



Department
for Business
Innovation & Skills



*Review of the
Balance of Competences*

**GOVERNMENT REVIEW OF THE
BALANCE OF COMPETENCES
BETWEEN THE UNITED KINGDOM
AND THE EUROPEAN UNION**

CALL FOR EVIDENCE

NOVEMBER 2012

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CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

Internal Market: Synoptic Review

Closing date: 28 February 2013

Introduction

1. The Foreign Secretary launched the Balance of Competences Review in Parliament on 12 July 2012. This takes forward the Coalition commitment to examine the balance of competences between the UK and the European Union. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It will not be tasked with producing specific recommendations, and will not prejudge future policy or look at alternative models for Britain's overall relationship with the EU. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges.
2. As the Foreign Secretary further announced in Parliament on 23 October, the overall review will be broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by the Government, but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners, and the EU institutions, are also invited to contribute. The process will be comprehensive, evidence-based and analytical. The progress of the review will be transparent, including in respect of the contributions submitted to it.

What is competence?

3. For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where

the Treaties apply directly to the Member States, without needing any further action by the EU institutions.

4. The EU's competences (i.e. its powers) are set out in the EU Treaties. These provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties. Where the Treaties do not confer competences on the EU, they remain with the Member States.
5. There are different types of competence, notably those known as "exclusive", "shared" or "supporting" competence. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In those areas Member States may not act independently. In areas of shared competence, such as most of the Internal Market, either the EU or the Member States may act, but once the EU has acted it "occupies the field" and Member States cannot act independently in those areas. This means that the border between EU and national competence can and does move, according to the extent of EU legislation. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.
6. The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

A brief history of the EU Treaties

7. The Treaty on the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. The EEC Treaty had a number of economic objectives, including establishing a European common market. Since 1957 a series of treaties has extended the objectives of what is now the European Union beyond the economic sphere. The amending treaties (with the dates on which they came into force) are: the Single European Act (1 July 1987), which provided for the completion of the Internal Market by 1992; the Treaty on European Union – the Maastricht Treaty (1 November 1993), which covered matters such as justice and home affairs, foreign and security policy, and economic and monetary union; and the Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

8. Following these changes, there are now two main treaties which together set out the competences of the European Union:
 - The Treaty on European Union (TEU);
 - The Treaty on the Functioning of the European Union (TFEU).

The Internal Market

9. The Department for Business, Innovation and Skills is leading the competence review covering the overall application and effect of the EU Internal Market. (This is also often known as the “single market”: the two terms are synonymous.)
10. The Internal Market of the EU is an area without internal frontiers designed to ensure the free movement of goods, services, capital and persons: the so-called Four Freedoms. Greater integration within an Internal Market reduces the autonomy of Member States to act independently, but can bring significant benefits as the barriers to trade between Member States are removed.
11. The economic gains from a single market in principle come in many ways, notably from economies of scale due to the creation of a larger market than the purely national one; from greater competitive pressures producing more efficient firms and better products for consumers; and generally from more efficient use of the factors of production due to greater specialisation.
12. The legal basis for the Internal Market is to be found in Articles 26 to 66 and 114 to 118 of TFEU. Some of the Articles apply directly, such as Article 34, which prohibits restrictions on imports between Member States. Other Articles give the institutions the powers to legislate in the areas of the Four Freedoms. They also create the EU’s Customs Union, the single tariff barrier at the EU’s external frontier, within which the Four Freedoms can be exercised. There are of course other EU competences closely related to the Internal Market. Some are **integrally connected** (for example, state aid rules which govern the use of any state subsidy); others have a **strong Internal Market dimension** (for example, creating an Internal Market in energy or transport services); while others are argued (by some) to be necessary to ensure **a level playing field** between Member States (for example, by setting common employment rights across the EU).

13. This structure is shown below:

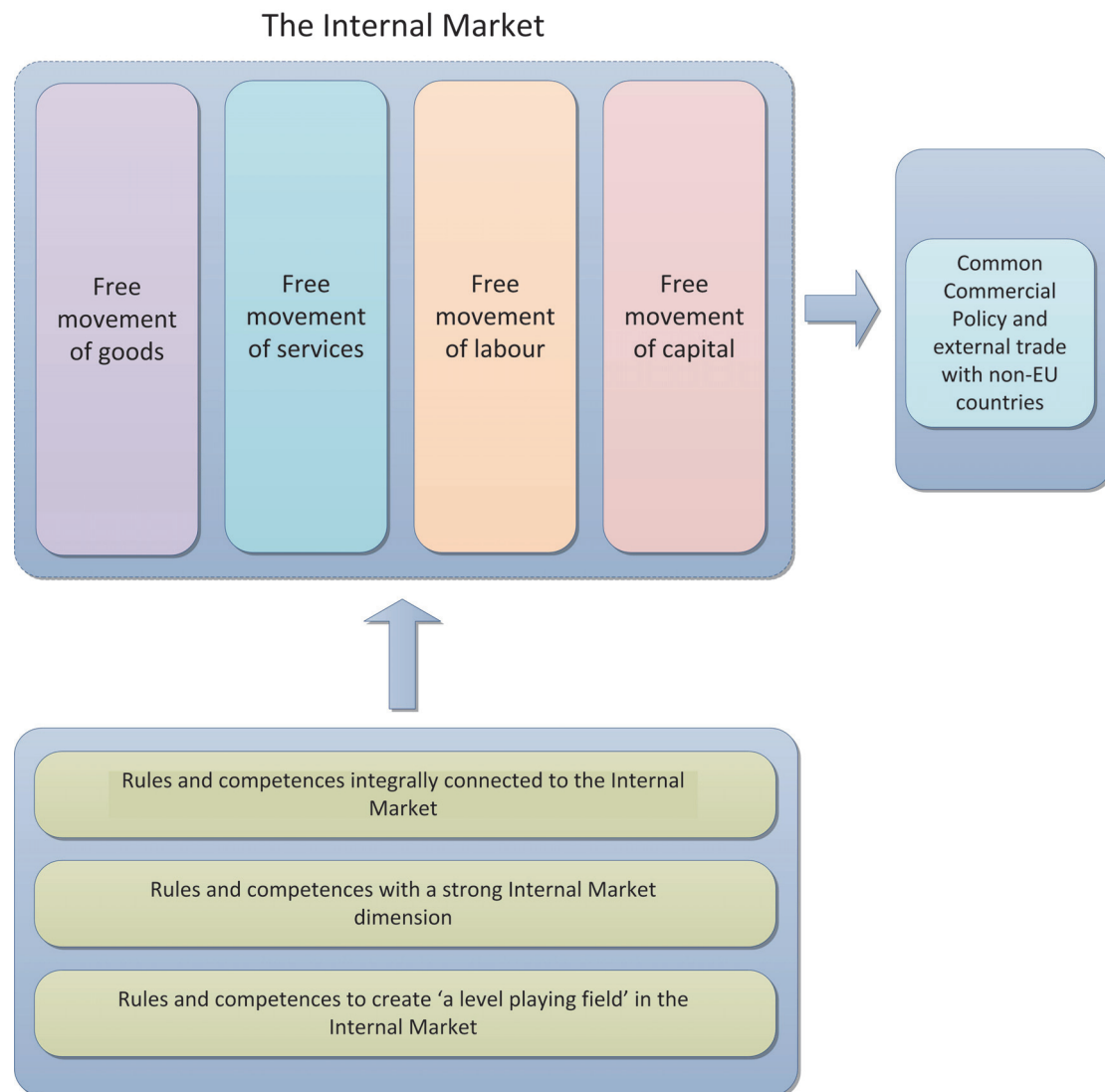


Figure 1: Structure of the Internal Market

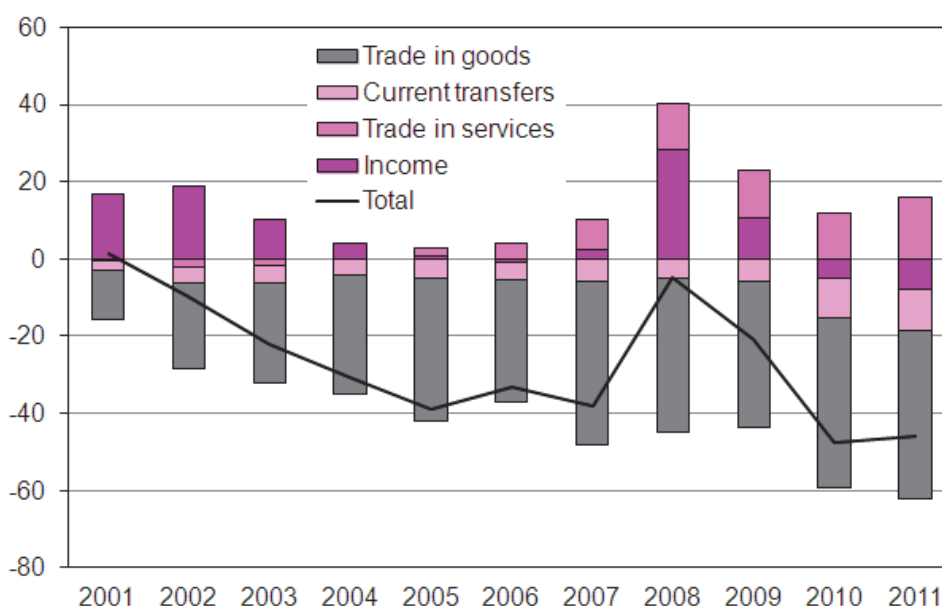
14. This complicated structure means that it is not possible to review individual Internal Market competences in isolation without some sense of the overall context. Given this complex backdrop, the Government therefore intends to handle the review of the balance of competences for the Internal Market as follows.
15. The first stage of the review will be the overall synoptic review of the Internal Market, for which this is a call for evidence. Its objectives will be:
- to consider the broad issues and main debates underlying the Internal Market as a whole, in particular exploring the level of market integration thought to be necessary for an effective Internal Market, and the mechanisms (such as harmonisation or mutual recognition) for achieving it;

- to explore the interrelationships between the Internal Market and other areas of competence, and to assess the strength of the arguments that certain other areas of competence are needed to enable the Internal Market to operate effectively;
 - as a result, to assess the implications for the UK national interest of the current state of integration and EU competence in the Internal Market field.
16. In a second stage, during 2013-14, the Four Freedoms will then each be reviewed separately:
- **Free movement of goods**, including the customs union and intellectual property (Articles 28 to 37, and 118 of TFEU) will be considered in semester 2 (Spring – Winter 2013)
 - **Free movement of persons**, including social security, certain establishment provisions, and the free movement aspects of citizenship (Articles 45-48, aspects of Articles 49-55, and Article 79 of TFEU) will also be considered in semester 2 (Spring – Winter 2013)
 - **Free movement of services**, including financial services, public and defence procurement, other establishment provisions, and the digital single market (other aspects of Articles 49-55, and Articles 56-62 of TFEU) will be considered in semester 3 (Autumn 2013 – Summer 2014)
 - **Free movement of capital** (Articles 63 to 66 of TFEU) will also be considered in semester 3 (Autumn 2013 – Summer 2014)
17. The other related competences will also be the subject of separate reviews over this period, with (for example) the Internal Market aspects of energy policy to be considered as part of the energy review in semester 3.
18. Full details of the programme as a whole can be found on the FCO website, via www.fco.gov.uk/en/global-issues/european-union/balance-of-competences-review

Growth, trade and investment in the Internal Market

- The Internal Market is made up of the 27 EU Member States. It has a population of 504 million people and its GDP in 2011 was €12.6 trillion (nearly £11 trillion). The UK's share of GDP is nearly 14% and of population 12.5%.
- Between 1992 and 2006, the Commission estimates that the Internal Market raised EU GDP by 2.2% (or just over €500 per person), and created 2.75 million additional jobs across Europe. (source: *Steps towards a deeper economic integration: the Internal Market in the 21st century - A contribution to the Single Market Review*, European Commission, European Economy Economic Papers, No. 271).
- Until 2007 over 50% of the UK's exports of goods and services went to the other 26 Member States. That proportion has fallen since then and currently stands at 47.4%. (source: ONS Pink Book 2012, Table 9.3).
- Over the last decade, more than 50% of the UK's imports of goods and services come from the other 26 Member States. The current proportion is 50.6%. (source: ONS Pink Book 2012, Table 9.3).
- The UK has accordingly run a persistent current account deficit with the EU, with a growing surplus in services and (until recently) income on investments outweighed by a large goods deficit.

UK balance with EU £billion



(Source: ONS Pink Book 2012, p138)

52% of the UK's foreign direct investment goes to other EU countries, and 49% of inward foreign direct investment. (Source: ONS Pink Book 2012, pp178-9)

For more economic analysis on the state of the Internal Market, see 'Twenty Years On: The UK and the Future of the Single Market' at

<http://www.tinyurl.com/twentyyearson>

Development of competence relating to the Internal Market

19. The basis of the Internal Market is to be found in the original Treaty of Rome. Some Articles of that Treaty applied directly to Member States, while others provided the legal base for the adoption of EEC legislation to promote the establishment of the Common Market. Customs duties between Member States disappeared in 1968. But trade still did not flow freely across EEC borders, mainly because of differences in national legislation.
20. As a result, in 1986 the Member States entered into a new Treaty, the Single European Act, which set the EEC an objective of establishing a Single Market by 31 December 1992, and which launched a major legislative programme designed to address the obstacles to free trade within the Internal Market. Until 1986 most of the legislation to create the Internal Market had to be agreed **unanimously** by the Member States. The Single European Act introduced a new Article 100a (now Article 114 of the TFEU) providing a general legal base for harmonising Member State laws in the Internal Market area by **qualified majority**. Subsequent Treaty changes have also gradually increased the role of the European Parliament in agreeing EU legislation in this area, to the extent that most of it now has to be jointly agreed by Member States and the Parliament. Article 114 specifically excludes action in some areas which are particularly sensitive: fiscal (i.e. tax) provisions; provisions relating to the free movement of persons; or provisions relating to the rights and interests of employed persons. The use of Article 115 for tax measures will be examined by the Tax Balance of Competence Review. These areas are covered by Article 115, which requires the unanimous support of Member States rather than the “qualified majority”. Most measures in these areas are, in any event, agreed under different competences, and Article 115 is used comparatively rarely.
21. There are broadly, under the Treaties, two possibilities, not mutually exclusive, for removing barriers to trade between Member States.
22. First, the principle of **mutual recognition**. This means that, for example, where goods and services are legally licensed and permitted in one Member State, then that authorisation must be equally accepted in all other Member States. Certain provisions in the Treaties give effect to the principle of mutual recognition in particular areas - see Article 53 of TFEU (mutual recognition of diplomas) – but the principle has been largely established and made specific through European Court of Justice jurisprudence. In the well-known Cassis de Dijon case (Case 120/78), the court held that the predecessor of Article 34 of TFEU had the effect that goods lawfully produced and marketed in one Member State can, in general, be sold in another Member State without needing to comply with any rules of the second Member State; it is enough that they have complied with the rules of the first Member State (though this principle has been clarified and to some extent qualified in subsequent

jurisprudence). In short, even where there is no legislation, the TFEU itself can have the effect of promoting the Internal Market and remove barriers.

23. Second, through the **harmonisation** of Member States' laws, normally using Article 114 TFEU, by setting a common European regulatory framework. Harmonisation can apply in a number of different ways – for instance, *exhaustive* (where different national rules are replaced by a single EU-wide rule), *optional* (where a harmonised standard can be chosen), or *minimum* (where EU rules set a minimum standard that Member States can exceed). To this end, Article 114 provides a far-reaching power which can be used in a wide variety of areas to harmonise national laws in order to improve the establishment and functioning of the Internal Market. But although the power is broad, it is not unlimited: it can only be used to remove disparities between national laws if it can be shown that doing so would remove obstacles to free movement or distortions in competition. When deciding how national laws should be harmonised for that purpose, the EU legislature can take into account other objectives such as the protection of health or the environment.
24. Both the mutual recognition principle and the substantial, and ongoing, legislative programme under Article 114 and similar have had a major effect on EU competence over the years. As explained above, in areas of shared competence, such as the Internal Market, Member States are prevented from acting in a particular area once the EU has done so. The mere existence of EU competence to pass legislation affecting a given topic does not normally prevent Member States from legislating on that topic. But once such EU legislation has been passed, Member States may not act (including legislate) in a manner contrary to it. As a result, it is very clear that large areas of Member States' regulatory and other powers in the Internal Market area have been ceded to the EU. The degree of integration in different areas varies – it is broadly less deep, though still significant, in the less tangible area of services – but it covers areas as various as motor vehicles, cosmetics, toy safety, food additives, consumer credit, financial services, package travel, packaging waste, and a whole range of technical standards and regulations.

Call for evidence: what we are asking for

25. We request input from anyone with relevant knowledge, expertise or experience. We would welcome contributions from individuals, companies, civil society organisations including think-tanks, and governments and governmental bodies. We welcome input from those within the UK or beyond our borders.
26. Your evidence should be information and judgements about the impact or effect of the Internal Market competence in your area of expertise. Where your evidence is relevant to other balance of competences reviews, we will pass your evidence over to the relevant review teams.

27. Please base your response on answers to the questions set out below. In responding, it would be helpful if you could indicate whether you are responding as an individual, a business, a trade union, a civil society organisation or a research institution.
28. Some of the questions are particularly broad in scope. You may find it useful to consider your evidence with regards to the following factors:
- **Political** (for example, the extent to which the UK is able to have greater or less influence as result of the Internal Market);
 - **Economic** (for example, the economic benefits of the Internal Market compared to the regulatory costs to the UK);
 - **Social** (for example, the extent to which the UK's social policy agenda is impacted by the Internal Market);
 - **Technological** (for example, the extent to which technological advances such as the internet are affecting EU competence in the Internal Market); or
 - **Proportionate**: (for example, the extent to which there is a need to act at EU or any other level, the action is proportionate, and the measure is effective in practice).
29. We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that even if you ask us to keep your contribution confidential we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included.
30. Please send your evidence to balanceofcompetences@bis.gsi.gov.uk by 28 February 2013. You can also submit your evidence online at <https://www.surveymonkey.com/s/internalmarket>.

Call for evidence questions

Market integration and the Internal Market

1. *What are the essential elements of an Internal Market and against what criteria should we judge its economic benefits? How deep does it need to be to be effective?*
2. *To what extent is EU action in other areas – for example, environment, social, employment – necessary for the operation of the Internal Market, as opposed to desirable in its own right?*

The operation of the Internal Market

3. *How have the EU's mechanisms for delivering an Internal Market worked? In particular, what do you believe is the right balance between harmonisation and mutual recognition? What evidence is there that harmonisation has worked well or badly? What are your views on the scope and effect of the EU's powers under Articles 114 and the use of Article 115 for non-tax measures?*
4. *Why is the Internal Market so much deeper in some areas than others? How effective has implementation of the Internal Market been, and what do you feel has helped or hindered implementation of Internal Market rules?*

Interaction with other forms of market integration

5. *To what extent do you feel that the Internal Market has been positively or adversely affected by other forms of integration of which the UK is not part, for example the Eurozone or the Schengen Area?*
6. *Has the Internal Market been helped or hindered by UK involvement in other groupings, such as the G20, the G8, the OECD, or the Commonwealth?*
7. *To what extent has the Internal Market brought additional costs and/or benefits when trading with countries outside of the EU?*
8. *To what extent has the UK kept requirements over and above the EU minimum, and what effect has that had on the UK's place in the Internal Market? Have other Member States done so, and if so with what consequences?*

Future options and challenges

9. *What future challenges/opportunities might we face in the Internal Market and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the Internal Market?*

General

10. *Are there any general points you wish to make which are not captured above?*

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