

# Balance of Competences Consultation Response

## Internal Market: Free Movement of Goods

August 2013

- I. UK membership of the EU has brought significant benefits to solicitors, law firms and their clients, most particularly through the ability to trade, provide services and establish across the EU and to seek effective redress to cross-border legal issues.
- II. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £26.8bn to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.
- III. The UK legal services sector is globally focussed with offices and lawyers based throughout Europe and the world. Law firms exist in order to service the needs of their customers; these are commonly British businesses trading throughout the Internal Market and increasingly non-British clients doing business in the Internal Market.
- IV. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields ranging from commercial transactions, intellectual property and competition law to employment law, civil justice and dispute resolution.
- V. It is for these reasons that the Law Society and the legal profession have an interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making.
- VI. The Law Society nevertheless accepts that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the other reviews of the balance of competences of most relevance to the legal profession.

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

1. EU action on the free movement of goods allows the creation of a level playing field, thus facilitating a more open market and fairer competition. The benefits to the UK of the free movement of goods into and within the (then) Common Market became evident soon after UK accession in 1973. The complete removal of tariffs at this time was a significant step.
2. The advantage of EU action in free trade in goods is not limited to the elimination of tariffs and quantitative restrictions in trade but today extends to a common set of rules on products and safety standards, on production methods that create a genuinely level playing field and establish consistent consumer standards. It would not be realistic to expect that such rules could be agreed at a WTO level.

3. Furthermore, the rules to allow the free movement of goods within the EU are unique in that the legal framework allows individuals and businesses to enforce their rights themselves in a much more efficient manner than would be available in a traditional free trade area.<sup>1</sup> This includes the possibility of relying directly on the Treaty provisions.<sup>2</sup> Furthermore a variety of legal instruments secure individuals' and businesses' access to justice, for example through the promotion of alternative dispute resolution<sup>3</sup> and mediation, the free movement of judgments, and common rules on choice of law found in Rome I and Rome II.<sup>4</sup>
4. Despite the more complex decision-making system of the Union, as compared to national level, the EU is a more dynamic polity vis-a-vis international intergovernmental fora such as the WTO. This includes a higher degree of transparency and possibility for dialogue between decision-makers and stakeholders. Specific problems can be identified and, if deemed appropriate and necessary resolved through a legislative and democratic process. It is possible to raise concerns with the Commission, for instance when it is carrying out a consultation, on a bilateral basis or through national representatives in Council or Members of the European Parliament (MEPs).
5. The rules on the free movement of goods and the exceptions to those rules have their origins in the GATT in so far as they relate to legal proceedings between governments. They have therefore been closely aligned to one of the most important sets of internationally agreed rules from the very start. However, the EU rules are more effective and immediate.
6. It is easy to forget what a tremendous effect the Internal Market has had as many aspects of EU law are now taken for granted. This applies also in relation to the direct effect of Articles 34-36 TFEU<sup>5</sup>. The UK legal system has embraced the concept of judicial cooperation built on the referral system and principle of direct effect since the latter was affirmed by the case of *van Gend en Loos*.<sup>6</sup>
7. One of the most difficult aspects of creating international rules is reaching agreement between a large number of parties. This task, although still challenging, is easier among the 28 Member States at the EU negotiating table than it is on the wider global level. The idea of agreeing all rules at the international level, for example through the WTO, is unrealistic. Furthermore, action at other levels is not reinforced by a specific legal system in the same way as are EU obligations.

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<sup>1</sup> However, in the consumer context it is not always the case that the EU legal order always succeeds in making it easier for consumers to enforce their contractual rights. This is one of the reasons why the Law Society supports initiatives such as that on Alternative Dispute Resolution in consumer disputes and Consumer Rights Directive (see further on both of these below). The Law Society considers that ADR and clear rules on the provision of information to consumers have the capacity to increase efficiency in this regard but it will not be possible to carry out an assessment until they have been implemented and are in operation.

<sup>2</sup> See further in relation to question 3 below.

<sup>3</sup> The recent [Directive on Alternative Dispute Resolution \(ADR\) \(2013/11/EU\)](#) is limited to resolution of disputes between businesses and consumers. The Law Society is in favour of initiatives to promote ADR for consumer disputes although does not think that an EU initiative along the same lines for the promotion of business to business ADR is currently required.

<sup>4</sup> The choice of law rules can be found in the Rome I and Rome II Regulations. The fact that there is also free movement of judgments (made much easier by the Brussels I Regulation and Lugano convention) with enforcement of English judgments across the Member States and EEA states, also serves to make the English court system in the UK more attractive to EU and non-EU litigants.

<sup>5</sup> Treaty on the Functioning of the European Union

<sup>6</sup> Case 26/62 *van Gend en Loos* [1963] ECR 1 – Court of Justice

8. It should also be noted that the existence of practical problems on trade in goods can be dealt with more quickly and effectively at EU rather than WTO level.
9. Once agreement on a particular matter has been reached at EU level, the ability to speak with one voice also strengthens the position of EU countries in negotiating international treaties. It also allows the EU may to demonstrate that the rules it is suggesting do work in practice.
10. Further, the system of delegating the making of community standards to independent bodies, such as under the CE marking system, is a good one which enables standards to be developed more quickly than if left to the legislative process. The key issue is to ensure that those independent standards setting bodies are not unfairly influenced by powerful commercial interests; in this respect the competitions authorities have an important safeguarding role to play.

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

11. 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.
12. The rules on free movement of goods have four broad aspects:
  - a. removal of tariffs and quotas;
  - b. setting of common safety and product standards;
  - c. prohibition of hidden discrimination or protectionism on the part of Member States, including strict rules on state aid; and
  - d. enforcement of competition rules to prevent private compartmentalisation of EU national markets by undertakings.
13. Harmonisation of standards means that an undertaking can save great cost by having a single standard with which its products need to comply for sale in a market of over 500 million people.<sup>7</sup>
14. Greater uniformity of rules increases legal certainty. This is good for businesses in itself. Furthermore, 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.
15. One of the most important mechanisms in creating the Internal Market has been the potential for direct applicability and enforceability of the Treaty. The direct effect of Articles 34, 49, 56 and 63 Treaty on the Functioning of the European Union (TFEU) has proven to be effective in preventing attempts by one Member States at discrimination or protectionism against suppliers in other Members States.
16. This is particularly important on the context of cases where the Court of Justice of the European Union (CJEU) set out when national "measures of equivalent effect" would be disallowed because they presented hidden barriers to imports. A good example of this is when the CJEU struck down low national excise duties on nationally produced spirits and higher duties on equivalent products from other Member States (for example in the case of Cognac, Schnapps and Whisky).

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<sup>7</sup> Source:

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tps00001>

17. The EU competition rules have been absolutely key in making sure that as tariffs and quotas were abolished on trade between EU Member States, such restrictions were not replaced by private agreements or cartels between national undertakings to keep out of each other's home market.
18. More generally the development of competition law at EU level has been one of the great successes of the Internal Market. The EU competition rules have been taken up as the template for competition legislation in many, if not all, EU Member States. The EU competition rules and those on state aid granted by Member States are essential features of the EU system and bring many practical benefits.<sup>8</sup> The latter, in particular, are viewed as having greatly reduced the practical ability of Member States to subsidise their own leading companies and thus as having made a significant contribution to the ability of UK business to take advantage of the Internal Market.
19. The EU competition rules are not, however, perfect, and further work may need to be done, for example, on the conditions around when Member States can control mergers to safeguard national security and freedom of expression and to ensure financial stability (banking, insurance, etc).<sup>9</sup>

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

20. The Law Society does not consider that the Internal Market has brought any additional costs when trading with countries outside the EU. On the contrary, it considers that it has resulted in significant benefits.
21. One of the most obvious benefits of trading within the EU is that there are no customs tariffs. This is of benefit to both buyer and seller as it reduces the cost of doing business and in turn results in lower prices and greater choice for consumers.
22. The EU trade protection measures (anti-subsidy, anti-dumping rules, and the operation of the customs union etc) are good examples of where EU action is more effective than action by the UK alone would have been.<sup>10</sup> While it may be difficult to quantify or assess these benefits in monetary terms, they should nevertheless be taken into account in assessing the economic benefit of the Internal Market.

<sup>8</sup> (a) What is now Article 101 TFEU has been very effective at breaking down intra-EU and global cartels, where in the past national industries often ran "no-poaching" understandings with their competitors in other Member States;

(b) The EU Commission has operated as an efficient enforcement body, with strong powers to detect and deter restrictive practices at EU level;

(c) Competition law is now accepted as a key tool of economic development in its own right across the EU; all EU Member States now have national legislation mirroring the EU competition rules;

(d) The EU merger control rules are effective at controlling larger mergers with an EU wide impact; a patchwork of national merger controls showed itself less well able to deal with large mergers affecting several EU markets;

(e) Further, the rule that the effect of a merger on competition is the only criterion used at EU level to decide whether to approve a merger has greatly reduced the practical ability of individual Member States to block mergers on protectionist grounds or to favour their "national champion". (In line with this approach, the UK's powers to control mergers on the grounds of national interest under the Industry Act have been revoked).

<sup>9</sup> See Article 21 of the EC Merger Regulation ([Council Regulation 139/2004 on the control of concentrations between undertakings](#)) which allows exemptions to the Regulation in the case of "legitimate interests" including public security, plurality of the media and prudential rules.

<sup>10</sup> As a specific example, the EU has been far more effective in the aircraft anti-subsidy dispute with the US than any one EU member state could have been on its own.

23. A uniform external tariff is essential for the customs union to work, although there is room for improvement. Evasion of tariffs due on imports has been known to occur, particularly where products benefit for a preferential tariff under EU-third country trade agreement, for example:

- Tuna from Mauritius, which did not satisfy the Lome<sup>11</sup> Convention preferential origin rules;
- VCRs from Singapore, which did not satisfy the local content requirement; and
- Orange juice from Israel, which had been mixed with non qualifying orange juice.

Further work may usefully be done on the current system under which Certificates of Origin are issued by the exporting country which is often just an exercise in rubber stamping.

24. Further work also needs to be done to ensure that, in practice, customs officials in each Member State classify products in the same way when they come in. There are still divergences between Member States in the ways they interpret the CCT classification and goods are therefore subject to different duties.

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

25. The need for coordinated EU action regarding the Internal Market relates back to the concept of a level playing field. A certain level of standardisation is needed to prevent Member States from introducing national provisions that indirectly favour national businesses and de facto create new trading barriers. The level playing field does not relate solely to equal access but also to preventing competition in the Internal Market being skewed by overly large differences in legislation that directly and/or indirectly affects the costs of running a business.

26. However, there may be practical difficulties in ensuring the achievement of a level playing field in this regard. 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. This is not inherently a disadvantage but can become so if and when the implementing law becomes disproportionately burdensome to comply with in comparison to the obligations in the underlying directive. The Law Society believes that UK businesses could in some instances benefit from more proportionate implementation of EU legislation.

27. As regards lack of implementation of directives by Member States the Law Society believes that a higher degree of enforcement could benefit UK businesses that may currently experience comparably higher regulatory compliance costs *vis-a-vis* some European competitors. This would however likely demand an increase or reprioritisation of resources in the Commission. The other challenge as regards implementation of directives is the tendency by certain Member States to "gold-plate" implementing legislation.

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<sup>11</sup> The Lome Convention is no longer in force

28. Common rules are also particularly important in the context of consumer protection. One of the biggest supply-side barriers<sup>12</sup> to cross-border trade (which applies also to trade in services) is the remaining divergences of consumer protection rules, although significant harmonisation already exists. It is hoped that the Consumer Rights Directive<sup>13</sup> will reduce a number of these problems. In the case of some products, the assurance that the end-user benefits from a given set of rights or knows that there is a minimum quality requirement also makes it more likely that cross-border offerings will be taken up. This may help businesses by broadening their customer base, and indeed it is the lack of confidence and trust of consumers that remains one of the main challenges to furthering the Internal Market in services and e-commerce.<sup>14</sup>
29. However, rules at an EU level must comply with the principle of subsidiarity. The Law Society would like to see the implementation of the ADR Directive and Consumer Rights Directive before further action is considered at the EU level.
30. The Society takes a keen interest in the current Commission proposal for a Common European Sales Law (CESL). The Society supports efforts to improve the functioning of the Internal Market but does not agree that a need for the CESL has been shown. It believes that there are more important factors in determining whether individuals and businesses enter into cross-border trade, such as access to effective redress, differing advertising rules, tax, etc. It is concerned that this initiative would cause uncertainty, not only in the interpretation of the new instrument but also in its scope of application, in its relationship to existing law and whether there is a legal basis under the treaties to create it. We also consider that the introduction of the instrument is likely to create additional costs ultimately to be borne by businesses and consumers.<sup>15</sup>
31. In the area of intellectual property (IP), further harmonisation would be helpful. This is discussed in further detail in the IP specific questions below.

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

32. A harmonised approach in certain product areas means that the EU is able to drive worldwide standards. Regulation of medical devices, such as pacemakers, offer a good example of this.
33. The Society is not in a position to give detailed commentary on the implementation and enforcement in other Member States. Anecdotally there is evidence to suggest

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<sup>12</sup> As a general rule standardisation is not required from a consumer perspective as consumer markets thrive on differentiation, innovation and choice.

<sup>13</sup> The [Directive on Consumer Rights](#) (2011/83/EC)

<sup>14</sup> The Law Society considers that consumer markets do not need a general principle of harmonisation although this may be appropriate for practical reasons to be assessed on a case-by-base basis, in particular where it resolves a particular problem in the market.

<sup>15</sup> See further latest joint comments by the Law Society and Bar Council on the Common European Sales Law (April 2013): [http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council\\_CESL%20briefing%20for%20MEPs%20April%202013.pdf](http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council_CESL%20briefing%20for%20MEPs%20April%202013.pdf)

that there may be cause for concern in some areas. At the same time, as a general rule the Internal Market functions very well: broadly speaking such differences have not prevented the creation of an effective single market.

34. The EU Treaty institutional framework has great advantages in the practical enforcement of directives and other legislation to which EU Members States are committed. As "guardian of the Treaties" the Commission plays an effective role in bringing infringement proceedings against Member States in breach of their Treaty obligations.

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

35. The Law Society is not in a position to answer this question.
36. As a general comment the Society position on international trade reflects the traditional stance of the UK as an advocate for liberalising markets and promoting competition.

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

37. The Law Society does not wish to comment on this question.

**Intellectual Property Rights**

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

38. Such rights are relatively unusual and it is difficult to assess their helpfulness as a class of right. For example, Supplementary Protection Certificates (SPCs) benefit a relatively specific market sector (principally pharmaceuticals). However, within that sector, the SPC is seen by rights holders as a beneficial extension to existing rights, stimulating investment by recognising the lengthy nature of research and regulatory approval. Consumers and generic pharmaceutical companies will not necessarily agree.
39. There is an argument that specific national rights should be provided entirely by national legislation. However, if their creation by European legislation helps harmonise protection across Europe, that is likely to be a beneficial outcome.

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

40. Specific Community-wide rights, eg for patents, copyright and trademarks, are seen as helpful for business and the consumer. Business costs are reduced by enabling the obtaining of rights across the Community in one application process, and this has an inevitable cost benefit to the consumer. The opportunity to enforce the identical right in different jurisdictions is also helpful and potentially a cost saving. The past introduction of such rights is considered, overall, a success.

41. Quote from an in-house practitioner:

*"Community Trade Marks and Community Design rights make both our business expansion and anti-counterfeiting programs relatively straight forward in the EU."*<sup>16</sup>

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

42. The EU exhaustion of rights doctrine, together with other rules concerning free movement of goods and services, are generally welcomed by businesses and consumers. The ability to trade across borders without concern over the enforcement of exhausted intellectual property rights is helpful to most businesses. There is a clear choice and cost benefit to consumers by the reduction in opportunity for rights holders to partition markets and by the encouragement of parallel imports. The compliance with and enforcement of these rules is not always perceived as being uniform.

43. Quote from an in-house practitioner:

*"Free movement of people is crucial. We have specialised team members from five different EU states. We are also able to base our research and development in member states with specific expertise e.g. Poland for certain types of software and Ghent for mapping without facing technology export restrictions. The lack of trade restriction between Member States is obviously a major benefit to our trade in Europe as is free movement of data."*<sup>17</sup>

**Future Challenges**

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

44. The Internal Market is constantly changing to adapt to challenges or exploit opportunities with the aim of promoting growth. The collective success or otherwise of these measures will impact accordingly on our national interest. With this in mind the Law Society believes that the UK government should engage positively and proactively to ensure the continuing success and further development of the Internal Market. To date the UK has been an important voice in Internal Market negotiations and in influencing the proposals the Commission puts forward. If the UK were to cease to be a member of the EU, it would lose this influence.

45. The Society believes that there are significant future opportunities in particular sectors such as services, e-commerce, telecommunication, pharmaceutical, high-end engineering and energy where the UK is particularly strong. Free movement of goods will obviously apply, for example, in the case of sale of pharmaceutical products but may also be an integral part of, or operate in conjunction with, services provision eg provision of energy plants or component parts for engineering projects.

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<sup>16</sup> In-house counsel for a navigation technology firm. The practitioner comments in the Law Society of England and Wales responses to the Balance of Competences consultation come from Committee members and other expert practitioners in the relevant fields.

<sup>17</sup> Ibid



46. Croatia joined the EU at the start of July, extending the Internal Market and possible customer base for UK companies wishing to trade cross-border within the EU. Future enlargement would also provide the opportunity for UK businesses to provide goods and services more widely and could allow UK consumers to benefit from a more open market. The Law Society advocates market opening, both in the context of provision of legal services and in furthering the interests of its members' clients.
47. An obvious challenge come from the fact that as the EU enlarges it becomes more difficult for Member States to reach agreement.

## **General**

### **Question 12 - Do you have any other general comments that have not been addressed above?**

48. In practice many UK businesses would be likely to have to meet EU standards and comply with EU regulations whether or not the UK was part of the EU because the EU is such an important export market. However the UK would not be able to help decide these standards if we were not part of the EU.
49. There would be a number of consequences for the UK if access to the Internal Market was not on the basis of EU Membership. At present the UK has a strong position as one of the larger Member States which allows it to participate in and inform negotiations. Involvement in the Internal Market along the same lines as Norway or Switzerland would still require the UK to comply with the vast bulk of EU legislation including those "wider" areas of legislation which the EU considered essential for the functioning of the Internal Market. However, there would be no UK Commissioner in the European Commission and UK citizens would not be able to elect Members of the European Parliament to represent their interests. While it is true that members of the EEA have access to some informal discussions and observer status, their influence cannot approach that of full Member States which participate in all relevant meetings, have representation in the Commission and all the other institutions, vote and exercise a power of veto
50. The CJEU (including General Court) fulfils a key institutional function in ensuring the smooth functioning of the Internal Market and the EU as a whole. In many cases the system works well but it is not wholly without problems. The capacity of the Courts is constrained by the numbers of both judges and Advocates General who are required to deal with an increasing case load as the body of European law grows and the EU itself expands. Any further enlargement would need to take into account the corresponding impact on the volume of casework. The Society is also aware, as noted above, that some thought needs to be given to the qualifications and competencies required of judges and Advocates General in both the General Court and the Court of Justice in order to make those bodies efficient and practical courts.