Written Evidence for the Government's Review of the Balance of Competences Between the United Kingdom and the European Union: Free Movement of Goods

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Introduction

The free movement of goods remains a cornerstone of the Internal Market. Union activity in the field of goods seeks to eliminate barriers to cross-border trade between the Member States for products in lawful circulation within the EU. The objective is not to establish a market without regulation, but rather to ensure that the conditions regulating economic activity across individual Member State markets are as close as possible to those of a genuine single market.[1]

At Union level, two principal sets of legal tools regulate the free movement of goods: (a) the primary law provisions prohibiting, between the Member States, obstacles to the importation and exportation of goods and all measures of equivalent effect;[2] and (b) provisions of secondary Union legislation ('harmonising measures'), adopted by the Council and European Parliament on a proposal from the Commission.[3] The basic legal framework governing the free movement of goods is now relatively well settled.[4] With respect to primary law, the Court of Justice has established a workable set of legal tests to determine the range of measures that constitute obstacles to cross-border trade in goods

[1] Consider e.g. Case 15/81 *Gaston Schul* [1982] ECR I-1409 at para. 33.
[2] Arts. 34-36 TFEU.
[3] Arts. 114 and 115 TFEU (The applicable legal bases for the adoption of harmonising measures).
[4] The reader is referred to the written evidence submitted to the *Balance of Competences Review* by Michael Dougan on the Internal Market (Synoptic Review) dated 28 February 2013 for detailed exposition of the legal framework of primary and secondary Union law regulating intra-EU movement for goods, persons, services and capital. Professor Dougan's previous submission examines, inter alia, the rules governing the activation and scope of the Treaty prohibitions on obstacles to intra-EU movement (the primary law provisions); the legal framework enabling Member States to justify obstacles to cross-border trade (public interest objectives and the proportionality test); and the limits, styles and forms of EU harmonising measures (the secondary, legislative regime) - all matters of direct relevance to the current call for evidence on goods *lex specialis*.

requiring justification by the Member States under EU law.[5] Points of tension persist at the margins of the Court's jurisprudence. However, with the exception of the specific issues raised below in this written evidence, these matters are primarily of academic interest. In the complementary sphere of legislative activity (EU secondary law), there is also now a reasonably clear delimitation of competences between the Member States and the Union Legislature with respect to the regulation of the free movement of goods. The applicable legal bases in the Treaty (Arts 114 and 115 TFEU) are crafted – and, moreover, have been interpreted by the Court of Justice – to restrict appropriately the scope and intensity of legislative initatives by the Union institutions.[6] The establishment, under the Lisbon Treaty, of a new role for Member State parliaments to monitor the Union Legislature's adherence to the subsidiarity principle (Art 5(3) TEU) has added an additional layer of competence protection in this context.[7]

The remainder of this written evidence isolates and reflects on several issues of specific concern to the regulation of the free movement of goods under the heading of 'future challenges.'

The Free Movement of Goods: Future Challenges

1) Improving the Implementation and Enforcement of Existing Provisions

This has been widely recognised as a chronic problem for the Union since at least the 1980s. Various initiatives have been developed to improve Member State compliance with Union law here: e.g. a greater emphasis on transparency of national law through systems based on the ex ante notification of draft rules to the Commission; e.g. the introduction of judicial penalties imposed by the ECJ for non-compliance with an adverse ruling; e.g. the possibility of claiming damages against Member States which commit a sufficiently serious breach of the free movement rules; e.g. administrative tools such as the SOLVIT mechanism which seek to promote cheaper dispute resolution in the case of free movement problems. However, there is almost universal agreement that implementation and enforcement remain serious problems that threaten to undermine many of the benefits of the Single Market in practice. It is likely that enforcement and implementation problems disproportionately impact on the activities of small and medium sized enterprises. SMEs are often particularly poorly placed in terms of resources and access to expertise to initiate legal challenges to tackle instances of non/inadequate implementation of EU provisions.

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[5] Consider e.g. See e.g. Case 8/74 *Dassonville* [1974] ECR 837 at para. 5; Case 120/78 *Cassis* [1979] ECR 649; and Case C-110/05 *Commission v. Italy (Motorcycle Trailers)* [2009] ECR 519 at para. 33. For Art 35 TFEU: see e.g. Case 15/79 *P.B. Groenveld* [1979] ECR 3409; Case C-205/07 *Gysbrechts* [2008] ECR I-9947; and Case C-161/09 *Kakavetsos-Fragkopoulos AE*, judgment of the Court (First Chamber) of 3 March 2011 (nyr).

[6] Consider e.g. Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419 and, subsequently, e.g. Case C-491/01 *ex parte British American Tobacco* [2002] ECR I-11453; Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451; Case C-58/08 *Vodafone* [2010] ECR I-4999.

[7] See Arts 5(3) and 12(a)/(b) TEU, read together with *Protocol (No2) on the Application of the Principles of Subsidiarity and Proportionality* [2010] OJ C-83/206.

Addressing implementation and enforcement issues is a difficult task. In particular, it remains unclear the extent to which the underlying problem is simply one of under-resourcing or rather a consequence of inadequacies with the system itself. In any case, there are undoubtedly enormous potential benefits to be gained from improving the implementation and enforcement regime within the Single Market. From a competence perspective, improvements to the existing legal regime may inevitably mean the difficult political sell of entrusting greater responsibilities to the Commission and/or other Union bodies or agencies. At the same time, however, there is clear scope for increased activity at Member State level. Member State governments are very well placed to raise awareness of – and, where necessary, direct additional resources to support the effective functioning of – existing troubleshooting mechanisms such as SOLVIT. This would benefit SME activities in particular.

2) The Continued Need to Tackle "Hidden" Obstacles to Cross-Border Trade

Union activity in the field of goods must continue to uncover and tackle disguised obstacles to cross-border trade in goods. Consider, for example, the recent case law on the "horizontal" application of the primary Treaty provisions on the free movement of goods. Although Article 34 TFEU does not apply directly to purely private parties, the ECJ reaffirmed recently in its case law on goods that the activities of certain private bodies can in practice have serious market-partitioning / protectionist effects. Thus, in its *Fra.Bo* judgment, the Court concluded that the activities of a German standardisation body, whose refusal to issue national certification to imported goods could in practice have a significant effect upon the ability of foreign manufacturers to penetrate the German market, and therefore fell within the scope of Article 34 TFEU.[8]

In its present form, the current legal framework is well placed to address future obstacles to cross-border trade in goods, such as those raised recently in the *Fra.Bo* judgment. In particular, the legal tests developed and applied by the Court of Justice have proven highly effective in the detection of disguised restrictions on the free movement of goods within the Internal Market. The Court has remained highly responsive to new legal challenges, whilst at the same time ensuring, for the most part, that its case law remains sensitive to the shared distribution of competence between the Union and the Member States. In addition, the Court has also avoided placing additional regulatory burdens on private enterprises by carefully limiting the scope of its case law on the horizontal direct effect of the Treaty provisions on goods. There is nothing currently to suggest that the Court is intent on departure from its current approach on this crucial point in the future.

3) Localism policies and Intra-EU trade

The Union institutions are yet to clarify the relationship between the basic objective of promoting cross-border trade in goods (on the one hand) and policy interests linked to emerging national "localism" agendas (on the other hand). In particular, there is a need for clearer guidance on the legitimacy of attempts by the Member States / sub-national

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[8] Case C 171/11 *Fra.bo SpA v. Deutsche Vereinigung des Gas und Wasserfaches eV*, Judgment of the Court (Fourth Chamber) 12 July 2012 (nyr).

public actors to encourage the consumption of locally produced goods on objective grounds, such as environmental protection. It is well established following the *Buy Irish* decision that public authorities cannot promote the consumption of local goods over imported equivalents for essentially protectionist purposes.[9] However, the Union institutions – and the Court in particular – are yet to provide a clear understanding of how to evaluate the legitimacy of Member State efforts to promote local products on non-discriminatory objective grounds, e.g. in recognition of the environmental/sustainability benefits associated with locally sourced products. Legitimate expressions of "localism" in the field of goods are presently linked exclusively to protecting the *quality* of goods in terms of their composition and manufacturing process (under the EU 'protected designation of origin' regime).

Outside of the environment sphere, there is also potential for conflict between the legal framework on goods and Member State efforts to promote "localism" policies *per se*. Indeed, this is identifiable more generally as a broader phenomenon in EU integration, i.e. whereby Union law's focus on free movement and non-discrimination comes into tension with national "localism" policies that seek to prioritise particular communities for social policy reasons. An example of this tension: attempts by Member States / sub-national public bodies to prioritise social housing for the benefit of local residents.[10] Historically, the Treaty rules on EU free movement have afforded Member States little scope to defend such policy choices against the principle of non-discrimination.

4) Addressing New Regulatory Challenges

Keeping pace with technological developments and especially the revolution in digital technologies is another of the key challenges for the Union institutions, and the Union legislature in particular, in the field of goods. Technologies such as 3D printing have the potential to radically alter our manufacturing and consumption patterns, but they also pose some difficult public interest questions, e.g. how regulate a legitimate product (the printer), which is capable of being used to create illegitimate products (guns and ammunition). Every Member State must respond to such new technologies, but only an EU-level response can ensure that such developments may be commercialised at the level of the Single Market itself. As the experience of the Biotechnology Directive illustrates, that will inevitably require the Union institutions to make some difficult and controversial regulatory choices.

5) The Scope for Enhanced Cooperation within a Single Market

It remains unclear how far the Treaty provisions on enhanced cooperation can extend into single market issues, including the free movement of goods. According to a long-held assumption, enhanced cooperation was intended to be used primarily in "marginal" fields of EU policymaking – such as social rights, public health or education – rather than in "core" matters relating to market integration. However, recent experience shows that

[9] Case 249/81 *Commission v. Ireland* (*Buy Irish)* [1982] ECR 4005.
[10] Consider recently e.g. Joined Cases C 197/11 and C 203/11, *Eric Libert, et al. v. Gouvernement flamand*, judgment of the Court (First Chamber) of 8 May 2013 (nyr).

enhanced cooperation is capable of being extended into fields which directly relate to single market law in general and free movement law in particular: consider the initiatives relating to unified patent protection and to the financial transactions tax. For the UK in particular, such developments pose a real dilemma. On the one hand, the UK is a strong advocate of greater flexibility within the EU – allowing Member States more freedom to opt out of particular legislative measures or even whole policy fields. On the other hand, the UK is also a strong defender of the unity and cohesion of the Single Market, particularly at a time when the Eurozone crisis is compelling certain Member States towards greater economic and political integration. The Union as a whole, and the UK in particular, will need to determine how far "flexible integration" should be allowed to extend into the domain of the single market and under what conditions / with what safeguards.

Concluding Remarks

The free movement of goods – and the internal market more broadly – is one of the great the success stories of European integration thus far. The process of integrating national markets through law has secured access to the world's largest single market for UK businesses. For consumers, free trade in goods within the EU increases choice and lowers prices. If the underlying objective of market integration in the field of goods was to establish conditions of economic activity as close as possible to those of a genuine single market, then considerable progress has been made towards the accomplishment of that goal. The free movement of goods is now an economic reality for European businesses and consumers alike.

Obstacles to intra-EU trade in goods remain, of course, and future challenges also appear on the horizon. The current evidence base firmly supports the view that the existing legal framework is, to a greater extent, well suited to address those future challenges. The Union institutions have consistently demonstrated a commitment to the detection and elimination of existing and future barriers to cross border trade. The Court of Justice, in particular, continues to make a major contribution to the liberalisation of cross-border trade; recently, e.g. by opening up the markets for optical and pharmaceutical products to competition from cross-border internet sales.[11] As this written evidence has illustrated, future challenges in the field of goods will be largely detached from questions of competence. Discussion will, for the most part, likely focus instead on matters of substantive policy (e.g. determining the EU's regulatory response to technologies such as 3D printing) and on tackling second-order problems (e.g. the implementation and enforcement of existing EU laws).

Sufficient safeguards exist to protect legitimate Member State policy concerns in the field of goods. In the judicial context, Member States retain the right to propose and assert legitimate public interest concerns to justify national measures that are found to constitute

[11] Consider e.g. Case C-322/11 *Deutscher Apothekerverband eV v 0800 DocMorris NV* [2003] ECR I-14887 and Case C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* [2010] ECR I-12213.

obstacles to intra-EU trade (subject to the proportionality test).[12] Following the entry into force of the Lisbon Treaty, respect for Member State interests in the justification context has been bolstered further by the introduction of Art 4(2) TEU. That provision requires the Union to respect fully the 'national identity' and 'essential state functions' of the Member States.[13] In the legislative (harmonising) context, Member States are also able to play an integral part in the formulation of substantive EU policy through the Council. Further, national parliaments now enjoy a competence to scrutinise Union legislative initiatives on subsidiarity grounds. The new 'yellow card' warning mechanism should work to ensure that the Union legislature acts only to address transnational regulatory problems in instances where it can clearly demonstrate the added value of Union intervention.

From the UK's perspective, perhaps the greatest concern in the field of goods is the potential to *introduce* fragmentation as a consequence of further use of the Treaty's enhanced cooperation provisions. The benefits associated with flexibility for the UK – as a consequence of its competence to opt out of any such measures – will have to be carefully balanced against the potential negative impact for the internal market of Union instruments adopted under the enhanced cooperation provisions.

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[12] The reader is again referred to the written evidence submitted by Dougan on 28th Feb. 2013 cited in note 4 above for detailed discussion of this point.

[13] The Court has already adjusted its case law on intra-EU movement in recognition of Art 4(2) TEU. Consider e.g. Case C-208/09, *Sayn-Wittgenstein*, [2010] ECR I-13693, paras. 82-83 and 93; Case C-391/09, *Runevič-Vardyn*, [2011] ECR I-3787, para 86; and Case C-202/11, *Anton Las*, judgment of 16 Apr. 2013, nyr, para 26 (applicable by analogy to the case law on goods).