95% exempting a large number of arrivals businesses from the Intrastat system (over 6,000).

The EU has decided that the burden on businesses of providing intra-EU trade data should be reduced by 50%. The UK and other Member States are working with the Commission to come up with a workable system that will reduce administrative burdens on EU businesses.

The Commission has proposed a preferred solution for the replacement of Intrastat, called SIMStat (Single Market Trade Statistics) which is an automated system based on data exchange. Under this system, Member States would only collect 'dispatch' data and then calculate their 'arrival' data from partner Member States' dispatch data.

However, HMRC is of the opinion that a reduction in coverage for both arrivals and dispatches would be simple, quick and more cost effective to introduce and would ultimately offer a greater reduction on the burden on business. HMRC estimates that reducing the coverage would substantially reduce the number of SMEs required to submit Intrastat returns. HMRC are currently lobbying their EU colleagues to support this simplification.

In the meantime, the UK, along with other Member States, proposed a further reduction in the coverage for arrivals from 95% to 93%. The Commission agreed to this proposal (as it is consistent with their preferred simplification option of removing the arrivals coverage requirement) and the implementation of this, which is intended to take place from 1 January 2014, will mean around 5,000 businesses will no longer be required to submit arrivals returns.

Appendix 3: Key Treaty Articles Relating to the Free Movement of Goods

Articles 114 & 115

As has been explained in the Single Market report, Articles 114 and 115 TFEU 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'.[9] They are the treaty bases for the bulk of EU legislation on product and technical standards and on 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 that is 'necessary to ensure the establishment and the functioning of the Internal Market and to avoid distortion of competition'. The three Articles are widely used to deal with situations where differences between the national laws of the Member States could hinder trade in the Single Market. However, it is only Article 114 which has been generally used in the case of legislation on IPRs. Legislation adopted 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 adopted under Article 114 follows the 'ordinary legislative procedure', in which the European Parliament and the Council legislate together and voting is by way of a qualified majority, therefore no veto.

Article 118

Until the Lisbon Treaty of 2009, there was no direct reference to IP in the EU Treaties. EU legislation in that field (such as the two Regulations establishing, respectively, the Community Trade Mark and the Community Design) was adopted under Article 308 of the EC Treaty (now Article 352 TFEU). Article 308 (like Article 352) is a 'residual' Treaty base, that is, it provides for the EU to take action when 'necessary to attain one of the objectives set out in the Treaties' but 'the Treaties have not provided the necessary powers'. The Lisbon Treaty introduced a new Treaty base, specifically for the creation of EU-wide IPRs, in Article 118 TFEU.

Article 118 provides:

> In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in according with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation,

[9] HMG, *The Balance of Competences between the UK and the EU: Single Market Synoptic Report* (2013).

> coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

Article 118, therefore, gives the EU power to enact legislation for the establishment of unitary IPRs throughout the EU. As with Article 114, Article 118 can only be invoked in furtherance of Single Market aims. The legislation must have a genuine link to the establishment and functioning of the Single Market: any new rights must be aimed at reducing obstacles to cross-border trade, the principle is explicitly recognised in the preamble to the Regulation establishing the Unitary Patent.[10] The adoption of legislation under Article 118 also follows the 'ordinary legislative procedure' except for language arrangements which require unanimity in the Council.

Articles 206 and 207

The CCP (introduced in Article 206) is the commercial policy adopted by the EU towards countries outside the Single Market. It governs such things as changes in tariff rates, the conclusion of tariff and trade agreements, 'the commercial aspects of intellectual property', and trade protection. Article 207 provides for legislation (under the ordinary procedure) to be made for the purpose of implementing the CCP. It is also the legal base for a number of measures in the customs union field.

The CCP is an area of exclusive EU competence. In other words, it is the EU and not Member States which has the power to conclude international agreements on the commercial aspects of IP, for example, the IP chapter of a free trade agreement. It also means that the EU, in addition to being a member of the World Trade Organisation in its own right, also represents the Member States, including on its Council on TRIPs Agreement.

The TFEU does not define 'commercial aspects of intellectual property'. However, in a recent case, the ECJ held that IP rules adopted by the EU, if they have a specific link to international trade can be regarded as 'commercial aspects of intellectual property' and are therefore within the field of the common commercial policy.[11] It is clear from Article 207(6) that the external competence of the EU does not affect the balance of competences internally, between the EU and its Member States. This means that mutual cooperation between the EU and its Member States will remain key to implementing international agreements that concern the commercial aspects of IP.

At the same time, since both the EU and its individual Member States are party to international IP treaties (and in particular the TRIPS Agreement), any EU action, whether external or internal must remain within the bounds of these treaties.

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[10] Regulation 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, 2012.

[11] *Daiichi Sankyo Co Ltd. and Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, Cases C-414/11, [18 July 2013].

Articles 30 to 33 and Article 87

The main treaty bases for legislation in the field of the customs union are Articles 30 -32. These prohibit the imposition of customs duties between Member States and provide for the EU to fix the common customs tariff. Article 33 further 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.

Annex A:
Contributors to the Call for Evidence

The following formal responses to the Call for Evidence were received:

ADS

AICES

AMDEA

Bearder, Catherine MEP

Bengs, Wolf-Rüdiger

Bostyn, Sven (Dr)

British American Tobacco

British Chamber of Commerce

British International Freight Association

British Ports Association

Burrage, Michael

Business for New Europe (BNE)

CargoWise

The Confederation of British Industry (CBI)

Chartered Institute of Patent Attorneys

Civitas: Institute for the Study of Civil Society

Committees on Arms Export Controls

Consumers for Health Choice

Council of British Chambers of Commerce in Europe (COBCOE)

DHL

Diageo

Dockar, Stuart

European Commission

European Transport Safety Council

Federation of Small Businesses (FSB)

Fresh Start

Goulard, Sylvie MEP

Hall, Fiona, MEP

Johnson Matthey PLC

Jones, Barry

Liverpool European Law Unit

National Farmers' Union

National Tax and Customs Administration, Hungary

Northern Ireland Executive

Oxfam

Port of Dover

Road Haulage Association

Russell, Malcolm

Sanofi

Scotch Whisky Association

Scottish Government

Swedish Customs

The Bruges Group

The Crop Protection Association

The Freedom Association

The Law Society of England and Wales

The Tile Association

The Wine and Spirits Association

UK Accreditation Service

UK Chamber of Shipping

UK Music

UK Trade Facilitation

UK Weighing Federation

Universities UK (UUK), UK Higher Education International Unit

Waring, David

Welsh Government

Annex B: Engagement Events

A number of engagement events were held during the duration of the call for evidence period to explore the issues raised in the call for evidence. These events included:

Roundtables with business representatives and other interested stakeholders, 26 June 2013, 1 July 2013 and 10 July 2013; a Brussels-based workshop organised by Malcolm Harbour MEP; a workshop session with academics and business representatives hosted by the Foreign and Commonwealth Office, 30 July 2013; joint workshops with the Balance of Competences Trade and Investment review, 5 July 2013 and 12 July 2013. In addition, presentations and discussions on the Review were held with a number of other bodies, including the Customs Practitioners Group, the UK Association for International Trade; intellectual property rights stakeholders; and the States of Guernsey and Jersey, and the Isle of Man.

Attendees at these events included:

4 Eyes Ltd

ADS Group

AIM (European Brands Associations)

Alan Powell Associates

Alliance for European Logistics

Alliance for Intellectual Property (IP)

American Chambers of Commerce to the EU

Amnesty International

Anti-Counterfeiting Group

Association of Chartered Certified Accountants (ACCA)

Association of International Courier and Express Services (AICES)

Association of Manufacturers of Domestic Appliances

Association of the British Pharmaceutical Industry

Baker and McKenzie LLP

Bentley Motors

Bio-industry Association / Rouse LLP

Bircham Dyson Bell LLP

British American Tobacco

British Chambers of Commerce

British Exporters Association

British International Freight Association

British Irish Chamber of Commerce

British Recorded Music Industry

British Screen Advisory Council

Business for New Europe (BNE)

Centre for European Policy Studies

Chartered Institute of Patent Attorneys

Confederation of British Industry (CBI)

Constantine Ltd

Copyright Licensing Agency

Deloitte LLP

DHL

Diageo

Dougan, Michael – Professor of EU law

EEF – The Manufacturers Association (formerly Engineering Employers' Federation)

Eli Lilly Holdings Limited

European Conservatives and Reformists

European Toys and Children's Products

Export Group for Aerospace and Defence

Federation of European Publishers

Federation of Small Businesses (FSB)

GE Aviation Systems

GE Corporate

GE Healthcare

Hutchison Whampoa Ltd

Institute of Chartered Accountants in England and Wales

Intellect

International Federation of Reproduction Rights Organisations

Isle of Man Customs and Excise

Livingstone International

Lloyds Banking Group

McMann & Co, International Trade and Customs

Mike Hodge Associates

Oxfam

Paul Ellis Consultancy Ltd

Pump Court Tax Chambers

Road Haulage Association

Rockwell Collins

Ryanair

Saferworld

Sanofi

The Bar Council

The Law Society of England and Wales

The Premier League

The Wine and Spirit Trade Association

Tobacco Manufacturers Association

UK Music

UK Trade Facilitation

UPS

Whitehouse Consulting

Annex C: Other Sources

The following list is not exhaustive but sets out some of the main sources drawn upon in preparing this analysis:

Andrew Grainger, 'A Paperless Trade and Customs Environment in Europe: Turning Vision into Reality,' *EUROPRO Paper* (2004).

Commission Communication to the European Parliament, the Council and the European Economic and Social Committee on the *State of the Customs Union*, Brussels. COM (2012) 791 Final.

European Commission, Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods (2010).

HMRC and BIS, *Simplifying Trade Across UK Borders: A Plan of Action*, (2009).

Andrew Grainger, 'Customs and Trade Facilitation: From Concepts to Implementation', World Customs Journal, April 2008, Volume 2, Number 1, pp.17-28.

Accenture, *Building the Customs Agency of the Future*, (2012).

John Springford, *The UK and the Single Market*, (2013).

Commission Communication, Commission Blue Belt, *A Single Transport Area for Shipping*, COM (2013) 510 final.

Kluwer Law International, Journal of World Trade. Available at: http://www.kluwerlawonline.com/toc.php?area=Journals&mode=bypub&level=4&values=Journals~~Journal+of+World+Trade.

Alasdair R. Young, *The Politics of Regulation and the Internal Market*, (2006).

Ana de Ramalho, *European Union Competence in the Field of Copyright*, (2013).