

Free movement of goods and services

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Conveners: Sir Jeremy Lever and Dr. Jeremias Prassl

Speakers:

- Rain Newton-Smith, Director of Economics, CBI
- Professor Stephen Weatherill, Jacques Delors Professor of European Law
- Edward Pitt, Chair, Law Society EU Committee

Rapporteur, Dr. Eirik Bjorge

The meeting was opened by Jeremias Prassl. The discussion began by highlighting that the UK's membership of the EU is going to one of the biggest issues for the UK economy. The EU is not perfect; there are a number of ways in which it can work better for everyone. On balance, however, the economic benefits of EU membership outweigh the disadvantages.

There is a debate as to the degree of regulation in the United Kingdom; one question is, will businesses have more freedom if the UK leaves? One needs to remember that, according to the OECD, within the G7, the United Kingdom is amongst the least regulated countries.

The EU should, however, work better for businesses by, first, completing the digital single market. Progress on this could make it easier for consumers to travel between countries on the same mobile phone package; to shop online in any EU country confident that one is getting the same deal as other consumers; and also lead to a simple common set of regulation around labelling to marketing to reach Europe's 500 million consumers.

Secondly, it should be more outward looking: trade deals like CITA and TTIP provide plenty of opportunities for UK business. TTIP could boost UK growth by 0.35% or £10 billion a year in the long run (EC). The EU–South Korea FTA in 2011 has been very successful and is a good example.

Third, the EU needs to become more competitive; the regulating needs to be reduced. There's more that can be done to improve innovation and infrastructure. 10% more households on high-speed broadband could generate up to 1.5% GDP

growth and create 20 million jobs by 2020. Harmonization of policy paves the way for companies to grow.

There have been signs of progress. The digital single market strategy, for example, is promising.

UK trade and exports have been the missing link in the UK's recovery. According to some recent research by Delta Economics, the number of products in which the UK has a comparative advantage is likely to decrease over the next ten years so the UK, needs to look for opportunities in a broader range of markets, including emerging markets. It is not either-or; the EU is a gateway to emerging markets in addition to being the gateway to Europe.

The UK has a comparative advantages in fields such as pharmaceuticals. The point is, too, that the UK needs to look outwards in order to drive innovation and exports; this can be done through the EU.

Stephen Weatherill began by making the point that the EU is in one sense made up of two pillars: negative and positive rules. The former stands for free movement provisions disabling domestic regulation that breaches EU law; the latter type of rules are the rules put in place by the EU to displace the laws of the Member States.

Legally, the internal market is an ambiguous concept. 26 TFEU defines internal market as area '*without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*'.

But how much of that should be done through negative law, and how much should be done through common rule making? All internal markets have to ask that question: what is the correct balance between deregulation and reregulation. We would assume there was a common market in the USA, Canada, Germany, the EU; however, they do not all look the same. The balance is different in the various systems.

In the EU the Court is highly influential in this regard. It contributes to the internal market becoming dynamic. The landmark case in this connection is *Cassis de Dijon*, where, famously, the Court ruled on German technical standards on German black currant liqueur. Germany demanded that this liqueur have more alcohol than was permitted under the French rules. The Court could have said that there was no discrimination, that this was only an example of diverse regulation. Germany could,

then, have kept its rules. Only if the EU had adopted positive rules would the internal market then have been furthered. But the Court found there was indeed a trade barrier which could not be justified.

The Court's choice had the effect of deregulation of the German market, maximizing private autonomy and competition on the market. This obviated the need for EU level regulation. In turn, this could be back up by private enforcement; private individuals could take their misgivings to the Court. The Court made a significant choice, pro competition. This has been developed in the *Centros* case, where a Danish couple had a company in the UK and wanted to set up a branch in Denmark. The regulatory regime was less restrictive in the UK; the Danish authorities denied authorization as they saw this as undermining Danish competition law. The Court held that the Danish authorities were in breach of EU law, in a judgment with a heavily deregulatory edge.

But the internal market is not only about this kind of deregulation. Where national measures restrict trade but are shown to be justified, legislative harmonization replaces diverse national rules with a common European rule. Medicine, cosmetics, and many other things are regulated in this centralized fashion. Diverse domestic regulation impedes the furthering of the internal market.

A slightly different approach has been used in connection with EU legislation setting common standards in areas such as environmental protection and labour market regulation. The rationale for the adoption of such rules has been that domestic rules, which are diverse, distort competition; common rules at EU level further integration. One could aver that the diversity in domestic legislation is not distortion of competition but in fact simply competition (between legal orders), but the political choice is otherwise and indeed the Court has taken the view that such diverse rules distort competition and that EU rules both promote the integration of markets and achieve social progress.

Thus the internal market has never been a purely deregulatory project—it combines de- and re-regulation. When we hear, and we heard it from Patrick Minford in the first Brexit seminar, that the UK joined only a common market in 1973, that is not true. The common market was no more than a means to an end (see Article 2 EEC). The internal market today is now about a de- and re-regulatory mix. The UK government's recent *Balances of Competences Review* got it exactly right: para 1. 14 states that the single market is a package; it represents a bargain in which every

Member State has to accept unpalatable aspects in order to acquire the aspects which they want. So the case sometimes made that the UK should seek a relationship with the EU based merely on free trade, shorn of any commitment to regulate the market, may be pursued as a political or economic project but there is absolutely no legal basis for claiming that the EU is or ever was a purely deregulatory project

The final point is that there might be a legal constitutional blockage to the type of negotiated post-Brexit arrangement that some seem to have in mind. As is well known, Opinion 2/13 reviewed the planned arrangements of accession of the UK to the ECHR, judging them to be incompatible with the EU legal order. The Opinion is not the most clearly written document of the Court. In paragraphs 183–84 the Court observed that *‘the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order ... [this] must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law’*. Plainly, the Court seeks to protect its autonomy. If it was thought that the UK could negotiate with EU to achieve a diluted version of the internal market, the UK would run up against the unwillingness of the Court to see any slippage of its grip on the autonomy of EU law and the supreme position of the Court.

The EEA Agreement provides that its provisions ‘shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement’. According to this so-called homogeneity clause, the EEA must in effect mirror that which happens in the EU. That is a significant obstacle to the opportunities of the UK, if it hopes to negotiate a new deal.

Edward Pitt began by saying that he would not focus on withdrawal, but rather show that if you step aside from the popular and populist issues of immigration and the protection of non-Eurozone economies within the EU, that there are some other issues which ought to be in the pot, relating to the provision of goods and services, in any re-negotiation. These issues may help us to be more exact about what is meant by “sovereignty”, which the government says is one of the four pillars of re-negotiation.

The basic EU principles on free movement of goods and services are now well understood. It is, however, good to remind ourselves of the huge impact over the last 42 years of these basic EU provisions, in particular, the directly enforceable provisions, such as what is now Article 30 TFEU, which prohibits customs duties on imports and exports, and Article 34 which prohibits quantitative restrictions (quotas) on imports and measures of equivalent effect. Similarly, Article 56 TFEU allows service providers, in principle, to provide services unrestricted to customers in other EU member states.

Articles 28–37 TFEU provide for a customs union so that: there is a common tariff on goods coming in from outside; goods from third countries can circulate freely once inside the EU; there can be no customs duties or quotas on goods moving between states; member states may not enact domestic legislation (such as an internal tax or a product standard) which has the same economic effect as a duty or quota.

The system is underpinned by the competition rules, which prevent private undertakings protecting their national markets. Further the State Aid rules prevent member states from protecting national industries with financial support.

He argued that were the UK to withdraw from the EU that in any Association Agreement these basic provisions will be preserved; so it may be that as respects trade goods trade between the UK and EU states will continue unhampered by tariffs or quotas. However, what could change is that the UK would have less control over the terms on which such goods are sold – consumer protection, product standards, and so, as we will see in some examples below. Freedom to provide services is covered by Articles 56–62 TFEU. In practice there is no neat distinction between the provision of services and the right of establishment set out in Articles 49–55 TFEU.

Freedom to provide services and the right to establish have needed considerable harmonisation measures, in those service sectors which are regulated in each member state. There is a long list of measures to harmonise, and then give mutual recognition to, qualifications for architects, doctors, dentists and so on. As I show below, lawyers have been lucky, that our training standards and qualifications have not been harmonised! In any withdrawal negotiations there may have to be

detailed agreement on each profession or qualification to see whether UK or EU member states qualifications are still mutually recognised.

The Court of Justice of the European Union did some excellent work in the seventies and eighties when it firmed up on what is meant by “measures of equivalent effect” to customs duties and quotas thereby allowing challenges to national legislation which, while on the face of it was not a customs duty or a quota, in practice impeded Imports from other European countries.

The Court also greatly speeded up market integration by holding that some Treaty articles are directly enforceable by individuals or undertakings. At the risk of saying the obvious, withdrawal could mean, depending on the terms of any revised Association Treaty, that British businesses would lose the ability to effectively challenge protectionist legislation, which, while not on its face a quota or customs duty, had the same economic effect. The old association agreements, with Spain and Portugal for example, in force before those countries joined the EU, could not be directly enforced by individuals or undertakings.

The British legal profession, in particular that of solicitors, has enjoyed very great benefits from membership of the EU, especially resulting from the direct applicability of what was Article 52, EEC Treaty, now Article 49 TFEU. This meant that: In few member states is the giving of legal advice a prerogative of nationally qualified lawyers. Anyone can advise on the law and help negotiate commercial or property contracts. In 1973 a solicitor could go to another European country and practice and advise on the law under his home title; we needed no residence or work permit. This is what many solicitors and barristers did from 1973 onwards, establishing offices in first Paris, Brussels and Amsterdam and later in Frankfurt, Madrid and elsewhere in the EU. Those offices were then a platform which helped London based law firms export English law, efficiently enforced by the English courts, to other centres, such as Hong Kong, Singapore and the Middle East.

The Law Society has just published a report—“the EU and the Legal Sector” which tries to assess the economic impact of EU membership on the Legal Services Sector. The implications of leaving the EU (and recalibrating the UK’s relationship with the EU as a member of the EEA or something similar) differ: For those law firms

who depend on and are fed by the financial services industry, their fortunes will follow whatever the effect of withdrawal is on the financial services industry. Assessing the economic value to the UK of EU related legal services is difficult, but crude estimates put legal services at 1.6% of the UK economy, generating an export surplus of £3.1 billion. The numbers may be rough and ready, but the views of London based commercial finance sector lawyers are almost universally opposed to the UK leaving the EU as they see legal work reducing;

To the extent that English law, as efficiently enforced by the English courts, is a choice of law for major international commercial contracts not specifically in the financial sector, the effect of withdrawal is perhaps more nuanced. Some commercial entities may see English law and English courts, free from the EU, as a better forum than a country which is a full member of the EU. This is the advantage which, for example, Switzerland has as a choice of law and choice of forum for commercial contracts and disputes. However, the majority view seems to be that English law's real attraction as the law of choice for major commercial contracts is that the UK is part of the EU mutual recognition system on jurisdiction and enforcement.

The third area I wish to talk about is the areas where, in the event of withdrawal, the United Kingdom would have greater policy independence in the provision of goods and services. Or, to put it more practically, not in black and white terms of "in or out", what are the specific areas of national economic regulation which might be in any re-negotiation.

The focus and the debate on immigration and the protection of the economy of non-Eurozone countries has rather put in the shade some other important areas where withdrawal from the EU or, as I would prefer to put it, loosening of the arrangements with the EU, could confer some significant advantages in determining national policy. I think it is also important to move in the EU debate from generality (immigration, UK financial services) or iconic issues (working time directive) to be specific as to areas relating to the cross-border provision of goods and services where perceived EU overreach do cause government frustration and public irritation and such overreach may restrict the UK government's ability to innovate in regulation. So what are the areas where EU competence might be refined? I set out below a list of examples. You will no doubt have others:

Are Government initiatives and programmes to improve the nation's health unduly constrained by EU regulations on advertising and the labelling of foods? Current Government policy is to try and get us to eat less sugar in our diet. The proposal is that makers of foods must be made to label their products to show its sugar content and state sugars risk to health. Yet the EU Food Labelling Regulations (Regulation (EU) 1169/2011) are meant to be a complete set of what can be put on labels. The food and drinks industries seem adept at invoking EU technical regulations to try and frustrate Government initiatives to get consumers to drink less, smoke less and eat less sugar. Yet separate labels have to be prepared for the UK and Irish market so why can the UK Government not impose requirements specific to our national health policy?

Has the scope of certain EU Treaty articles been stretched too far by the CJEU? In the 1970s the ECJ said that national measures of price control to impose minimum or maximum prices could fall within what then was Article 30, EEC Treaty. This was when national internal taxes and customs duties on tobacco and alcohol regimes were used by national Governments to restrict imports. Is it right that what is now Article 34 TFEU, the prohibition on quantitative restrictions on imports and "measures of equivalent effect", should prevent a member state from setting a minimum price for a unit of alcohol as a means to reduce alcoholism? The Scottish Parliament has voted 84 to 1 to impose a minimum price of 50p per unit of alcohol. Should the European Court now say that the Scottish Parliament cannot impose this rule?

In its response to the last Government's balance of EU competences reviews on social and economic employment policy, the Law Society said clearly that given national differences between EU member states laws, EU measures must be proportionate and respect the principle of subsidiarity: "creating a level playing field does not mean the member states should adopt identical social systems and labour market structures". We hear from some hospital consultants that the working time directive makes it difficult to train junior doctors quickly and properly. Is it essential for a common market to work that a commercial agent must be treated as an employee? Does such regulation not cut across the UK tradition of freedom to contract, including in the provision of one's labour? Minimum EU social and

employment standards, which are solely economic in purpose; are needed to prevent social dumping and a race to the bottom between member states on costs. This was the original limited purpose of Article 119 EEC Treaty which provided for equal pay for women and for men; it was economic and not social in purpose. The Law Society's report suggests that a re-negotiation could consolidate existing UK opt-outs from existing labour law directives such as the Working Time Directive. Re-negotiation might also include the right to opt out of further employment law directives.

Based on my experience acting for Ofcom, and its predecessor body Oftel, I wonder whether EU member states have been forced to conform their models of utility regulation too closely to an EU straightjacket or template. For example, in the field of telecommunications we have got rid of the licensing system for network operators and service providers, yet a licensing system is very flexible, and enables a utility regulator to adapt quickly to economic changes. The EU legislative process is slow and cumbersome in reacting to economic change. The EU telecommunications directives and regulations lay down detailed rules as to the terms on which operators and service providers should be able to interconnect. Such detailed rules may be an easy way to stop hidden discrimination against overseas providers and operators, but do such detailed rules prevent innovation by national telecoms regulators? No doubt others can think of cases in the fields of rail, water, energy and regulation where EU legislation has unduly hampered the UK's ability to innovate in regulation.

Access to landing rights at airports in the EU which are heavily congested (known as slots) is governed by the EU Slot Regulation 93/95 as amended in 2004. This lays down the terms on which slots should be allocated to air carriers, when they can transfer slots between themselves and when they might lose the right to slots for the next scheduling season. Slots are very valuable rights, for example at Heathrow and Gatwick. The IATA scheduling guidelines set out some fair rules for slot allocation and entitlement. Is it essential that slot allocation is also regulated at EU level? When the UK government wanted to innovate and allocate slots according to 'green criteria', it looked as if the EU Slot Regulation would not allow it. When the UK Government negotiated rights to increase a number of flights between Delhi and London, the UK Government was unable to offer some slots at Heathrow to Indian

airlines, whereas the Indian Government was able to do the same in reverse at Delhi and Mumbai. Is it essential that national policy on allowing access to UK airports should be regulated at EU level?

There are several areas of the British economy where the industry regulates its sector (under threat that if it does not do the job properly the Government will do it but probably more inefficiently!). The tradition of self regulation seems stronger in the UK than in some other EU member states. A good example is the advertising industry which is self-regulated by the Advertising Standards Authority and the Committee of Advertising Practice. The drinks industry also has a self denying advertising code enforced by the Portman Group. Another example is the ecological labelling of foods or fish products by, for example, the Fair Trade Foundation or the Marine Stewardship Council. Both these latter bodies are under pressure, in particular from Germany, to be swept into a Government controlled system of quality labelling.

Funding of what are really national projects or projects of a social nature (education, transport, health, energy supply and housing). For example, is the EU's intervention under the state aid rules into the cost of disposing of spent nuclear fuel right? Do the EU state aid rules unduly constrain national policy in the funding of primary and secondary re-education?

There seems to be an awareness that local authorities and central government may often be too cautious in applying the State Aid rules. Excessive bureaucratic caution and risk aversion means sight of public benefit purpose is lost. "State Aid might apply, we can't act" is a safe position, but leads to failure to fund social projects of significant public benefit value with no real potential impact on the European free market. Very rarely is economic analysis utilised by central government or local authority administrators, despite competition law (of which the state aid rules are part) being essentially an economic discipline. Instead assumptions are made by administrative officials remote from the realities of service delivery. Far too often the only exception to the prohibition on State Aids is said to be funding at below the general de minimis limit of €200k over a three year period, without any attempt to utilise the higher €500k which can apply for social projects. Worse, far too often no consideration is given to whether the State Aid rules are actually engaged and instead public sector grants are wrongly assumed automatically to "be State Aid".

This is especially relevant to social projects which will typically not be operating in a competitive market, or in a market that is not fully functional by reference to public benefit requirements, or in a market which is (actually or potentially) operative across European boundaries.

The issue is not the legal status of an organisation, but whether it is operating in a European competitive market which could be anti-competitively distorted by State subsidy. Most markets are, in principle, deemed to be potentially open to non-UK entrants, even when that is really only true in theory.

This is a particularly live issue under the EU's digital agenda. The issue is whether it is essential, for the single market to work, that detailed rules be laid down to apply EU wide as to the terms on which products are sold digitally – both physical products which are sold on line, and non-physical products, such as the copyrighted content, which are released on line. The EU Commission's proposal to have a Common European Sales Law (CESL) for consumers throws the issue into sharp relief. The proposal is (or was) for a complete 'standalone' European contract law system. Do we need to have a uniform EU system for this? Is not mutual recognition of the seller's terms and complaints procedures, subject to minimum EU wide standards, enough? In the Law Society's balance of competences response on competition and consumer policy, the Society in general supports the policy that there should be minimum harmonisation in the area of consumer protection. In other words it is for the national governments to determine the appropriate level of consumer protection on the basis that each member state's customers should be able to rely on the protection which is granted by the laws of the seller's state - "full faith and credit" being given to another member state's system of consumer protection. A related question needs to be asked whether the so called Brussels and Rome Regulations, which in effect say that a consumer can always go to his or her national court to enforce his or her national consumer rights are in fact protectionist in economic effect because they mean that some sellers simply do not sell into other European countries for fear of some unexpected draconian claim from an upset customer.

The free movement of both goods and services, including copyrighted works, is inextricably bound up with the IP rights attaching to them. This is not the place to explore the impact of EU withdrawal, but my sense is that broadly in the event of

withdrawal the UK would continue to apply the web of IP protections which have developed EU wide over the last fifty years, and longer, for patents, copyrights, database rights, trade marks and so on. After several pages explaining the EU and wider system of IP protection, the Law Society's Report says, laconically: "It is unlikely that re-negotiations would have any bearing on intellectual property law". If that is right, withdrawal would not impede UK manufacturers from selling their patented products into the EU. I simply add here that data protection, it seems to me, is something which has to be regulated EU wide – and negotiated by the EU with third countries such as the United States.

Do the EU rules unduly constrain national policies aiming at a social and economic purpose or furthering social enterprise? Are local authorities in this area too restricted?

There are other areas where the scope of EU competence may need looking at again. I see that next week Fisheries and Agriculture is your BREXIT topic. We forget now that under the Wilson Government, when we had our last referendum on EU membership, a main theme in the debate was whether we should lose access to cheap New Zealand lamb, butter and cheese. Food Processing Standards may need to be set to a European level so that food products can flow freely within the EU. However, does fisheries policy (quotas on catches) need to be coordinated EU wide, rather than on a regional basis? Have you spoken to Yorkshire cattle farmers, angered at the closure of small abattoirs which means it is now more difficult to sell small lots of cattle, while now have to be driven a great distance to a large abattoir?

Large mergers are cleared at EU level. However do member states have sufficient control over mergers which may have a significant impact on their economy? For example, the recent offer by Pfizer for AstraZeneca threw into relief whether the UK needed to be able to protect itself from mergers which seriously risk allowing advanced research in the pharmaceutical sector to move abroad.

Subsidiarity at the moment is a political concept, which gives member states the right to challenge EU proposals. The concept has no real legal teeth. The public might be reassured if there was a clearer statement of the principles of subsidiarity and as to the hurdles which EU institutions have to cross before they can propose or

adopt EU legislation, whether relating to the provision of goods or services, or more generally. Related to this is the need to toughen up the research which the Commission must do before submitting a proposal. The proposal for a Common European Sales Law was based on a skimpy report prepared by consultants. Much time was wasted while member states and the European Parliament looked at the proposal, which has now been dropped at least in its original form. Such time, and great cost, could have been saved if the Commission had carried out proper research. 'Proposals' need to be based on thorough research. An impact of assessment may not be good enough – especially if made after the legislation has been finalised, to 'justify' it.

All of these issues could of course be solved by withdrawal from the EU. My question for you this evening, however, is whether these and other issues of detail but great importance should not be in the negotiating pot and clarified before any vote in a referendum. In short, I do not think you can take a view on whether we should have renegotiation on EU membership, a Swiss Style arrangement or a Norwegian/EFTA model, until you have formed a clear view as to which are the policy areas we wish to bring home. Don't let us rush to the exit and promote alternatives to EU membership until we are very clear what are the precise areas where the UK government has felt frustrated over the last 20 years; it is not all about immigration.

The question was asked whether, if the UK does renegotiate or arrive at new arrangements, are they going to be Court of Justice proof? Surely that will be very difficult?

Stephen Weatherill answered that the UK is particularly concerned to protect its financial services industry. 2 months ago the Court decided a case on a ECB act, saying the ECB's act was discriminatory against non-Eurozone members and so invalid as a matter of EU law. The Court of Justice is the UK's best friend; that is where the UK gets its protection. Outside the EU it would not get it.

But at what stage is there a role for the Court to play (asked Andrew Burrows)? A deal is drafted, and the Court will then, by way of prior approval, say whether or not the deal is acceptable. This is the pattern of Opinion 2/13.

Services represent 70–80% of the economy, in this area how important is it for the UK to be inside the EU in order to influence?

Rain Newton Smith answered that there is still more alignment to be done within the EU. The UK could survive outside. If the UK leaves and the EU do more in terms of regulation, we would have to negotiate in respect of all those sectors. The EU is likely to be the UK's first trading partner in this field too. TTIP will be a landmark in this regard. We still have successful services trade with the US, it could be better, and in regard of Asia it would be interesting to see how that plays out if the UK leaves the EU. For China it makes more sense to negotiate with the EU bloc rather than a single country. In this regard too, therefore, it is a risk to leave.

Jeremias Prassl asked: One might get the impression that in terms of the UK's comparative advantage UK products were losing their comparative advantage, what does this mean in terms of the internal market?

Rain Newton Smith answered that it shows that the UK is becoming more competitive within services. We may be becoming too specialized within manufacturing, however.

Jeremias Prassl asked: Is there such a thing as protecting national differences? Social equality has been carved out. Certain things the EU does not have competence to get involved with. The right to strike is gone with *Viking* and *Laval*.

Edward Pitt answered by wondering whether there should be a fixed quota of women on boards. People would be reassured if this could be dealt with nationally. The Commission is preparing regulation on this. But this is one of the bigger areas where we can have clearer lines drawn in the sand. It is about the public perception—social issues such as this one cause the problems.

In conclusion, Stephen Weatherill pointed out that there is nothing in the EU Treaties to define what could be termed the fourth type of competence (beyond those listed in arts 2 – 6 TFEU), that is, that which is the exclusive competence of the Member State. There is nothing in terms in the EU treaties about this. There is no walling off of national authority (and subsidiarity does a poor job in this regard); this is where the sense of creeping EU regulation comes into play. The UK government's Competences Review found, across the board, that the balance was about right; there is not in practice a serious problem associated with 'over-centralisation'.

