Too much EU interference? A look at the areas where critics say the single market overreaches itself

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*In the second of a two-part series for LSE BrexitVote, lawyer **Edward Pitt** looks at the areas of cross-border trade in goods and services where the EU is sometimes accused of overreach – such as state aid, utility and airport regulation, consumer protection and intellectual property rights.*

In some areas relating to the cross-border provision of goods and services, perceived EU overreach does 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?

Health policy

Are government initiatives and programmes to improve the nation's health unduly constrained by EU regulations on advertising and food labelling ? 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?

Wide interpretation of directly applicable articles of TFEU

Has the scope of certain EU Treaty articles been stretched too far by the Court of Justice? 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 quantitive 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?

Social and labour policy – working hours, commercial agents, etc

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 (Commercial Agents Directive, based on French law). 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

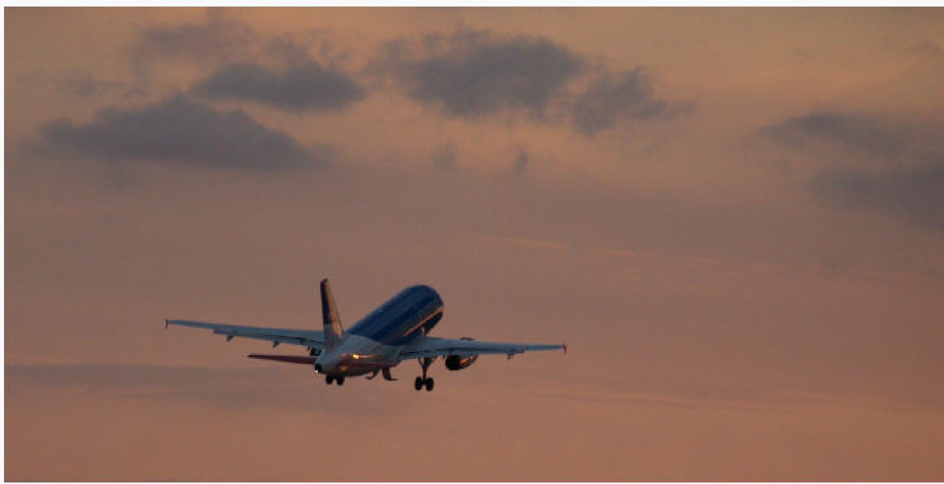
costs. This was the original limited purpose of Article 119 EEC Treaty which provided for equal pay for women and for men; it was economic and not social in purpose. The Law Society's report suggests that a renegotiation could consolidate existing UK opt-outs from existing labour law directives such as the Working Time Directive. Renegotiation might also include the right to opt out of further employment law directives.

Utility regulation

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 straitjacket 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?

Airport regulation



A plane takes off from Heathrow. Photo: Roy via a CC 2.0 licence

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 the 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.

When the government wanted to encourage free transfer/sale of slots to make better use of capacity, the EU Commission said the slots had to fall back into the slot pool. Luckily, a robust English judge said the EU regulation did not mean what the regulation appeared to say and allowed the sale of slots by one airline to another. Is it essential that national policy on allowing access to UK airports should be regulated at EU level.

The self-regulatory system

There are several areas of the British economy where the industry regulates its sector. 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.

State aids

This involves 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?

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.

Consumer protection

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 – it has been withdrawn, pending a 'modified proposal') 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 about 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.

Intellectual property rights

The free movement of both goods and services, including copyrighted works, is inextricably bound up with the IP rights attaching to them. 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, back to the 1920s – 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.

Public procurement

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?

Fisheries and agriculture

A fishing trawler in the North Sea off Denmark. Photo: Jens Auer via a CC 2.0 licence

There are other areas where the scope of EU competence may need looking at again. 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?

Merger control policy

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. The old Industry Act enabled the government to control mergers in strategically important industries (see steel today).

Subsidiarity

Subsidiarity is set out as a grand principle to the Treaty of European Union (TEU), 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. Much 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.

In short, I do not think you can take a view on whether we should have renegotiation on EU membership, a Swiss-stlye 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.

This post represents the views of the author, and not those of the BrexitVote blog, nor the LSE.

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