HM Government

Review of the Balance of Competences between the United Kingdom and the European Union

Competition and Consumer Policy Report

Summer 2014

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Competition and Consumer Policy

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Executive Summary

This report examines the balance of competences between the European Union and the United Kingdom in the area of competition and consumer policy, including policy on State aid, and is led by the Department for Business, Innovation and Skills (BIS). It is a reflection and analysis of the evidence submitted by experts, non-governmental organisations, business-people and other interested parties, either in writing or orally, as well as a literature review of relevant material. Where appropriate, the report sets out the current position agreed within the Coalition Government for handling this policy area in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences.

Chapter One sets out the historical development of EU competence on competition, State aid and consumer policy. Competition and State aid rules establish the conditions under which the Single Market can operate effectively. They have been a part of European law since the inception of the European Economic Community and the core provisions have changed little since, although the way they are applied has evolved over time. The rules exist to ensure that trade within the Single Market is not distorted and vigorous competition exists between firms across the EU, to the benefit of consumers and the wider economy.

Whilst not originally supported by a Treaty provision specifically dedicated to the protection of consumers, consumer policy has become an increasingly significant area of EU law-making, principally with the aim of improving the operation of the Single Market. Since 1993 this has also been supported by a Treaty requirement that the EU takes as a base a high level of consumer protection when harmonising the laws of the Member States.[1]

Chapter Two describes the way that competence is currently exercised, delineating the roles of the Commission and of Member States and explaining how the competition and State aid rules apply in practice and how the EU has sought to legislate in the area of consumer policy.

In the competition arena it describes the important role that Commission guidelines and the jurisprudence of the Court of Justice of the European Union (ECJ) have played in the development of competition law and practice. It explores how the Commission and Member States' national competition authorities work alongside one another, and the limits on each. Both the Commission and national competition authorities can, where they have jurisdiction, apply the EU prohibitions against anti-competitive agreements and abuse of a dominant position and can also examine and prohibit mergers. An important limit on EU competition law is that it only applies to agreements or conduct which has an actual or potential effect on trade between Member States or to mergers which have an EU dimension, based on the size of the turnover

[1] Article 169 of the Treaty on the Functioning of the European Union (TFEU).

of the parties involved. Since both EU and national competition laws can be engaged in a particular case, there are requirements to ensure their harmonious operation and the ultimate supremacy of EU law.

This chapter also considers how the jurisprudence relating to State aid has been significant in defining the broad scope of what is within the control of the Commission. It considers how the Commission has sought to respond to the needs of Member States in their use of State aid, by developing appropriate legal frameworks for approving it, and reflects on trends in the granting of aid over time. It explores how the Commission has exercised its exclusive competence for State aid control over time, moving from a case by case approach to greater codification through Guidelines and Block Exemption Regulations.

Consumer policy is a shared competence and this chapter describes the range of consumer protection measures which the EU has adopted and the objectives which the Commission has been pursuing. Over the past fifty years, the EU has put in place a set of policies and rules in order to provide a high level of protection for EU consumers allowing this competence to gain far more visibility at EU level. Like competition and State aid, this field of EU regulatory intervention remains inextricably linked to the development of the Single Market.

Chapter Three explores the impact of EU policy on competition, State aid and consumer protection on the UK's national interest. It sets out and weighs the evidence submitted to us as well as drawing upon the academic and other literature. It looks at the impact of the competition and State aid regimes on policymaking, the economy and EU competitiveness. On consumer policy, it explains where the EU has sought minimum and maximum harmonisation and examines the extent to which EU measures have respected the principles of subsidiarity and proportionality.

The chapter concludes that the evidence suggests having EU competence on competition and State aid does further the UK's national interest. Overwhelmingly stakeholders consider that the competition rules are a key pillar of the Single Market and having an effective regime at supranational level is the best way of ensuring that there is a level playing field for competition. And in the field of State aid, there was a strong sense that, if there is to be a level playing field, Member States should not be judges in their own cause. There were, however, some concerns expressed about the increasing amount of measures falling within the scope of State aid control, and that the level at which State aid control is triggered is too low. Also, the Coalition Government has serious concerns that, where we need to notify measures to the Commission for approval, this takes too long and the delivery of necessary Government support is delayed. The Coalition Government is working with the Commission to improve the process.

Most stakeholders also feel that in relation to competition and trade with third countries, the UK benefits from its membership of the EU, as the State aid regime helps to avoid subsidy races, with World Trade Organisation rules not forming an effective substitute.

On consumer policy, the argument is more nuanced. The balance of opinion is that EU-driven consumer policy is a benefit, primarily because it is a factor in making the Single Market work effectively. However, in this area there are more doubts about the way in which EU legislation is made, including whether it is sufficiently well thought through on inception, or robustly implemented after agreement. There was a sense among stakeholders that with the creation of legislation such as the Unfair Commercial Practices Directive and the Consumer Rights Directive, significant new EU action to protect consumers was not necessary. Instead, there should be more emphasis on ensuring that existing rules were enforced and applied correctly across the Single Market so as to remove remaining distortions and barriers to cross-border commerce. This contrasts the Commission's determination to move progressively from minimum to maximum harmonisation directives with the concerns of some stakeholders that

this could sometimes be detrimental to consumers; there is a degree of discomfort with the compromises that must be made to create maximum harmonisation laws in this area.

The chapter also examines the potential impact on these policy areas of some alternative approaches, noting that some may lead to less policy freedom than might be expected. In particular, becoming a Contracting Party to the European Economic Area Agreement would involve the UK remaining subject to similar rules but without having a role in their negotiation.

Chapter Four considers the future direction of policy on competition, State aid and consumer protection. On competition, the trend towards increasing cooperation between competition authorities and the sharing of information and best practice is expected to continue, both within the EU and with authorities elsewhere. The chapter also discusses the spread of competition regimes across the world and the importance of international trade agreements in providing opportunities to embed principles of fair competition and effective enforcement. Finally, it looks at plans for reforms to the EU regime relating to damages for infringements of competition law and the way the mergers regime deals with minority holdings.

The chapter considers the implications of recent case law on State aid. The likelihood of greater pressure on the regime is explored, as support for both infrastructure and public services will be delivered through markets and will thus need to be approved by the Commission; the Coalition Government will continue to press for the process to be streamlined. There is also consideration of the future of Regional Aid.

On consumer policy, the chapter reflects on the new concept of optional instruments like the Common European Sales Law and the effects this type of approach could have on businesses and consumers in the UK. It also considers the future of the Digital Single Market. It reflects on the broad view of stakeholders that, in spite of the Commission's appetite to continue legislating on consumer policy, the amount of recent activity both at EU and UK level suggests that it may be more appropriate now to focus on implementation and enforcement of the measures which are already underway or in place.

In conclusion, there is a strong consensus that effective competition and consumer policies are vital to helping markets, including the Single Market, work well for consumers and society as a whole. They are mutually supporting policies but the balance of competence does not need to be identical for each – and it is not at present.

On competition policy, the evidence suggests strongly that a supranational EU competition regime with a central authority at its heart is vital to the realisation of the Single Market, to making markets work well and to minimising the burden on business. The system of shared competence for dealing with cases within the European Competition Network appears to work well, with cases generally being taken by the authority best placed to investigate and with consistent application of the rules across the EU encouraged.

On State aid control, there are similarly strong arguments that competence needs to remain at EU level. Critiques of the current balance of competence are focused more on the 'how' the Commission controls State aid and the 'what' in terms of the court broadly defining what constitutes State aid, rather then the question of where competence sits. There is also discussion about how the State aid rules reflect market realities, and how responsive the Commission is in its processes.

For consumer policy, however, there can be a tension. On the one hand, improving the Single Market through consumer measures can benefit both businesses and consumers in the UK. On the other hand, harmonising measures can sometimes fail to take full account of local social, cultural and economic conditions which are of particular importance in considering consumer policy. Balancing the benefits and drawbacks of full or partial harmonisation, and understanding the implications of optional instruments, will be important future challenges.

Introduction

This report covers competition and consumer policy including State aid. It is one of 32 reports being produced as part of the Balance of Competences Review and is taking forward the Coalition commitment to examine the balance of competences between the UK and the EU. It will provide an analysis of what the UK's membership of the EU means for the UK national interest. 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. It has not been tasked with producing specific recommendations or looking at alternative models for Britain's overall relationship with the EU.

For the purposes of this review, we are using a broad definition of competence as set out in the text box below.

Definition of EU Competence

The EU's competences are set out in the EU Treaties, which 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, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the Customs Union and common commercial policy. In areas of shared competence, such as the Single Market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. 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.

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 with 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.

The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. More information can be found on the review, including a timetable of reports to be published, at www.gov.uk/review-of-the-balance-of-competences.

The Objectives of this Report

The objectives of this report are:

- To consider the broad issues and main debates underlying EU action on competition and consumer policy and the extent to which EU competence is necessary to achieve the desired objectives;
- To assess the implications for the UK national interest of the current state of competence on competition and consumer policy; and
- To consider the future of EU competence in this space, identifying drivers and possible policy options, including how the current exercise of competence could be more effective.

Chapters One and Two set out the essential background: the history of the development of EU competition and consumer policy and the current nature of the EU's powers in this area. Chapter Three considers the first two of the objectives above, particularly considering the impact on the UK's national interest, whilst Chapter Four considers the third objective, looking to the future.

The Scope of this Report

This report covers all State aid granted under the general State aid rules, that is it only excludes those granted under sector specific rules in transport and agriculture. The general rules cover areas from financial to State aid in support of broadband rollout and coverage, and aid in respect of public services.

This report does not cover:

- Procurement policy (covered in *The Single Market: Free Movement of Services Report* – Semester Three);
- Areas such as product safety (covered in the *Free Movement of Goods Report* – Semester Two).

In certain sectors there are limited prospects for competition and so the behaviour of firms is regulated to provide a proxy for competitive market outcomes. This is called economic regulation and is not covered in this report. Sectoral economic regulation will be covered in the relevant sector specific report; for example the regulation of the energy sector will be covered in the energy report.

Engagement with Interested Parties

The analysis in this report is based on 35 pieces of evidence received in response to a Call for Evidence by the Department for Business Innovation and Skills from 21 October 2013 to 13 January 2014. It also draws on notes of workshops held during the Call for Evidence period and existing material, such as Parliamentary reports and an internal review of academic and other relevant literature. The report also takes account of relevant evidence submitted to other reports in Semesters One, Two and Three, such as the *Single Market* and the *Energy* reports.

The Call for Evidence was distributed widely in the UK and in other EU Member States. Organisations and individuals with an interest in competition, State aid and consumer policy were encouraged to respond, including individuals or groups representing national competition authorities, business, the voluntary sector and consumer organisations, academics and legal practitioners. Relevant Parliamentary committees, members of the European Parliament, government agencies and the Commission were also invited to contribute as were the administrations in Scotland, Wales and Northern Ireland, the Crown Dependencies and Gibraltar.

A list of those who submitted evidence can be found in Annex A, with details of those who participated in the various workshops in Annex B. A list of the additional literature and material considered as part of this report can be found in Annex C.

Chapter 1: Development of EU Competence

1.1 This chapter sets out the historical development of EU competence on competition, State aid and consumer policy.

Competition and Consumer Policy

1.2 By way of context, competition and consumer policies play a vital role in shaping how market economies operate. In the Government's view, the two policies are complementary and share the same goal: to help markets work well for consumers and society as a whole.

1.3 Competition between businesses is a key pillar of a vibrant economy. But competition cannot simply be assumed. Left to themselves, businesses may act in ways which are detrimental to competition and hence to the public, for example by entering into cartels. Or they may simply be unchallenged by competitors, enabling them to opt for an easy life.

1.4 By outlawing certain anti-competitive activities and facilitating open and competitive markets, a strong competition regime encourages the process of rivalry between businesses which generates more choice for consumers, driving down prices and promoting quality. Such competition also promotes a more efficient economy, encouraging the allocation of resources to where they can best be used, incentivising innovation and making businesses more competitive on the world stage. Thus vibrant competition benefits society as a whole.

1.5 Rules on State aid are a subset of the competition rules aimed at preventing market distortions as a result of government support. They therefore support a level playing field between competing businesses, enabling the most efficient to thrive.

1.6 Consumer policy empowers consumers, by giving them rights including rights to information, so they are confident and are able to make well informed choices. These consumers in turn actively seek better quality goods or services at lower prices, thereby driving firms to compete for their custom. Competition policy and consumer policy are therefore mutually reinforcing. As well as this role in driving competition, consumer policy also gives consumers protections when purchasing a product or a service, in recognition in particular of the imbalance of power between them and their suppliers.

Origins in the Treaty of Rome

1.7 The EU competition law rules, including the State aid rules, derive from the 1957 Treaty of Rome itself. The activities of the European Economic Community (EEC), included amongst other things, not only the creation of an internal market but also 'a system ensuring that competition in the internal market is not distorted'. These provisions were included in the Treaty as it was believed that intervention was necessary to ensure that the competitive process in which the internal market worked would not be undermined or distorted by anti-competitive behaviour by firms. An example of such anti-competitive behaviour could be a group of firms agreeing to fix prices rather than competing between themselves, leading to higher prices for consumers, or large firms with significant market power behaving in a way which prevents potential competitors from entering the market, thereby in the long run again keeping prices to consumers high. In the same way, subsidies paid by governments to businesses could also distort competition and discourage new market entry.

1.8 The principle of undistorted competition was thus embedded in the fundamental provisions of the Treaty as a mechanism for reinforcing, complementing and implementing other Treaty provisions and tasks, in particular, the functioning of the internal market – what we now call the Single Market.

Consten and Grundig

German electronics manufacturer Grundig granted an exclusive right to sell certain of its products in France to a French firm Consten. Grundig undertook not to make deliveries, either directly or indirectly, to other persons in France. The agreement also prevented Consten from re-exporting. If allowed this would have stopped other firms from buying Grundig products in Germany and selling them in France, in effect a private trade barrier. This would have been contrary to the European goal of market integration. The Commission ruled that the agreement had as its object the restriction of competition. The decision was upheld by the European Court of Justice (Consten and Grundig vs Commission (1966)). The case also illustrates that the competition rules can apply when trade between Member States is only potentially affected.

1.9 The EU competition rules are now set out in the Treaty of the Functioning of the European Union (TFEU) and legislation adopted under it. The main provisions are:

- Articles 101-106 contain rules applicable to undertakings, including a prohibition of certain anti-competitive agreements between undertakings (Article 101) and a prohibition of abusive conduct of dominant undertakings (Article 102) – these are referred to below as the 'antitrust prohibitions';
- Articles 107-109 set out the State aid rules. The provisions are structured as an initial general prohibition on Member States granting State aid followed by power for the Commission to approve State aid in certain circumstances. They also contain procedural provisions, in particular an obligation on Member States to notify proposed aid to the Commission.

1.10 The Agreement establishing the European Economic Area (EEA), creating a free trade area between the EU and the European Free Trade Area (EFTA) countries with the exception of Switzerland, also contains competition rules modelled on those set out in

the TFEU.[1] This Agreement effectively extends to the territory of the relevant EFTA States the EU competition rules and all the rules governing the Single Market.

1.11 The establishment of competition rules necessary for the functioning of the Single Market falls within the EU's exclusive competence. This means that only the EU may adopt legally binding acts in relation to EU competition law unless it empowers Member States to do so. Nonetheless, the institutional arrangements governing competition are specifically designed to be in accordance with the principle of subsidiarity. In particular:

- EU competition law applies only to potentially anti-competitive agreements and conduct of undertakings when they affect trade between Member States or to 'concentrations' [mergers] that have a Community (now Union) dimension;
- The antitrust prohibitions are directly effective; consequently they can be enforced not only at the EU level by the Commission but also at the national level – both by National Competition Authorities (NCAs) and national courts;
- National competition law can be applied concurrently with the antitrust prohibitions so long as the principle of supremacy, and other fundamental principles, of EU law is respected;
- Although the EU merger rules cannot be enforced by national courts and NCAs, there are certain defined circumstances in which national merger rules can be applied concurrently with them.

1.12 The requirement for there to be an actual or potential and direct or indirect effect on trade between Member States for Articles 101 and 102 to apply, defines the boundaries between EU and national competition law.[2] Where there are no cross national implications, the EU cannot act to deal with the infringement of competition rules. However, as the conduct of firms frequently has the ability to affect trade between Member States, EU competition law often applies. EU law is least likely to apply in small localised markets – there have, for example, been cases under UK national law involving bus services in Cardiff and local newspapers in Aberdeen.

1.13 There have been no substantive changes in the provisions on antitrust since they were originally enshrined in the Treaty of Rome. However:

- Jurisprudence of the Court of Justice of the European Union (ECJ) and guidelines issued by the Commission, have explained their meaning;
- The way they are enforced has changed, notably with the 'Modernisation' Regulation of 2003 which delegated a large proportion of cases to the European Competition Network (ECN) consisting of the Commission and the Member States' NCAs and provided for the relationship between EU and national competition law;
- Merger control has been introduced at an EU level (in 1989). In most circumstances, cases are either dealt with by the Commission or by a Member State.

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[1] The concept of an undertaking, in the context of competition law, covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way it is funded. Hofner & Elser v Macraton, C-41/90, [1991].

[2] See Articles 53, 54, 57 and 59 of the EEA competition rules. The purpose of the competition rules of the agreement is to create a homogeneous and strong competitive environment in the European Economic Area. The principal substantive rules of the Agreement concerning competition matters are laid down in Article 53, which bans collusion of undertakings, Article 54, which bans the abuse by undertakings of a dominant position, and Article 57, which addresses the concentration of undertakings.

1.14 As is the case with the other competition Treaty Articles, those that deal with State aid have not changed substantively since the Treaty of Rome. However, over time significant changes have occurred in the development of the Single Market, notably increased liberalisation of services, and in the role of the State, in particular activities which were seen as functions of the State are now carried out by private sector entities, and may be within the scope of the State aid rules.

1.15 By no means is all aid banned. In particular there is broad discretion for the Commission to approve aid for economic development. This includes regional aid and aid for research and development and Small and Medium Sized Enterprises (SMEs).

Extending Competence

Consumer Policy

1.16 Beyond the provisions which implicitly recognised the importance of competition and the Single Market, with the underlining assumption that consumers would benefit from free trade, the Treaty of Rome did not contain provisions dedicated to the protection of consumers.[3] There was also no specific legal basis for the adoption of EU measures in this policy area; it would be a further 18 years before consumer policy began to take shape, beginning with three Council Resolutions which laid the foundations of basic consumer rights at EU level. A range of Directives in the 1970s and 1980s supplemented by significant rulings of the ECJ followed.[4] [5] The Single European Act 1987 then introduced what is now Article 114 TFEU, specifically requiring that the EU should take as a base a high level of consumer protection when harmonising the laws of the Member States.

1.17 It was not until the Maastricht Treaty came into force in 1993 that consumer protection became a policy of the Union (Article 169 TFEU) and therefore subsequently an issue that had to be taken into account when any EU policy or activity was defined or implemented (Article 12 TFEU). Furthermore, the Maastricht Treaty also provided that when the Commission produced proposals relating to consumer protection in the cause of promoting the Single Market, the Commission had to take as a base a high level of protection (Article 114(3) TFEU).

1.18 This insertion of Article 169 paved the way for the adoption of several consumer programmes by the Commission, including the two consumer strategies for 2002-2006 and for 2007-2013.[6] [7] In these strategies the Commission explicitly stated that consumers would benefit more fully from the Single Market if the EU adopted uniform consumer protection rules. This marked a clear departure from the traditional approach characterising EU consumer protection directives, which laid down minimum standards and thereby left a margin of discretion to Member States as to whether and how to increase the protection provided to consumers in their countries.[8]

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3 S. Weatherill, *EU Consumer Law and Policy* (2013), p8.

4 Council Resolution C 92/2 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 1975.

5 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, C-120/78 [1979].

6 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Consumer Policy Strategy 2000-2006*, COM(2002) 208 final.

7 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A European Consumer Agenda – Boosting Confidence and Growth*, COM(2012) 225 final.

8 Please see: Council Directive 93/13/EEC on unfair terms of consumer contracts, 1993; Directive 1999/44/EC of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees, 1999; and Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, 1985.

1.19 Following on from this, the Treaty of Lisbon introduced Article 12 TFEU and placed a duty on the EU to take consumer protection requirements into account when defining and implementing other EU policies and activities. This provision was reinforced by Article 38 of the EU Charter on Fundamental Rights which provided that 'Union policies shall ensure a high level of consumer protection'.

Mergers

1.20 The EEC Treaty did not contain any specific provision for controlling mergers. The Commission recognised early on, however, that some form of EU merger control was important. Although initially it utilised Articles 101 and 102 to scrutinise merger transactions where possible, the lack of a specific provision governing mergers which would effect a lasting change to the structure of the market inhibited its capability to operate effective competition control.

1.21 In 1973, the Commission had proposed that a regulation to deal with mergers be adopted, but opinions differed between Member States on the extent to which concentrations should be controlled at the EU rather than national level. Any EU merger regulation had to be passed unanimously by the Council. Initially, a lack of consensus amongst the Member States over a number of issues led to delay in such EU merger control being adopted. Not only was there disagreement over the question of whether merger control was necessary at all and which appraisal criteria should be relevant, but jurisdiction and competence were a major issue. A number of Member States were reluctant to cede power over changes in industrial structure in their territory to the Commission. A major sticking point was therefore whether, and if so at what point, control should be relinquished by the Member States to the Commission and what the relationship between EU and national law should be.

1.22 However, the determination to achieve a Single Market by the end of 1992 added impetus and made the need for an effective system of EU merger control appear all the more important. The European Union Merger Regulation (EUMR) was eventually adopted in 1989, and came into force in 1990.[9] The question of how jurisdiction should be allocated between the Commission and the Member States was controversial during the negotiations and has remained sensitive, being revisited on a number of occasions when the EUMR has been reviewed, amended and when it was recast into the current EUMR, Regulation 139/2004.

[9] Then the European Community Merger Regulation.

Chapter 2: Current State of Competence

2.1 This chapter describes the way that competence is currently exercised, delineating the roles of the Commission and of Member States and explaining how the competition and State aid rules apply in practice and how the EU has sought to legislate in the area of consumer policy.

Competition Policy

2.2 The Commission has been at the core of the development of EU competition law and policy. It has played a central part in enforcement through taking action against infringements of the antitrust prohibitions, imposing fines and historically, granting individual exemptions to agreements that would otherwise infringe Article 101 – it still issues block exemption regulations exempting categories of agreements from the prohibition where there are countervailing economic benefits that outweigh restrictions on competition. It has also published a wide range of communications and notices (some of which are called 'guidelines'). The application of competition law is influenced by these guidelines as well as being governed by the jurisprudence of the EU courts. Since the UK's national competition law, like those of many other Member States, is closely modelled on the Treaty provisions, these guidelines and the jurisprudence influence the way cases are dealt with even if only national competition law is being applied. This extensive body of jurisprudence and guidelines is especially important in ensuring similar cases are dealt with consistently, and in giving business assurance as to what constitutes unlawful behaviour and what does not, in circumstances in which there are a number of different decision makers, NCAs, as well as the Commission, national and EU courts.

Commission Guidelines

2.3 The guidelines may constitute a clarification of the substantive law and explain the approach the Commission takes to particular kinds of agreements, practices, or mergers or set out the principles by which the Commission exercises its administrative discretion. Most of the notices are crucial to complete an overall picture of a particular competition rule and in practice they influence the way in which firms conduct business. They do not have legislative force and are sometimes referred to as 'soft law'; nonetheless the ECJ has held that they may form rules of practice from which the Commission cannot depart in an individual case without breaching general principles of law such as equal treatment and legitimate expectation. The notices are not, however, binding on the courts or NCAs of the Member States.

Jurisprudence

2.4 The ECJ, which includes the ECJ and the General Court (GC), has the task of interpreting the law set out in the Treaties and secondary legislation and ensuring that it is observed. The EU Courts hear two main types of action: reviews of the acts of the Commission and references from national courts.

2.5 The ECJ has the power to review fines and Commission decisions. These provisions confer unlimited jurisdiction to cancel, increase or reduce fines (Article 261 TFEU) and the power to review the legality of the Commission's decisions in judicial review proceedings (under Article 263 TFEU).

2.6 The ECJ also receives cases from national courts. Article 267 TFEU provides a procedure whereby a national court or tribunal may, and in some circumstances must, request the ECJ to give a preliminary ruling on the interpretation or validity of EU law where a decision on the question is necessary to enable that court or tribunal to give judgment. This procedure, including in the sphere of competition law, is 'essential for the preservation of the [EU] character of the law established by the Treaty and has the object of ensuring that in all circumstances the law is the same in all states of the [EU]'.[1] The ECJ will give rulings on points of EU law which are crucial to the interpretation of domestic law in the case before the referring court. This is important in competition law where many Member States (including the UK) have domestic laws which deliberately mirror the EU rules and are interpreted in line with them.

EU law and the Competition Act 1998

2.7 EU law lays out a framework governing the relationship between EU and UK competition laws. This has been developed and reinforced through the work of the European Competition Network (ECN) and cooperation between the relevant bodies at EU and national level.[2] This framework imposes limits on the extent to which the application of national competition law can diverge from EU provisions. It also imposes obligations and duties on NCAs and national courts when applying EU competition law and protecting rights derived from them. In addition EU law incorporates provisions which preclude Member States from enacting or maintaining in force measures contrary to the competition rules (or other Treaty rules) and/or which would deprive them of their effectiveness.

2.8 This EU structure has resulted in a relatively high degree of convergence between EU and national competition law in substantive terms and to effective administrative enforcement and judicial protection of EU rights. Member States retain considerable autonomy, however, in relation to institutional design and the procedures governing public and private enforcement of the competition rules.[3] So therefore the UK was not subject to specific EU obligations when setting up the new Competition and Markets Authority (CMA) other than the need to ensure EU competition law could be effectively enforced.

2.9 The Competition Act 1998 closely modelled UK national antitrust law on the corresponding EU law. This means that even where EU competition law does not apply, because there is no effect on interstate trade, the law in the UK is very similar. One of the

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1 Rheinmühlen-Düsseldorf v Einfuhr und Vorratsstelle für Getreide und Futtermittel, C-166/73, [1974].

2 Consisting of the Commission and NCAs.

3 Last year, the Commission published a package of measures designed to ensure that victims of EU competition infringements can obtain full compensation, including an EU Directive designed to facilitate damage claims. It has also been considering whether further action should be taken to tackle national institutional and procedural divergences. These developments are discussed in Chapter Four.

key reasons for this was to ease the burden for businesses that would arise were they to be subject to markedly different regimes. The investigatory and sanctioning powers of national competition authorities are similar to those available to the Commission. Moreover, section 60 of the Act states that competition cases within the UK must be dealt with as far as possible in a manner which is consistent with EU law. This ensures that there is consistent application of common concepts across UK and EU competition law such as defining an undertaking or identifying what constitutes an abuse of dominance.

2.10 In accordance with EU law, the UK's national competition authorities will apply Articles 101 and 102 when applying the Competition Act 1998 prohibitions to agreements or conduct, as the case may be that affect trade between Member States.[4]

Enforcement of the Antitrust Prohibitions

2.11 Initially the Commission played the central role in the enforcement process. This was partly because, from 1962 to 2004, it had the exclusive right to rule on the compatibility of an individual agreement with Article 101(3) and so to exempt individually agreements from the Article 101(1) prohibition, following the notification of the agreement to it. This set up meant that it was difficult for NCAs and national courts to play a meaningful role in the enforcement process. From 1 May 2004, however, Regulation 1/2003 removed the Commission's exclusive competence to apply Article 101(3). This paved the way for greater enforcement of the rules at the national level and sets out provisions designed to encourage decentralised enforcement and to ensure consistency in application and interpretation by the different decision-makers. Indeed, Regulation 1/2003 requires Member States to designate NCAs to enforce Articles 101 and 102 and obliges NCAs to apply Articles 101 and 102 when applying national competition law to agreements or conduct which affects trade between Member States.

2.12 Regulation 1/2003 contains provisions dealing with cooperation between the Commission and the NCAs. Together the Commission and NCAs form the ECN, a network designed to ensure the success of the decentralised system, so that the authorities operate according to common principles and in close collaboration and the competition rules are applied effectively and consistently.

2.13 Despite the creation of the ECN and shared enforcement of the rules, the Commission has sought to retain its central role 'as the guardian of the Treaty' which 'has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law'.[5]

2.14 The degree of independence of NCAs, their institutional structure and procedural powers, varies from Member State to Member State. Questions of institutional choice and procedure have thus, as a general rule, been left to the Member States and there is considerable diversity in the national procedural enforcement frameworks. Although in some Member States, including the UK, NCAs have the power to fine undertakings in breach of Articles 101 or 102, and/or national equivalents, following an administrative procedure similar to that followed by the Commission, in some Member States a 'judicial' or 'prosecutorial' model is followed. The UK Government considered introducing a so-called prosecutorial model for antitrust enforcement when it consulted on reforming the competition regime in 2011/12 but ultimately decided not to do so at that stage.

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[4] Prior to 1 April 2014 these were the Office of Fair Trading (OFT) and certain sector regulators in their sectors. From that date the CMA assumed the OFT's role in respect of competition enforcement.

[5] European Commission Notice, 27/04/2004 on cooperation within the network of competition authorities, 2004.

2.15 Under the modernised system Article 101 and 102 cases can be dealt with by:

- A single NCA (possibly with the assistance of others);
- Several NCAs acting in parallel; or
- The Commission.

2.16 Broadly, the principle that applies is that a case should be dealt with by the authority 'best placed' to deal with it and best able to restore or maintain competition in the market. A single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory. Where two or more NCAs are well placed to act, then one NCA only should act where the action of one would be sufficient to bring the entire infringement to an end. If it would not, then two or more NCAs should act. The authorities should coordinate their action and where possible designate a lead authority for the case.

2.17 The Commission is likely to be best placed to deal with an agreement or practice where it has effects on competition in three or more Member States. For example, where two undertakings agree to share markets or fix prices for the whole territory of the EU or where an undertaking, dominant in four different national markets, abuses its position by imposing fidelity rebates on its distributor in all these markets. The Commission is also likely best placed to deal with an agreement or practise where the conduct is linked with other Union provisions which may be exclusively or more effectively applied by the Commission; or the Union interest requires it to develop competition policy or to ensure effective enforcement.

2.18 Whether enforcement is via the Commission or NCAs – or whether Articles 101 and 102 or the Competition Act 1998 is being applied, since our law is so closely modelled on EU law – the consequences for firms which breach the rules can be very serious. They include potential fines of up to 10% of worldwide turnover. Since 2010, the Commission has imposed fines for cartel infringements totalling €5.5bn. Both Intel and Microsoft have been fined over €1bn for abuse of dominance.

Abuse of Dominance

Microsoft

In 2004 the Commission decided that Microsoft had abused the dominant position of its Windows operating system. It had done so by refusing to supply competitors with information necessary for their products to interoperate with Windows. Microsoft had also harmed competition by tying its separate Windows Media Player with its Windows operating system. The Commission ordered Microsoft to change its behaviour and fined the firm €497m. Microsoft did not cooperate properly and so further fines totalling €1.14bn followed. Microsoft appealed both the original decision and the additional fines and may yet further appeal.

The Commission also investigated Microsoft's tying of its Internet Explorer web browser to its dominant Windows operating system. In response Microsoft agreed to unbundle the products and offer users a choice of browser.

Intel

In May 2009 the Commission found Intel had abused its dominant position in the computer chip market. The Commission found that Intel made hidden payments to computer manufacturers Dell, HP, NEC and Lenovo on condition that they bought all or almost all their chips from Intel. Intel also made direct payments to Europe's largest PC retailer – Media Saturn Holding (MSH) on condition that it stocked only computers with Intel chips. A second anti-competitive practice Intel engaged in was to pay computer manufacturers HP, Acer and Lenovo to stop or delay the launch of specific products containing rivals' chips. Intel's behaviour diminished competitors' ability to compete. The Commission fined Intel €1.06bn and ordered Intel to stop the anti-competitive practices.

Anti-Competitive Agreements

Car Glass Cartel

Four car glass manufacturers, Saint Gobain, Asahi, Pilkington and Soliver, who controlled about 90% of the EU market, ran a cartel for up to five years. The firms held regular meetings to share the market and exchanged commercially sensitive information. In 2008 the Commission decided the cartelists had infringed Article 101 of the TFEU and Article 53 of the EEA Agreement and fined them over €1.3bn; Saint Gobain alone was fined €896m, later reduced by the Commission to €880m. In March 2014 the General Court reduced Saint Gobain's fine on appeal to €715m but it remains the highest fine for participation in a cartel.

2.19 The Commission has broad powers to assist it in the investigation of possible breaches of the rules. They include the power to obtain necessary information from firms and carry out site inspections (so called 'dawn raids'). Firms may be fined for not cooperating with the Commission. In the UK, the CMA has similar powers, whether it is applying EU law or the Competition Act 1998.

2.20 In all these ways enforcement of the antitrust prohibitions can be intrusive and costly for businesses. Given this, businesses have a full right of appeal on the merits before the specialist judicial body – the Competition Appeal Tribunal – against infringement decisions by a UK competition authority whether it involves Articles 101 or 102 or the prohibitions in the Competition Act 1998. As noted earlier, undertakings may appeal Commission decisions under Articles 101 and 102 to the EU courts.

Mergers

2.21 In contrast to the position on antitrust, the EUMR does not provide for decentralised enforcement of the EU merger rules. Rather the system operates through allocating jurisdiction over 'concentrations' between the EU and national authorities respectively. It is only in exceptional circumstances, and subject to limits set out in EU law, that national and EU merger rules apply concurrently.[6]

2.22 Under the EU merger rules, mergers with an 'EU dimension', which is calculated by reference to turnover, must be notified to the Commission.[7] This means that firms with large operations in the EU that wish to merge need to notify the Commission, which then assesses the proposed merger.

2.23 Whilst the aim of the EUMR is to draw a clear line between mergers which are to be appraised by the Commission and those that lack an EU dimension and which can be appraised at the national level by NCAs, it has been accepted that the jurisdictional test will not necessarily always ensure that the transaction is allocated to the correct competition agency for review. Consequently, the EUMR contains provisions which allow for some concentrations with an EU dimension to be referred, or partially referred, downwards to one or more NCAs and for concentrations without an EU dimension to be referred upwards from one or more NCAs to the Commission.

2.24 There are exceptions to the rule that the EUMR alone applies to concentrations with an EU dimension, concerning 'distinct markets' (an NCA may request a merger to be referred to it where it threatens competition in a distinct market in that state), 'requests for referral' (instead of notifying a concentration the parties may submit that it may affect competition in a distinct market in a Member State and should be examined in whole or part by that State), 'legitimate interests' (a Member State may take steps where a merger threatens particularly sensitive national interests, including public security, plurality of the media and prudential rules), and 'essential interests of security' (a Member State remains able to apply measures it considers necessary to protect essential interests of security connected to the production of, or trade in, arms, munitions and war material). The UK has relied on these exceptions to review concentrations, or aspects of a concentration, under UK merger rules on a handful of occasions.

2.25 Firms and Member States may also request that a merger or aspects of it are looked at by a particular authority. Over a thousand mergers with an EU dimension have been notified since 2010. The merger must stand still while clearance is awaited. The Commission may block a merger where it is incompatible with the Single Market because it would significantly impede effective competition.[8]

2.26 Where mergers do not have an EU dimension, national merger rules apply. In contrast to the position on antitrust – where the UK followed long after the EU in prohibiting anti-competitive agreements and the abuse of dominance – the UK introduced merger control significantly earlier than had the EU, with the Monopolies and Mergers Act 1965. Nowadays, and in practice, the substantive assessment of mergers under the UK regime closely mirrors the assessment conducted in the EU, the more so since the Enterprise Act 2002 provided for the vast majority of cases to be handled by the UK competition authorities on the basis of a competition test.[9]

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6 Essentially where two or more previously independent undertakings merge or come under common control.

7 The main legislative texts for merger decisions are the EUMR and the Implementing Regulation.

8 Or declare it compatible with the common market subject to commitments to ensure compliance with modifications proposed by the parties.

9 The Act provides for Ministers to intervene in a small number of cases which raise specified public interest considerations such as national security.

2.27 However, the jurisdictional rules and procedure are different. For example, there is no obligation for the merger to be suspended whilst the CMA considers the case.

Other UK Law Provisions

2.28 The above arrangements do not prevent Member States retaining other domestic provisions such as the UK criminal cartel offence or the UK regime for investigating markets, which are not national competition law within the meaning of Regulation 1/2003.[10]

State Aid

The Concept of Aid

2.29 The Treaty sets out a definition of what is State aid which has been broadly interpreted by the ECJ.[11]

2.30 For a measure to constitute State aid, it needs to be an intervention by the State or through State resources, which provides a selective advantage to an undertaking. It also needs to distort or potentially distort competition, and to affect trade between Member States.

2.31 The Commission Decision on the UK Renewables Obligation illustrates the wide scope of the concept of State resources and the point that if resources are attributable to the State, they are classed as State resources.[12]

The Renewables Obligation

The UK Renewables Obligation involves private resources paid to a fund. The system requires electricity suppliers to purchase a certain amount of "green certificates" from producers of green electricity. If, however, electricity suppliers do not have a sufficient amount of green certificates, they must pay a buyout price to a fund set up by the UK Government and managed by OFGEM, the industry regulator. The UK Government argued that the fund did not involve a transfer of State resources, relying on past precedent the PreussenElektra case Case C-379/98, but the Commission decided that it was, because it was established by the State and was fed by contributions imposed by the State.

2.32 In reality if there is a grant of State resources on a selective basis to an undertaking, which, in itself, is broadly defined, and can include charities and public bodies if they are placing goods or services on to a market, then this will generally be sufficient for a measure to constitute State aid, given that the other two elements of aid set out in the Treaty have usually been deemed to be met by the ECJ. It is sufficient for a measure to have the potential to distort competition, and for a subsidised good or service to be tradeable across Member States.

2.33 The Commission has sought to respond to developments in Member States through the development of guidelines, frameworks and block exemptions.

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[10] The cartel offence in section 188 of the Enterprise Act 2002 is neither a law applicable to undertakings that pursue the same objective as the TFEU competition rules nor a law which is the means of directly enforcing such competition rules in the event of an infringement.

[11] State aid is defined, and restricted/prohibited, in Article 107(1) of TFEU in the following, edited, terms: 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings [...] shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

[12] European Commission, *State Aid No N 504/2000 – United Kingdom Renewables Obligation and Capital Grants for Renewable Technologies*, 2000.

Block Exemption Regulations

2.34 Any measure which meets all four tests of aid must normally be notified to the Commission and the aid cannot be awarded until this approval is given. The purpose of block exemption regulations is to reduce the number of notifications to enable the Commission to focus on the cases where distortions of competition are most significant. By enabling public authorities to grant smaller less distortive amounts of aid without prior notification to the Commission, Member States' time and resources are saved. An aid measure which meets all the conditions contained in a block exemption regulation is exempted from the obligation to notify the Commission. Member States can go ahead without Commission approval but are required to provide a short note on the measure to the Commission which can then seek further information from the Member State if necessary.

2.35 The Commission exempts aid where it has gained sufficient experience that aid which meets the conditions set out in the block exemption regulation is clearly compatible and does not give rise to a significant distortion of competition or effect on trade.

2.36 The General Block Exemption Regulation (GBER) includes the following types of aid:

- Aid to SMEs – aid for investment in plant and for hiring additional workers, aid in the form of risk capital, innovation aid and aid contributing to intellectual property rights costs;
- Social aid – aid to employ disabled and disadvantaged workers;
- Regional aid in assisted areas – these are areas that are less advantaged and which have been identified as needing support;
- Environmental aid – a number of aid measures favouring environmental protection or tackling climate change, aid promoting investment in energy saving or investments in renewable energy sources and aid in the form of tax reductions;
- Aid for R&D and innovation – aid for certain R&D projects and measures supporting newly established innovation companies.

2.37 The Regulation does not apply in a number of cases; in particular it does not apply to firms in difficulty. The Regulation sets out detailed conditions which must be complied with and sets a threshold where aid to individual companies above a certain limit, dependent on the kind of aid, is outside the scope of the Regulation and must be notified to the Commission.

2.38 Member States may also grant small amounts of aid in the form of de minimis support, currently €200K to an undertaking over any three year period without the need to notify the Commission. The legal cover for this is the De Minimis Regulation.

2012-14 Reform Package

2.39 In 2012 the Commission set out a further programme of State aid reform with three objectives:

- Foster growth in a strengthened, dynamic and competitive Single Market;
- Focus enforcement on cases with the biggest impact on the Single Market;
- Streamlined rules and faster decisions.

2.40 The Council subsequently adopted a new Enabling Regulation in July 2013. It introduced new categories of aid that the Commission may decide to exempt from the obligation of prior notification by means of block exemption regulations. The Council also adopted a new Procedural Regulation to make the handling of complaints swifter, more predictable and more transparent, and to enable the Commission to gather information directly from market participants and conduct sector inquiries, thus improving the Commission's ability to adopt faster and better decisions.

2.41 The Commission has also significantly revised its guidelines, with the 2014-2020 Guidelines coming into force from 1 July 2014. In parallel, the Commission has introduced the GBER, also in force from 1 July. This will enable the Commission to focus on cases with the biggest impact on competition and trade. The GBER now also covers:

- Innovation;
- Culture;
- Natural disasters;
- Sport;
- Certain broadband infrastructure;
- Other infrastructure; and
- Social aid for transport to remote regions and certain agriculture, forestry and fisheries initiatives.

Role of the Council

2.42 The Council has very limited powers in relation to State aid. The Treaty sets out what State aid is and confers the power to approve State aid on the Commission. The Council cannot therefore amend these provisions or adopt legislation derogating from them.

2.43 The Council may by means of a decision on a proposal from the Commission specify other categories of aid which may be compatible with the Single Market.[13] It is not clear what the limits of this provision might be. It has been used in the past for the instruments governing aid to shipbuilding, and aid to facilitate the closure of coal mines. This was on the basis that the Treaty did not provide a legal base for the Commission to adopt those rules.

2.44 The Council may, in unanimity, decide that aid which a State is planning to grant is compatible with the Single Market, but this facility has rarely been used. The ECJ has emphasised that it can be used only in exceptional circumstances.[14]

2.45 The Council is also able, on a proposal from the Commission and after consulting the European Parliament, to make appropriate regulations for the application of the State aid Treaty Articles and in particular can determine when aid needs to be notified to the Commission for individual approval. The Article has been used to adopt the Procedural Regulation and to give the Commission power to adopt block exemption regulations.

2.46 It could not be used to amend the Treaty provisions or to adopt provisions inconsistent with them.

[13] Under Article 107(3)(e) of the TFEU on Notion of State aid and Derogations.

[14] Commission v Council, C-110/02, [2004].

Challenges to Commission Decisions

2.47 The ECJ has had a significant role in developing the Treaty rules on State aid, in particular what constitutes State aid.[15] The UK can seek to influence the development of EU competence in State aid by challenging decisions of the Commission and by intervening in cases.

2.48 The UK Government has the power to challenge decisions of the Commission addressed to it. In addition, as a Member State it has the power to challenge decisions addressed to other Member States and to intervene in cases in the ECJ relating to aid in other Member States or where the Commission has refused to grant approval or has ordered the recovery of aid unlawfully paid.

2.49 The ECJ does not rule directly on compatibility, granting the Commission a wide margin of discretion, but can say whether or not the Commission in reaching a view has erred in law.

2.50 The power to challenge a positive decision of the Commission has rarely been exercised. In Case C-279/08P Commission v Netherlands the ECJ held that a Member State could challenge a decision where the Member State considered that the measure did not contain State aid even if the Commission had approved the aid. However, the process of securing a positive Commission decision will have involved a great deal of effort and the appetite for a Member State to challenge such a decision would depend on the point of principle at stake, that is, how important it is that the support in question is not regarded as State aid.

Process of Intervening in Cases Before the European Court of Justice

2.51 The UK can intervene in two situations. The first is where a Member State or natural or legal person challenges a decision of the Commission. On occasion the UK has intervened in a challenge brought by a UK company where the Commission has approved aid to one of its competitors. An early example is BP v Commission where the UK intervened in support of BP's challenge to a decision of the Commission approving aid from another Member State to one of its competitors.[16]

2.52 The second situation is where there is a preliminary reference to the ECJ from the national court. There have been a number of examples where the UK has intervened where important UK policy objectives were clearly involved. An example of a case where the implications for the UK were clear was the Azores case.[17]

The Azores Case

The Azores case concerned a 30% reduction by the Azores Government of national company tax in comparison to the main Portuguese rate. The Commission concluded that this was State aid. Portugal appealed to the ECJ and the UK intervened to support the argument that sub-national bodies could set a different tax rate where they had sufficient autonomy, and that this should not constitute aid. Our national interest was to ensure that there was scope for differential tax rates to be set by the Devolved Administrations. The principle itself was accepted by the ECJ.

[15] Within Article 107(1).

[16] BP Chemicals Ltd v Commission, C-184/97, [2000].

[17] Portugal v Commission, C-88/03, [2006].

Trends in State Aid Giving

2.53 The Commission has been pushing for some time for less and better targeted aid and aid which supports horizontal rather than sectoral aims. There has been a general reduction in aid over time.

UK State Aid Trends

2.54 The large volumes of aid granted in the UK at the height of the financial crisis reflected the need to respond to an existential threat to the banking sector as a whole. However, aside from that, the UK has been remarkably consistent in its State aid spending. In terms of non-crisis spending, which is better reflective of our approach over time, there is stability.

2.55 According to the Commission's State aid scoreboard, overall non-crisis spend for the UK and other Member States since 2007 is as below.

Figure One: Trends in State Aid Giving – The UK vs. Other Member States[18]

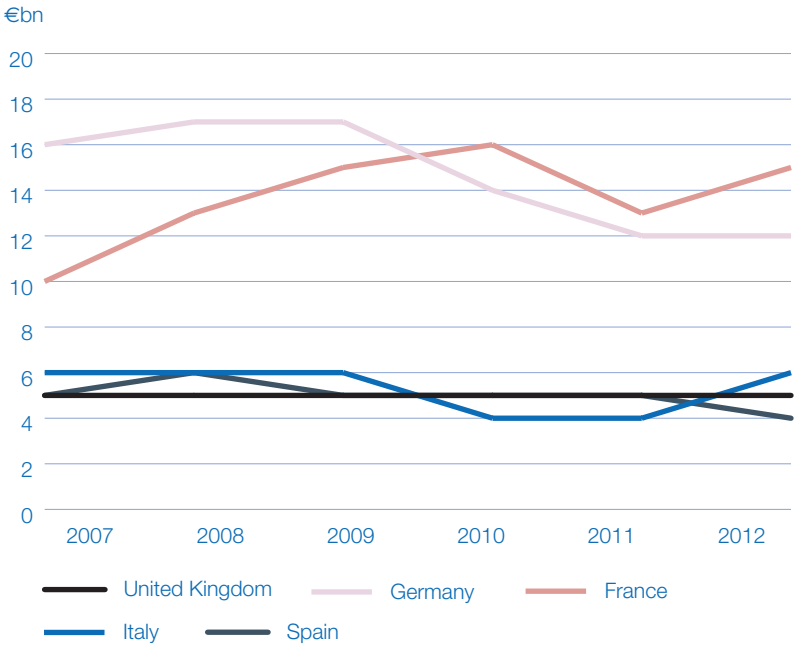

Figure Two: Comparison of State Aid Giving Across Member States[19]

Country	% GDP	Rank (% GDP)	€ mns	rank (€m)
United Kingdom	0.26%	26	4,993	4
EU (27 countries)	0.55%	na	71,144	na
Germany	0.57%	18	14,579	1
France	0.69%	14	13,772	2
Italy	0.33%	24	5,268	3
Spain	0.46%	20	4,921	5
Malta	1.74%	1	114	25
Luxembourg	0.24%	27	104	26

[18] This Figure relates to Non-crisis State Aid, excluding railways. Data is taken from: European Commission, *Previous State Aid Scorecards* (n.d.) Available at: www:ec.europa.eu/competition/state_aid/scoreboard/non_crisis_en.html, accessed on 17 June 2014.

[19] Compiled by BIS from Commission data.

2.56 In terms of percentage of GDP, the UK has spent less on aid over the last six years than all other countries except Luxembourg, and spends significantly less than both France and Germany. Limits on spending therefore may constrain other Member States to a greater degree than the UK, and the limits that exist at EU level provide the UK, in principle, with scope to increase spending. In fact, even where the UK had the margin to grant large amounts of aid in respect of the real economy (not aid to banks) during the financial and economic crisis, it actually spent very little over the period that more flexible State aid rules were in force.[20] At our stakeholder engagement event it was agreed that 'as an instrument of economic policy, the regime has been very helpful for the UK in tackling more industrially active Member States'. And where Member States have granted illegal aid, the Commission has been active in ordering Member States to remedy the breach by recovering the aid, details of which are set out in Chapter Three.

Consumer Policy

2.57 Under Article 4(2) TFEU, consumer policy is a shared competence; meaning once EU legislation has been passed, Member States may not act, including legislate, in a manner contrary to it, but in the absence of EU legislation, Member States are free to act.[21]

2.58 Consumer protection measures, which form part of consumer policy, can be adopted via one of two routes. Article 169 TFEU gives the Union the power to legislate in order to promote the interests of consumers and to ensure a high level of consumer protection. However, if the measure is intended to further the completion of the Single Market, then it is adopted under Article 114 TFEU. However, as stakeholders have noted, to date very few regulatory instruments have been adopted on the basis of Article 169 (even though it is often cited alongside Article 114 in legislative instruments, to clarify that they pursue consumer protection objectives in tandem with Single Market ones).[22]

> Article 114 is not the only option for EU consumer protection legislation. Article 169 is an alternative legal base which is rarely (if ever) used. A significant change in attitude would be needed to steer consumer policy away from the Single Market objectives currently pursued by the EU and use Article 169 instead.
>
> (Consumer Policy Workshop on 25 November 2013)

2.59 Over the last 35 years, the EU has adopted a broad range of consumer protection legislation. Several of these regulatory instruments focus on contractual rights which, for example, cover a wide range of areas from unfair contract terms and particular information requirements to specific cancellation rights and remedies. Other instruments prohibit certain unfair commercial practices; an example of such a practice could include misleading consumers on the price or quality of a good.

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[20] European Commission, *State Aid Granted Under the Temporary Union Framework* (2011).

[21] The Treaty of Lisbon expressly classified the nature of EU competences. In particular Articles 2, 3, 4 and 6 TFEU distinguish between exclusive, shared and supportive (or complementary) EU competences and give an indicative list of subjects falling within each competence heading.

[22] Regulatory instruments adopted on the basis of Article 169: Directive 2001/95/EC of the European Parliament and of the Council on product safety, 2002; Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EU of the European Parliament and the Council, 2011; and Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation 2006/2004/EC of the European Parliament and of the Council, 2015.

2.60 Furthermore, the enforcement of consumer rights have become more important in the last ten years and have been identified by the Commission as one of the EU priorities in the field of consumer protection alongside a number of regulatory instruments, which are intended to facilitate the enforcement of consumer rights and have been adopted by Member States. This includes the Injunctions Directive 2009/22, which requires a system of independent public bodies to exercise injunctions where collective harm on consumers is suffered and the Regulation on Consumer Protection Cooperation 2006/2004, which establishes a consumer protection cooperation network and lays down the general conditions and a framework for cooperation between national enforcement authorities.[23] It applies to situations where the collective interests of consumers are at stake and allows competent authorities to stop breaches of consumer rules when the trader and the consumer are established in different Member States.[24]

2.61 The most recent regulatory instrument adopted by Member States in the area of consumer protection is the Consumer Rights Directive 2011/83/EU which came into force in the UK in June 2014 via the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.[25] These Regulations simplify consumer rights in certain areas, mostly relating to buying and selling.

Consumer Agenda

2.62 In May 2012, the Commission published a *Consumer Agenda for 2014-2020*.[26] The European consumer organisation BEUC welcomed that the Commission for the first time had taken a holistic approach in the agenda, by taking into account (nearly) all policy areas that were important for consumers in the Single Market. Their view was that by gathering previously scattered EU initiatives, the Commission had given a strong signal of higher standing for consumer needs and expectations in EU policy making.[27] This agenda contained four main objectives to support the EU's *Growth Strategy: Europe 2020*.

(i) Improving consumer safety so that consumers are protected from serious risks and threats that they cannot tackle as individuals.

2.63 The EU attempted to redress the imbalance existing between consumers and traders by regulating certain substantive aspects of consumer contracts. In particular, the EU adopted rules on unfair contract terms, rules on consumer sales and guarantees and most recently Directive 2011/83 on consumer rights as regards to information and procedural provisions for distance and off-premises contracts.[28]

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[23] Recital 3, Articles 2 to 4 define the role of qualified entities responsible for enforcement.

[24] It covers a broad range of areas of consumer interest, including unfair commercial practices, e-commerce, comparative advertising, package holidays, timeshares, distance selling, and passenger rights. For a list of relevant areas, please see: www.ec.europa.eu/consumers/enforcement/docs/simplified_annex_2013_en.pdf, accessed in May 2014.

[25] Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EU of the European Parliament and the Council, 2011.

[26] This replaced the 2007-2013 Consumer Strategy.

[27] Consumer Agenda BEUC (Bureau Européen des Unions de Consommateurs), *Note on the Commission Communication* (2012).

[28] Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EU of the European Parliament and the Council, 2011.

(ii) Enhancing knowledge so that consumers can make choices, based on clear, accurate and consistent information.

2.64 As well as improving information and raising awareness of consumer rights and interests among both consumers and traders via non regulatory means, the Commission is also focussing on building knowledge and capacity for more effective consumer participation in the market. However, on this latter point the Coalition Government has voiced its concerns to the Commission that unless carefully managed, such initiatives could cut-across national campaigns and policy on consumer information, education and advice.

(iii) Improving implementation, stepping up enforcement and securing redress access so that consumers have fast and efficient ways of resolving disputes with traders.

2.65 The measures adopted to date include setting up the network of European Consumer Centres which offer free consumer advice and support to EU residents who are buying goods or services from a trader based in another EU Member State.[29] The EU has also attempted to make judicial procedures more simple and less costly for consumers and recently adopted rules intended to facilitate alternative dispute resolution and online dispute resolution. [30] [31]

(iv) Aligning rights and key policies to economic and societal change so that consumers can access digital products and services easily, legally and affordably from anywhere in the EU.

2.66 This fourth objective is relatively new and shows a desire of the EU to act in areas of economic activity which are of primary concern to consumers, for example in October 2011, the Commission proposed a Regulation for a Common European Sales Law in order to overcome barriers resulting from divergent contract laws.[32] It would contain a single set of rules for sales contracts as well as for contracts governing digital products and content, which businesses and consumers could voluntarily choose to apply.[33] Furthermore, in January 2012, the Commission proposed a directive and a regulation on data protection, with a view to reinforcing the current EU data protection framework by strengthening consumers' data protection rights in order to increase their trust in the Digital Single Market and in cross-border services.[34]

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[29] All Member States have a national contact point.

[30] Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004/EC and Directive 2009/22/EC which requires that Member States shall facilitate consumer access to ADR through online systems on a voluntary basis for either domestic or cross-border EU disputes, 2013.

[31] Regulation 524/2013/EU of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation 2006/2004/EC and Directive 2009/22/EC which requires the Commission to produce and maintain an ODR platform for free use, 2013.

[32] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635.

[33] The proposal has given rise to vivid academic debates. For example, please see: S. Whittaker, 'The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties', *Modern Law Review* 75 578 (2012); U. Pachl, 'The Common European Sales Law: Have the Right Choices Been Made? A Consumer Policy Perspective', *Maastricht Journal of European and Comparative Law* 19 180 (2012); M. Kenny, L. Gillies and J. Devenney, 'The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law', *Yearbook of Private International Law* 13 315 (2011).

[34] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Crown Dependencies

The Crown Dependencies (CDs) the Isle of Man and the Bailiwicks of Guernsey and Jersey are not members of the EU, but certain aspects of EU law relating, in particular, to trade in goods and the Customs Union apply to them, as set out in Protocol 3 to the UK's Treaty of Accession. Competition policy per se is not within the scope of Protocol 3 (although normal conditions of competition in trade in agricultural products apply) so there is no obligation on the CDs to follow general EU competition rules. However the CD's own legislation deals with competition questions in a manner consistent with treatment of similar questions under EU competition law.

The EU's competition rules have over time been increasingly influential internationally and have provided the CDs with a substantial body of law to draw upon. EU competition law protects companies in the CDs from abuse of a dominant position by an EU based supplier to a local company (for example in the energy field); and it prevents a company treating the CDs differently through price discrimination (for example in the transport field).

EU consumer rights legislation does not automatically apply under Protocol 3. Although consumer rights legislation in each of the CDs varies, where it has been more recently updated, it is generally closely based on relevant EU legislation. There are also indirect benefits for the CDs because, even when not explicitly provided for under domestic (Insular) legislation, consumer goods imported from the UK meet UK/EU standards. Even goods sourced from outside the EU are UK/EU compliant because that is their primary market.

Chapter 3: Impact on the National Interest

3.1 This chapter explores the impact of EU policy on competition, State aid and consumer protection on the UK's national interest. It sets out and weighs the evidence submitted to us as well as drawing upon the academic and other literature. It looks at the impact of the competition and State aid regimes on policymaking, the economy and EU competitiveness. On consumer policy, it assesses where the EU has sought minimum and maximum harmonisation and examines the extent to which EU measures have respected the principles of subsidiarity and proportionality.

3.2 The views from the stakeholders who attended both the Competition and Consumer Workshops suggests a broad consensus that on competition, State aid and consumer policy, the current balance between EU and UK competence is about right. That is, most of these stakeholders agreed that it is in the UK's national interest to have a robust framework governing the Single Market and that EU competence in these policy areas supports that. As highlighted later in this report, there are undoubtedly some concerns about the way in which competence is exercised, particularly in the case of State aid and consumer policy and especially in respect of enforcement in those areas. Few of these stakeholders, however, felt that a fundamental change of competences on any of these policies would benefit the UK overall – there were few visions of an alternative competency balance presented in the evidence. Most accepted that some trade-off for the UK was necessary in order to gain the Single Market advantages of the current regime, with a number of suggestions being made for achieving improved outcomes within the existing framework.

Competition Policy

> EU competition law lies at the heart of the Internal Market and is essential in ensuring private actors do not resurrect barriers between Member States removed by market integration, for example partitioning markets along territorial lines between one or more competitors. EU competition law, and its effective enforcement, has been one of the more successful outcomes of EU membership for the UK.
>
> (Law Society of England and Wales and Law Society of Scotland)

The Significance of Competition Policy

3.3 Competition policies and enforcement actions do not evolve in a vacuum but rather they respond to and may anticipate economic and societal trends. One such trend has been towards increasingly integrated and interdependent economies, not just the deepening of the Single Market, itself facilitated by EU competition policy, but also the rise of the

global economy, because of political changes as market economies have become more prevalent and because of wider communication, production and management innovations. This has led to challenges to competition policy – for example, competition authorities have increasingly had to examine possible anti-competitive conduct in the context of wider geographic markets, which has also led to the need for greater international cooperation on cases – but also greater weight being attached to it as a key policy instrument in market economies. This is important background to any examination of the impact of the current balance of competence on the national interest.

3.4 The most immediate effect of competition policy is on those businesses subjected to regulatory measures by the competition authorities. These can be very significant for the businesses concerned, their customers, stakeholders and competitors. The measures can cover the imposition of huge fines of up to 10% of an undertaking's turnover, the ability to make their agreements unenforceable, prohibitions against particular conduct which could rule out entire business models, and a ban on particular business structures, for example one that would have arisen from a merger.

3.5 From a wider perspective, the significance of competition policy for businesses, consumers and the economy is much more wide-ranging: there is a wealth of evidence that effective competition, for which a strong competition regime is a crucial condition, is necessary for a productive economy and for growth.[1] Competition is a key driver of productivity, bringing benefits to businesses and consumers. The Office of Fair Trading (OFT) and Competition Commission have estimated that in recent years the value of their work has ranged from £598m to £810m per annum.[2] These figures include only direct financial savings to consumers and do not account for wider effects, such as any impact on productivity or the deterrence effect of the OFT and Competition Commission's work or the wider competition and consumer regime, including as operated by the sector regulators. Research carried out by the OFT in 2011 estimated that the deterrence effect of their competition enforcement work (abuse of dominance, cartels and other anti-competitive agreements) alone could be between 12 and 40 times the direct effect.[3]

3.6 With this in mind, successive UK Governments have shared with the European Commission a strong belief in the value of an effective competition regime. Over the last few decades there have been trends towards more interventions and greater consideration of the effect of seemingly anti-competitive behaviour, including taking into account the nature of the markets that firms act in. The EU, with the support of the UK prominent among Member States, has been at the forefront of these trends.

3.7 It is also worth emphasising the important role the competition rules have played in helping to establish a Single Market of which, again, the UK has historically been a notable supporter. This is because removing national barriers to trade between Member States would not achieve a Single Market if these barriers might effectively be reintroduced by private firms. Accordingly, the Commission has used competition rules to challenge attempts by private firms to segment national markets; for example in the *Consten and Grundig vs Commission* (1966) case (see *Consten and Grundig* box

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1 For example, please see: R. Disney, J. Haskel and Y. Heden, 'Restructuring and Productivity Growth in UK Manufacturing', *Economic Journal* 113 (2003); and S.J. Nickell, 'Competition and Corporate Performance', *Journal of Political Economy 104* (1996).

2 OFT, *Positive Impact Report* (n.d.), cited in BIS, BIS Performance Indicators: the Value of the Consumer-Benefits of the Competition Regime (2013).

3 Ibid., Table 1.1.

in Chapter One). The academic literature has documented the value of a large internal market and strong enforcement.[4]

Historical and International Context

3.8 Some historical and international perspective may also be worth considering. Modern competition policy began with the movement to control the 'trusts' or big businesses which had emerged in the United States in the latter part of the nineteenth century. The Sherman Act 1890 built upon English common law doctrines on the enforceability of agreements in restraint of trade in making unlawful (indeed criminal) trying to restrain trade or forming a monopoly. This was an important inspiration for West Germany's post-war approach to competition and then the antitrust provisions in the Treaty of Rome.

3.9 Notwithstanding the common law origins of US antitrust law, the UK's approach to competition law meanwhile was more focused on public interest rather than purely competition considerations, on the registration of agreements and the form they took rather than their effects, and on forbidding agreements and conduct after they had been investigated rather than providing penalties for past behaviour with a view to deterrence.[5] It was only with the UK's accession to the EEC that it adopted a competition regime providing for the prohibition *ab initio* of certain agreements and courses of conduct based on their economic effects and only in 1998 that the UK adopted a similar approach in its domestic legislation. Whilst the question of how UK competition law might have developed post 1973 had we not joined the EEC must be moot, the competition rules of the Treaty of Rome did set us on a path now very widely taken across the globe. Edwards Wildman Palmer commented that 'the existence of EU competition law has had the indirect benefit of encouraging the modernisation of competition law in the UK. The replacement of the (largely discredited) Restrictive Trade Practices Act 1976 (RTPA) by the Competition Act 1998, the main provisions of which were closely modelled on Articles 101 and 102 TFEU, marked a clear qualitative improvement in the UK competition law regime […] Although it is impossible to know how the UK competition law regime would have developed in the absence of EU competition law, we would suggest that EU law has provided a better model in this field than the purely administrative tradition on which the RTPA, Fair Trading Act 1973 and Competition Act 1980 were based'.[6]

3.10 It is also worth noting here the high level of influence the EU has had in promoting and embedding effective competition policy regimes across the globe, as explained at more length in Chapter Four. The Commission and Member States (including the UK) are also influential in international standard-setting networks. For example, the EU is represented among the co-chairs of almost all the International Competition Network's (ICN's) standing working groups. The OFT chaired the ICN from 2009 to 2012. The EU and its Member States are also active and vocal participants in the Organisation for Economic Cooperation and Development (OECD) Competition Committee. In both these networks, and others, the EU and Member States including the UK contribute significantly to producing best practices and recommendations which are highly respected and influential worldwide (both with national competition authorities but also within the legal

[4] For example, please see: P. Aghion, M. Du L. Dewatripont, A. Harrison, P. Legros, *Industrial Policy and Competition: NBER Working Paper 18048* (2012); Dan Corry, Anna Valero and John Van Reenen, *UK Economic Performance Since 1997: Growth, Productivity and Jobs: Centre for Economic Performance Special Paper No. 24* (2011); Alla Lileeva and Daniel Trefler 'Improved Access to Foreign Markets Raises Plant-level Productivity … For Some Plants', *Quarterly Journal of Economics 125* (2010); Marc Melitz and Daniel Trefler, 'Gains from Trade when Firms Matter', *Journal of Economic Perspectives 26* (2012).

[5] The Monopolies Act 1948, the Restrictive Trade Practices Acts 1956-76, the Resale Prices Acts 1964-76, the Monopolies and Mergers Act 1965, the Fair Trading Act 1973.

[6] Edwards Wildman Palmer UK LLP, *submission of evidence*.

and business communities). Recent work of this nature to which the EU and the UK contributed includes the recently published OECD competition law and policy indicators and the current review of the OECD recommendation on cooperation between member countries on competition investigations and proceedings.[7]

3.11 Technical assistance carried out by the Commission and the Member States help to embed these standards including in emerging markets such as China, India and Brazil, to whom the Commission devotes a significant proportion of its capacity building resources.

3.12 Against this background, it is clearly very much in our interests that UK businesses should be exposed to vigorous competition, with world class laws and arrangements for competition scrutiny and enforcement which are effective but not unduly burdensome to business. The question then is whether or not the present balance of competence delivers this.

Stakeholders' Views on EU Competition Policy and the National Interest

3.13 A prevailing theme in the responses to our call for evidence was that EU competition policy has acted and continues to act in the UK's national interest - that it is, in the words of the Law Societies quoted above, one of the more successful outcomes of the UK's membership of the EU. A favourable view was expressed by amongst others the Confederation of British Industry (CBI), the British Chambers of Commerce, the Engineering Employers Federation (EEF) as well as individual firms such as EDF Energy; the Law Societies of England and Wales, the Law Society of Scotland, the City of London Law Society, the Competition Law Committee of the City of London Law Society (CLLS), and several individual law firms; the Senior European Experts Group and academic centres such as the Liverpool European Law Unit (LELU); and the UK's national competition authorities, the OFT and the Competition Commission. It was also the theme of the stakeholder event, whilst businesses who were interviewed as part of the evidence gathering process felt that it was essential that laws in the area of competition and consumer rights were controlled centrally because non-compliance could be particularly damaging to EU trade and competitiveness.[8] This was especially considered to be the case for the prevention of the largest and most dominant firms from abusing their position.

3.14 Several arguments were advanced in favour of the current arrangements:

- Competition policy is essential to making markets more effective and dynamic, by reducing prices and increasing choices for consumers, encouraging the allocation of resources to where they can best be used, incentivising innovation and making businesses more competitive on the world stage – and the EU system has proved effective and enabled a more open and efficient EU economy to emerge;[9]
- Several respondents regarded the competition rules as vital to the realisation of the Single Market which they see as very much in the UK's interests, as reflected in the Semester One Balance of Competences Single Market report.[10] EDF Energy considered supranational control of competition policy the only feasible means of delivering a Single Market;

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7 This passage draws upon evidence received from the CMA on the influence of EU competition policy and of the Commission and NCAs.

8 IFF Research on behalf of BIS, *UK Business Views of the Balance of Competences between the EU and the UK* (2014).

9 CBI, Senior European Experts Group, CLLS, the Law Societies, LELU and Edwards Wildman Palmer, *submissions of evidence*.

10 CLLS, Senior European Experts Group, CLLS and LELU, *submissions of evidence*.

- In particular, without a centralised competition regime, stakeholders considered serious impediments to the Single Market would be created through national cartels and monopolists protecting their market against foreign entrants by anti-competitive activity and Member States applying national competition rules strategically to favour national firms or punish foreign ones;[11]
- A 'level playing field' is key to competition and so it is right that competition policy is managed at the European level to ensure high and equal standards across Member States;[12]
- In competition cases involving many Member States it will often be more efficient for the Commission rather than numerous national authorities to take the case so that businesses only have to deal with one authority rather than several and do not need to obtain separate legal advice for each relevant jurisdiction;[13]
- In particular, it is argued that the EUMR had created a 'one-stop shop' for the clearance of major transactions within the EU which has significantly reduced the burden on business and on the competition authorities;[14]
- In certain circumstances, centralised enforcement had also provided, it is said, greater predictability for businesses and militated against contradictory decisions being reached by different authorities.[15]

3.15 The system of shared competence, including the role of the ECN, is considered to have worked well, with cases generally being taken by the authority best placed to investigate.[16] It is also thought to have encouraged consistent application of the rules across the EU and the pooling of expertise and best practice.[17] De-centralisation of competition enforcement, with a greater number of cases being dealt with at a national level, is seen as a healthy development and an exemplar of the principle of subsidiarity working well in practice.[18]

3.16 Criticisms have focused on relatively narrow aspects of the regime rather than on the fundamental distribution of competence and the arrangements for enforcement of competition policy as a whole, although a few stakeholders queried how effective enforcement was in some other Member States. For example, the British Chambers of Commerce commented that enforcement across Member States for both consumer and competition policy was in some cases inconsistent and some Member States less diligent than others.[19]

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[11] The Law Societies, Senior European Experts Group, CLLS and LELU, *submissions of evidence*.

[12] CBI, British Chambers of Commerce, Law Societies and LELU, *submissions of evidence*.

[13] OFT, Competition Commission, CLLS and Slaughter and May, *submissions of evidence*.

[14] OFT, Competition Commission, Senior European Experts Group, CLLS, the Bar Council, Edwards Wildman Palmer and Slaughter and May, *submissions of evidence*.

[15] OFT and Competition Commission, and CBI, *submissions of evidence*.

[16] OFT and the Competition Commission, *submissions of evidence*.

[17] OFT and the Competition Commission, and CBI, *submissions of evidence*.

[18] The Law Societies, *submissions of evidence*.

[19] As explained in Chapter Four, the Commission is contemplating proposals to improve the effectiveness of NCAs.

3.17 One academic respondent considered that enforcement of the antitrust prohibitions ought to allow for more divergence between NCAs, since there was not universal agreement on the balancing of the public interests involved, including whether a consumer welfare model was appropriate, and better approaches might ultimately emerge by allowing multiple strings of policy experimentation; he considered this change could be brought about without legislative change.[20] Another respondent, very much against the trend, argued that, in circumstances when merger cases could be repatriated, for example to deal with public policy impacts aside from competition, it would benefit the UK if all mergers qualifying for investigation under UK law should fall within the exclusive jurisdiction of the UK since Member States have filled in gaps in the patchwork of EU-wide merger controls by introducing their own which has led to ever more complicated jurisdictional lines being drawn to try to save some elements of one-stop shopping.[21]

3.18 A more common criticism, which came from the CBI, law firms and their representative bodies, concerned the proposal on which the Commission consulted last year to extend the EUMR to cover minority holdings in another business which fall short of the current test of 'decisive' influence over another business.[22] It was feared that this would give rise to substantial compliance costs for business for no good purpose. The CLLS also suggested that the EUMR be dis-applied to extra-EU joint ventures in circumstances when the turnover of the joint venture parents tripped the turnover thresholds if the joint venture has no possible effects on competition in the EU; and they, along with the CBI, considered that there was scope to reduce further information requests in merger cases, notwithstanding the Commission's simplification reforms.

3.19 In the sphere of intellectual property, the Commission's practice of bringing infringement proceedings against companies seeking injunctive relief against patent violations led one respondent to argue that this perversely discouraged innovation and raised issues of respect for fundamental rights.[23] Others sought greater transparency as to when the Commission will intervene to relieve an NCA of its competence to apply the antitrust prohibitions.[24] There was an appeal for greater EU involvement, with a call for an EU wide system of fully harmonised leniency programmes (for cartel whistle-blowers) in place of the various different programmes across the EU.[25] However, given the procedural differences between Member States, including the mix of criminal, civil and administrative regimes, a one-stop shop would pose significant challenges.

3.20 Whatever the weight of some of these points in terms of the overall balance of competences, it is worth observing that the UK has generally taken a position closely allied to the Commission on competition issues, so it ought not to be assumed that the UK would take a different view on the points, were it to have competence. For example, the CMA supports the application of a consumer welfare standard in competition cases, the UK's domestic merger regime presently allows for certain minority holdings in another business to qualify for investigation and both the Coalition Government and the CMA has supported the EUMR applying to some such holdings, provided any practical difficulties can be overcome.[26]

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[20] Dr Chris Townley – King's College, *submissions of evidence*.

[21] Stephen Hornsby and Goodman Derrick LLP, *submissions of evidence*.

[22] CBI, Slaughter and May and CLLS, *submissions of evidence*.

[23] Davina Garrod, Bingham McCutchen, *submissions of evidence*.

[24] CLLS and Slaughter and May, *submissions of evidence*.

[25] CLLS and Slaughter and May, *submissions of evidence*.

[26] At the time, it was the OFT, one of the CMA's predecessors, which responded to the Commission's consultation.

3.21 One contrasting minority view found in the evidence was, however, distinct in that it recommended a much more fundamental change to the current arrangements.[27] This is the argument that the UK should pursue an 'EEA Lite' approach in which the UK could opt in to certain EU laws in respect of exporters to other EU Member States but could opt out of EU laws in respect of those who only traded on the UK's domestic market. Such an approach would require a fundamental change to the way competition policy is applied across the EU, and indeed throughout the EEA, since the Agreement establishing it effectively extends the EU competition rules to the territory of the relevant EFTA States. It is a long standing principle of EU competition law that an anti-competitive agreement which only involves the territory of one Member State can have an appreciable effect on trade between Member States.[28] This is because it can partition the Single Market on national lines. A further issue might be that if 'EEA Lite' involved dis-applying EU competition law from traders who only supplied UK businesses or consumers, it could raise practical problems as to how a retailer, for example, would know the origin of his customers.

3.22 It is also relevant that the antitrust prohibitions only apply when there is an appreciable effect on trade between Member States, so they specifically concern cross-EU trading, actual or potential, and only involve agreements or conduct which have an appreciable effect on competition, so not only are the prohibitions irrelevant to the vast majority of business agreements and courses of conduct they are inherently less likely to concern smaller businesses with less market power. The fact that the prohibition of abuse only involves businesses in a dominant market position accentuates the latter point.

3.23 Large multinational companies who wish to operate in the EU are of course bound by the Single Market rules. The current arrangements for competence mean that businesses here are subject to a highly-regarded competition regime which places great store on common rules, including as between domestic and EU law, and on providing a 'one-stop shop'. The effect is that businesses have a clear idea of the rules, do not have to make multiple filings or seek legal advice in each jurisdiction, and also know that their competitors are subject to the same rules and that competition can in principle embrace the entire market. The Senior European Experts Group argued this is likely to have encouraged inward investment. Since the EU competition rules and all the rules governing the Single Market are effectively extended to the territory of the relevant EFTA States, many of these advantages are shared by businesses there. An important issue in respect of competence in this area is the extent to which the UK benefits from being able to influence, under the current EU arrangements, developments in the field of competition policy. That influence has hitherto been in a liberal, pro-competition direction, and closer to the Commission's position than some other Member States. Absent the UK's influence, policy might move in a less liberal direction than otherwise.

3.24 One commentator highlighted what he sees as the risks among others of the ground rules for EU competition policy being weakened, and of drift in the way the existing rules are applied, if the UK were not at the table. He comments that '[it] was, after all, the UK that led the counter-attack against President Sarkozy's attempts to demote the principle of 'undistorted competition' during the 2007 negotiations that led to the Lisbon Treaty […] the Sarkozy tendency, present even before today's economic crisis, is far from a spent force: the forces of protectionism are alive and well, in France and elsewhere. A future treaty renegotiation could witness renewed calls to promote European champions, protect strategic national industries and slacken State aid disciplines […] The UK is an active voice (in the ECN and the advisory committee). Over time, Britain's absence from them would probably lead to policy drift, as other voices became more prominent in the

[27] David Campbell Bannerman MEP, *submissions of evidence*.

[28] For example, please see: SC Belasco and Others v Commission of the Communities, C-246/86 [1989].

debate. British companies active across Europe would remain subject to EU competition rules, regardless of Brexit. But the UK would have voted itself off the committee that sets and applies the rules'.[29]

3.25 The CMA has indeed emphasised the influence its predecessors have had on EU competition policy and practice. For example, in co-chairing the European Union Mergers Working Group which has improved cooperation and knowledge sharing between Member States and between them and the Commission; through Advisory Committees where the UK has influenced decisions on merger cases which have affected UK businesses and consumers (such as IAG/BMI, where the OFT heavily influenced the remedy that was imposed) and the drafting of measures such as EU block exemptions; and more generally in providing intellectual leadership on such matters as joining competition and consumer policy analysis.

3.26 This issue of influence on the rules is discussed further below under 'Alternative Approaches', which also deals with the position under State aid and consumer policy.

State Aid

3.27 The stakeholder event and other written evidence showed that there was broad agreement in principle on the current balance of competence on State aid, but some expressed concern about its limits, about real or apparent extension of EU competence into areas of domestic policy, and about the way State aid controls are exercised.

> EU competence gives Member States a clear framework within which they can support their economies without, for example, being tempted into expensive "subsidy wars" to retain or attract firms.
>
> (Scottish Government)

3.28 This broad view was shared by most respondents to the call for evidence. Stakeholders agreed that the rules are needed to prevent subsidy races which would lead to inefficiencies in the market. The evidence we received suggested that State aid policy, with competence at European level, is a flag bearer of the Single Market and overall is doing reasonably well to level the playing field and dismantle national champions.

3.29 Slaughter & May, reflecting the consensus of our stakeholder event, suggested that the nature of the State aid regime means that the Commission should retain its exclusive competence, given that Member States are direct stakeholders in State aid cases.

3.30 Stakeholders did criticise the way the State aid regime operates. Some stakeholders suggested, however, that perceived problems might be attributable to an over-interpretation or under-interpretation at national level of what was allowed, either too laissez-faire or too restrictive, with the feeling being that many UK authorities fell into the latter camp; effectively 'hiding behind' the State aid regime.

Impact on Policymaking

3.31 UK State aid case experience suggests that the State aid rules may constrain or delay delivery of Government support.

3.32 This occurs in two main ways:

1) Design of measures;

2) The speed of the process.

[29] Alec Burnside, *What Would a Brexit Mean for EU Competition Policy?* (2013).

Design of Measures

3.33 The Senior European Experts Group asked whether the perceived increase in scope of State aid represented an extension of State aid control by the EU into new areas, or whether the domestic policy choices made by the UK had that effect. In other words, different delivery models for the same outcome would have different State aid implications, depending on whether the State was providing services directly, such as NHS hospitals or whether it was entrusting the delivery of services to an undertaking.

3.34 Member States have competence in such matters as direct taxation, industrial policy, the environment, employment and social policy and health, yet such competence is limited in practice by the requirement to exercise such competence in State aid compliant ways.

3.35 The interplay between the competence of the EU and that of the Member States can be illustrated by an example. A Member State wants to amend its tax legislation to encourage small- and medium-sized enterprises to invest in more research and development. Direct taxation, industrial policy relating to small and medium sized enterprises and research and development are within the competence of Member States. However, since the measure contains State aid, the Member State must notify the proposed law to the Commission before it comes into force and the Commission has a broad discretion whether to approve it.

3.36 And, many stakeholders have said that the broad interpretation of the concept of what is State aid by the ECJ, in cases such as Leipzig Halle (discussed in Chapter Four) has resulted in a broadening of the Commission's competence, with the CBI pointing to the very low thresholds for the criteria of distortion of competition and effect on trade.

3.37 Yet, the Commission does recognise that State aid control is more wide ranging than in the past, and wishes to focus its scrutiny on the most distortive aids and allow Member States to grant more aid via the GBER. Devolving powers to Member States reflects the desire by the Commission for a partnership approach where Member States have greater room to manoeuvre without a specific nod to proceed from the Commission.

3.38 There was a widespread view at our stakeholder engagement event that the level at which State aid control bites, at above €200,000 (de minimis) does not reflect the level at which trade by Member States is actually affected, and the CLLS suggested a couple of options. One that the de minimis level be increased, and the other to seek Treaty change in the State aid articles to bring them into line with the competition provisions, so that the Commission's competence only kicks in when the aid in question appreciably affects trade between Member States.

3.39 However, the Commission's impact assessment for the current de minimis Regulation found that where de minimis was increased to €500,000 under the Temporary Framework that there are big differences in Member States making use of this additional flexibility with a risk of distortion of competition.[30] Thus the Commission considered that a substantial increase in the de minimis ceiling on a permanent basis could have potentially high negative impacts.

3.40 Furthermore, de minimis is not limited to investment aid, but can also be operating aid that is to say it can offset the normal costs of doing business. This is, as the Commission notes, in principle more distortive than targeted support linked to a specific objective.

[30] European Commission, Commission staff working document impact assessment accompanying the document Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis, 2013.

3.41 The Coalition Government acknowledged in its response to the Commission's consultation in 2013 that while 'an increase in the limit could remove a number of cases from the system we have not seen evidence of sufficient benefit to justify such an increase. Even small amounts of aid can be distortive in certain markets – for example textiles. On balance therefore we agree that there should be no increase'.[31]

3.42 However, in relation to more targeted support the UK has welcomed an increase in the scope of the GBER and agrees with the view expressed at our stakeholder engagement that there was 'not much the Commission can do on scope (of what is State aid), but extending Block Exemption Regulations might be helpful'.

Measures Falling Outside the Scope of the Guidelines

3.43 The Government welcomes the fact that the Commission has been able to approve cases that fall outside Commission Guidelines, and considers that this flexibility is in the national interest.

3.44 The fact that a measure does not fall within the scope of guidelines issued by the Commission does not mean that the Commission cannot approve the aid. It is still possible for the Commission to approve the aid directly under the Treaty itself. For example, aid to the Nuclear Decommissioning Authority was approved directly under the Treaty because there were no guidelines covering the aid in question.[32]

3.45 In addition the British Venture Capital Association (BVCA) noted that where the rules were not fully reflective of the market failures that they should be targeting, the Commission has been prepared to approve aid beyond the safe harbours set out in Guideline.[33]

3.46 The Commission has sought to be responsive and proportionate in its approach to the UK's desire to stimulate new markets, even where they have lacked case experience. This is illustrated by the Commission's approval of Big Society Capital (BSC) which was an ad hoc case with no Guidelines acting as a reference point. The objective of BSC is to invest in social investment companies that have difficulties in obtaining affordable funding from the markets, due to a market failure affecting social investment.

3.47 The Commission is however clear that State aid should target a market failure, exemplified by the UK's experience with the setting up of the Green Investment Bank. This had the effect of limiting the scope of its activities.

Green Investment Bank

The provision of capital to create the Green Investment Bank required the Commission's approval under the State aid rules. The UK had originally hoped that the bank would be allowed to make a range of investments in any project fulfilling a green objective. However, the Commission took the view that the bank should only be allowed to invest in sectors where the UK could provide evidence of a clear market failure in order to avoid undue distortion in the financial sector. The UK has the option to notify and seek approval for the bank to invest in further sectors as and when the need arises. For example, a separate case was made and the Commission gave their approval for the bank to invest in the green deal finance company. This facilitates public access to the green deal, which supports household energy efficiency measures.

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31 HMG, *UK Response to Draft de Minimus Regulation, 5 June 2013*.

32 Article 107(3)(c) of TFEU on compatible and incompatible aids in the EU.

33 BVCA, *submission of evidence*.

Process: Speed of Approval

> 'The trade-off of strict scrutiny is that cases become very long, delaying the implementation of national measures'.
>
> (November Stakeholder Event)

3.48 The speed of the State aid approval process is one identified by the Coalition Government as a key issue, and it should be noted that as the process is principally one conducted between the Coalition Government and the Commission, that Government itself is a key stakeholder as the granting authority. The Coalition Government has serious concerns over the speed of the process and considers that improvements are required as delays could have a negative impact on investment in the UK and on the functioning of markets.

3.49 While the speed of the process did not emerge as the primary theme in our consultation, where it was raised the clear consensus was that streamlining was necessary. The UK State aid Law Association comment was that they 'welcome the Commission's approach of seeking to broaden block exemptions, of issuing detailed guidance as to its approach and setting up various categories of aid that can be "fast-tracked", but the delay in issuing decisions remains a problem that causes considerable expense and frustration to all those involved in the process'.[34]

3.50 Moreover, the issue has been highlighted in the context of the Balance of Competences Report on Energy. Making the Single Market in energy work requires the Commission to apply State aid rules in a thorough but proportionate way, and the slowness of the Commission dealing with State aid cases was quoted as an issue by a number of stakeholders, including the Sustainable Energy Association. They generally supported the principle that the Commission had a role to see that national governments do not act to give undue advantage to specific companies and, as Centrica put it, national policy objectives are 'not smokescreens for State aid'.[35] Nevertheless, concerns were expressed over the knock on effects of delays for the UK plans for introducing a capacity mechanism. The Commission had a backlog of cases to consider; this contributed further to investor uncertainty.

3.51 In part, this slowness is due to the increasing range and complexity of State aid measures. The Coalition Government is working to encourage policy development that fits more neatly within the State aid rules.

3.52 There is also a role for the Commission to speed up their processes and ensure that the legal framework is appropriate. The Commission has started to address this through the State aid modernisation process, including enlarging the scope of the GBER. This should free up more time for the Commission to address complex cases and help the EU meet current policy challenges like security of energy supply. The Coalition Government has welcomed the modernisation programme. It is also working with the Commission on speeding up the State aid approval process both bilaterally and by sharing best practice with other Member States.

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[34] UK State Aid Law (UKSALA), *submission of evidence*.

[35] Centrica, *submission of evidence*.

Investigations

3.53 The Coalition Government also sees scope for the Commission to speed up State aid investigations. In some cases it takes up to 18 months to complete an investigation. The new Procedural Regulation (described in Chapter Two in the section on the reform package) is designed to address this and should significantly reduce the duration of the investigation of complex cases. The stakeholder engagement event welcomed the new tools the Commission has to consult third parties.

3.54 There is also criticism that the process for investigations can take too long, up to 18 months in some cases. The latest version of the Procedural Regulation is designed to address both of these. It makes provision for gathering information directly from market participants and for conducting sector inquiries that will allow the Commission to obtain all necessary information to adopt well-reasoned decisions. The Commission expects this to significantly reduce the duration of the investigation in complex cases. It was seen as a positive development at the stakeholder engagement event to allow for third party input. And the Coalition Government is clear that State aid processes need to speed up.

Impact on Support for the Economy

3.55 There was a divergence of views expressed about the degree to which the subsidiarity principle should apply in State aid control. Due to recent limitations by the Commission on granting regional aid to large companies, the Industrial Communities Alliance took the view in their response to our consultation that the balance has swung too far in restricting the legitimate activities of Member States in promoting growth.

3.56 It should be noted, however, that the Coalition Government uses a wide range of instruments to promote growth. This goes beyond the Regional Aid rules, including Research, Development and Innovation and Risk Capital aid which can be targeted towards incentivising specific activities. The UK currently spends more on aid targeted towards other objectives, such as SME support, than on regional development.

3.57 State aid controls on regional assistance are EU-wide and aimed at EU objectives. The agreed EU goal is to reduce disparities among EU regions via State aid control policy and the logic of this is that those policies have to be targeted to particular regions and particular companies. The Industrial Communities Alliance, however, challenged the idea that the rules on regional aid should seek to address differences in prosperity across the EU as opposed to disparities in Member States. It called for greater flexibility for Member States to be able to support their own regions, as a matter of effective subsidiarity. However one attendee at our stakeholder engagement event highlighted the potential tension here – 'we need to bear in mind that what we get in terms of subsidiarity, other Member States would get back too, and there would inevitably be divergences in interpretation'. This leads into another theme that came out in our stakeholder engagement; that of consistency.

Consistency

3.58 Both the CBI and the British Chambers of Commerce expressed concerns in their responses over an uneven application of the rules by Member States. There is however a lack of evidence about the extent to which other Member States apply the rules inconsistently or deliver support in ways that are not within the scope of the rules.

3.59 The Alstom case illustrates the Commission's approach to approving aid, with the guiding principle being the maintenance of a level playing field.

Alstom

In the summer of 2003, Alstom a large French engineering group was on the brink of bankruptcy and called upon France for support to avoid this. The then Competition Commissioner said that 'it is difficult to imagine a case where the political pressures could be greater' than over the French Government's plans to rescue Alstom.

Rescue and restructuring aid was ultimately approved by the Commission, but could not be granted in the form of a capital injection as the French Government had planned, and was limited to ensure that any distortion of competition would be limited to the minimum necessary.

In the Commission approval, the exposure of the State was considerably lower than was envisaged by French authorities, with the form of aid changed from a purchase of shares to a loans and bonding facility.

The approval also built in a number of further safeguards. This included the limitation of Alstom's presence on certain markets, through both divestments and industrial partnerships. Moreover, the early amortisation of the State guarantee on bonding facility and the State's exit as shareholder would limit the duration of the aid.

3.60 In so far as there is inconsistency in application of the rules by Member States, this does not necessarily have a negative impact on UK business as long as the EU applies its rules consistently across all Member States and takes action to remedy breaches. There is evidence that action to remedy breaches is being taken. For example, since 2000, the Commission has ordered the recovery of illegal State aid in 202 cases across all Member States. Of those, four were UK measures (only one of these was in the field of industrial State aid which is the focus of this report). This compares with, a total of nine in Belgium, 20 in France, 50 in Germany, 41 in Italy, nine in the Netherlands, and 27 in Spain. UK business has a strong interest in State aid compliance, because the consequences of getting it wrong are severe, giving market advantage to competitors. Recovery is intended to restore the market to its original state, and thus Member States are required to recover any illegal State aid plus interest.

3.61 Where the Commission has doubts as to whether a measure notified to them by a Member State is State aid compliant, it can open an investigation. A summary of the measure and the Commission's initial analysis is published in the Official Journal and comments from third parties are invited. This offers companies the opportunity to express any concerns they may have about the distortionary effect of a proposed State aid and thus acts, in principle, as a safeguard against Member States damaging the level playing field for competition. In practice however companies rarely take advantage of this facility.

3.62 Nonetheless, a number of stakeholders at our engagement event suggested that the Commission could take more enforcement action in this area in future to ensure greater consistency across Member States. More enforcement action could include, for example, more monitoring of aid spend by the Commission. It would also imply a greater focus by the Commission on recovery of illegal State aid, which, based on the figures above, may be less of a concern for the UK than for some other Member States.

3.63 Apparent inconsistency could also in some cases be the result of the policy choices made in different Member States. These choices have over time meant that some services will be delivered on a market basis in one Member State and therefore fall within the scope of the State aid rules, but on a non–market, public basis in another Member State.

3.64 Some Member States have decided to transfer to undertakings certain tasks which in the past were traditionally carried out by the State. These include telecoms and energy supply in the UK. Some States may also create a market in an activity where one did not previously exist – an example in the UK is training for job seekers. In addition, there are often providers that are clearly undertakings because they operate on the basis of making profits whereas other providers do not. The corollary of this choice is that financial support to these undertakings will often constitute State aid.

3.65 As a result of these differing policy choices across the EU, there may not always appear to be equal treatment for Member States. Further liberalisation of markets across the EU is a policy objective of the UK Government; one consequence of this would be a reduction in the appearance of inconsistency described here.

Impact on EU Competitiveness

3.66 As previously discussed, there is a widespread view amongst stakeholders that an effective State aid regime is necessary to prevent subsidy races which would distort the market, particularly in areas where other Member States were willing to offer greater subsidies to national champions. This is seen by the Law Societies as having made a significant contribution to the ability of UK businesses to take advantage of the Single Market.[36]

3.67 However, there is a lack of empirical evidence to assess the impact of the regime on the EU's competitiveness. There was a perception among a minority of stakeholders at our stakeholder event that having our subsidies regulated by the EU State aid regime has a negative impact on the EU's global competitiveness, and this was reflected in a written comment from a member of the Anglo-French Chamber:

> I am increasingly ill at ease with the idea of a level playing field within Europe when there is no frontier around Europe in terms of trade (for services). In other words, Europe can be seen to be increasingly fair but the playing field in which international groups operate does not end at the frontiers of Europe.
>
> (Member of the Anglo – French Chamber)

3.68 Another respondent similarly argued that State subsidies regulations may level the playing field within the EU but could also make EU Member States less competitive within global markets, citing that State aid provided to the car industry in the US has allowed US businesses to survive while making European and Asian manufacturers less competitive.[37] It should be noted in this context that there is no counterpart to the EU State aid rules in Asia.

3.69 Member States have also raised the risk to their global competitiveness as a result of more liberal subsidy regimes outside. It is, however, worth noting that since 2008 the Research aid rules have allowed Member States to match an offer from a third country if this means that the research will remain in the EU. This clause has never been used. This may call into question the need for a match clause, and suggests that Member States can attract investment within the State aid rules.

3.70 The Producers Alliance for Cinema & Television (PACT) said in their response that 'even where more attractive incentives are available in the form of tax reliefs for film production, such as Canada, current legislation is sufficiently flexible to enable a greater amount of production'.[38]

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[36] Law Societies, *submission of evidence*.

[37] IFF Research on behalf of BIS, *UK Business Views of the Balance of Competences between the EU and the UK* (2014).

[38] PACT, submission of evidence.

Consumer Policy

3.71 Consumer policy aims to create growth by empowering and protecting consumers so they are aware of their rights and are able to make wise decisions when purchasing goods and services across the EU. It also aims to facilitate cooperation between Member States so that consumers have an appropriate degree of protection when things go wrong. The objective of creating consumer law at EU level has been primarily to facilitate the development of the Single Market. The measures should therefore, in principle, benefit UK businesses, as well as providing protection and benefits to consumers. As explained earlier, most consumer measures have a Single Market legal base, with the objectives of consumer protection cited alongside those of improving the operation of the market.

3.72 The example of the Timeshare Directive illustrates how consumer policy seeks to achieve the aims of providing cross-border benefits to UK consumers.

Directive on Timeshare, Long-term Holiday Product, Resale and Exchange Contracts (the Timeshare Directive)

The timeshare and other long-term holiday product market provides the archetypal example of trading activity where consumers often shop across borders, often committing to high levels of expenditure, and where they have proven to be particularly vulnerable when abroad.

The Directive sets common rules on sales practices, information provisions and contractual obligations and rights, including the right to a cooling-off period, in relation to timeshare and other long-term holiday products wherever in the EU the consumer happens to be. For example, a UK consumer visiting Spain or Malta, is entitled to reconsider for up to 14 days, his or her decision to spend money (usually not an inconsiderable amount), without having to provide even a deposit. The consumer can make that decision while he or she is in possession of all the important and relevant information as to the content and operation of the contract, and their liability for future expense.

3.73 As consumer policy is an area of shared competence both the EU and Member States may legislate in this area and have done so. In the UK, successive Governments legislated on consumer matters during the 1970s-90s. These domestic measures included the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977, the Sale of Goods Act 1979, the Consumer Protection Act 1987 and the Food Safety Act 1990, all of which predated EU activity in these fields.

3.74 UK Governments were careful to ensure that key provisions of consumer protection, such as the right to reject faulty goods within a reasonable period (set out in the Sale of Goods Act 1979), and the right of a consumer to pursue a creditor as being jointly and severally liable for the misrepresentation or breach of contract made by the supplier (set out in the Consumer Credit Act 1974) were not removed by any new EU legislation. Overall, the increased harmonisation of consumer policy which has occurred since the EU became more active has served to increase levels of consumer protection. EU legislation has introduced further rights and protections in discrete areas, such as the new consumer protections introduced by the Consumer Rights Directive, implemented as the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This may help to explain why most stakeholders, for example, the Scottish Government, Competition Commission and Office of Fair Trading, Department for Enterprise, Trade and Investment in Northern Ireland, Senior European Experts Group, CBI and those who attended the Consumer Workshop support EU action which better protects and informs consumers as well as giving them confidence to shop cross-border.

3.75 Given the track record which the UK already had in introducing domestic consumer protection legislation, it is of course possible that successive UK Governments may in any case have willingly chosen to introduce some of the protections that they were obliged to introduce due to the UK's membership of the EU, albeit perhaps in a different time frame.

3.76 The Scottish Government, Department of Enterprise, Trade and Investment in Northern Ireland, Office of Fair Trading, Competition Commission, British Chamber of Commerce, Wine and Spirit Trade Association, Ofcom, Senior European Experts Group, General Council of the Bar of England and Wales, CCP Horizontal Interest Groups event and Consumer Workshop attendees supported measures which lead to better informed and therefore empowered consumers. Their overall view was that it makes sense from a Single Market perspective to enact such measures at the EU level. The main area of concern for the majority of these respondents was how the EU took action and this is now where this report turns.

The Degree of Harmonisation: Minimum versus Maximum?

3.77 Measures of minimum harmonisation lay down minimum standards which Member States must all implement in their national legal orders; however, Member States remain free to apply stricter requirements to ensure a higher level of protection. The method of minimum harmonisation has traditionally been considered as the most appropriate way to strike a compromise between differing approaches to a given problem in sensitive areas, including consumer protection.[39]

3.78 However, in the last decade the Commission has started to view minimum harmonisation as an obstacle to, rather than a facilitator of, cross-border trade in the area of consumer law and policy.[40] This is because the effect that minimum harmonisation creates means that consumer protection legislation continues to remain fragmented across the EU and the objective of moving towards a Single Market is not met.

3.79 In recent years the Commission has made it clear that it is determined to bring existing EU consumer protection directives up to date and progressively adapt them from minimum harmonisation to maximum harmonisation measures, where Member States can not, at a national level, legislate beyond the requirements of the Directive. The rationale behind this is that it would increase legal certainty and foster a deeper degree of EU integration.[41]

3.80 The evidence suggests that many UK stakeholders hold a different view, arguing that minimum harmonisation remains more appropriate for consumer measures.

> As to the level of harmonisation required to create that optimal market, we remain of the view that minimum harmonisation should be the rule, but maximum harmonisation can be acceptable only, and to the extent that, it is carefully targeted.
>
> (General Council of the Bar of England and Wales)

[39] J. Stuyck, 'Patterns of Justice in the European Constitutional Charter: Minimum Harmonisation in the Field of Consumer Law', in L. Kramer, H. W. Micklitz and K. Tonner (eds), *Law and Diffuse Interests in the European Legal Order* (1997).

[40] This is unequivocal in: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Consumer, *Policy Strategy* 2002-2006, COM(2002) 208 final.

[41] For a discussion of the relationship between legal certainty and maximum harmonisation, please see A. Garde, 'Can the UCP Directive Really Be a Vector of Legal Certainty?', in W. Van Boom, A. Garde and O. Akseli (eds), *The European Unfair Commercial Practices Directive: Impact, Enforcement Strategies and National Legal Systems* (forthcoming, 2014). For a different view, see A. De Vries, 'The Aim for Complete Uniformity in EU Private Law: An Obstacle to Further Harmonization', *European Review of Private Law* 913 (2012).

3.81 In its response to the Commission's Green Paper on the Review of the Consumer Acquis (2007), the then UK Government set out its view that maximum harmonisation was not always necessary at the EU level as it could prove to be a barrier to flexibility as circumstances changed. It also stated that the use of maximum harmonisation could be justified if there was evidence of a clear barrier to trade or that a regulatory difference was leading to a reduction in consumer confidence.

3.82 The Advertising Association commented that there was sometimes a case for maximum harmonisation to provide legal certainty for both businesses and consumers, but 'this approach should only be taken where demonstrably needed to address clear barriers to trade'. They pointed to 'the need for proportionality and an evidence-base for proposals'.[42]

3.83 The Office of Fair Trading and Competition Commission commented in their submission to this review that the increasing use of maximum harmonisation Directives may not always be in the best interests of consumers and could remove safeguards.

> In our view […] national laws can have a crucial, complementary role to play in safeguarding consumers in Member States given the range of different market conditions and laws across Member States […] We recognise that maximum harmonisation may be appropriate in certain cases but its use in consumer protection legislation should be considered very carefully, taking greater account of local levels of existing consumer protection, and where maximum harmonisation is used the drafting process at EU level must be more robust.
>
> (Office of Fair Trading and Competition Commission)

3.84 Consumer Focus shared the concern that maximum harmonisation measures could in some circumstances be detrimental to consumers, saying

> Maximum harmonisation limits the scope of Member States to provide additional protection where appropriate or indeed in new and developing markets.
>
> (Consumer Focus, *Response to the House of Lords European Union Sub-Committee G (Social Policy and Consumer Affairs) Inquiry into the European Union Commission's proposed Consumer Rights Directive* (2009))

3.85 The Consumer Rights Directive is an example of an instrument which was originally intended by the Commission to be a maximum harmonisation instrument, which could have led to a poorer outcome for UK consumers.

> Ultimately it was necessary to restrict the scope of the Consumer Rights Directive to two of the original directives to secure the agreement of all Member States on a maximum harmonisation approach.
>
> (Office of Fair Trading and Competition Commission)

3.86 The eventual outcome of negotiations was that the bulk of the provisions are harmonised at the maximum level, but in order to secure agreement some important practical exceptions from the maximum harmonisation requirement were made, for example in respect of general contracts for goods or services. If the original draft of the Directive with all its maximum harmonisation requirements had been agreed, UK consumers would have lost their short term right to reject a faulty product as the Directive did not provide for this high degree of consumer protection. During negotiations the UK successfully argued its case to keep this consumer remedy.

3.87 Another example is the Unfair Commercial Practices Directive (UCPD) 2005/29 which superseded a range of previously-existing legislation in the UK and other Member States. During its implementation, some Member States' previous legislation went beyond the

[42] Advertising Association, *submission of evidence*.

maximum limits set out in the Directive and they had to reduce the level of consumer protection they traditionally provided.[43] It is not, however, clear that these restrictions have caused detriment in the UK.

3.88 The UCPD sets the maximum level at which Member States can regulate unfair business to consumer commercial practices (marketing, sales practices and methods, advertising etc.) to the extent that they affect consumers' transactional decisions. Member States may not regulate particular practices in any more detail than is set out in the Directive.

3.89 The constraints of the UCPD can be viewed by some as frustrating a Member State Government's power to introduce specific, tighter, rules to regulate certain sales methods or practices in order to provide more certainty for consumers and business. For example, in the UK, some have called for a national ban or specific rules to govern cold calling on the doorstep or for tighter rules on 'lookalike' websites.

3.90 However, this constraint is counterbalanced in the UCPD by the broad principles-based approach it sets out which is designed to cover any unfairness irrespective of the circumstances. The UCPD regime is still settling down and experience of its application in the courts and in relation to practical enforcement action continues to grow. This means it is difficult to say at present whether the possibly constrictive effects will prove to be a barrier to more effective specific controls, or whether the application of the broad approach will prove adequate in all reasonable circumstances.

3.91 Although it is clearly possible in principle, therefore, there is a lack of specific evidence of cases in which the UK has failed to negotiate an acceptable compromise on proposals for fully-harmonised measures. Nevertheless, the evidence to this report demonstrates concern, and the difficult passage of the Consumer Rights Directive suggests that many Member States feel that there is a difficult trade-off between the Single Market benefits of harmonisation and ability to adapt to local conditions in relation to consumer law – and therefore in this area there is a degree of discomfort with the compromises that must be made to create maximum harmonisation laws.

Subsidiarity and Proportionality

3.92 Both subsidiarity and proportionality are fundamental principles which should be applied across all EU activity. As these principles are of a broad horizontal nature the Balance of Competences Review will examine these in a separate report in Semester Four. The Competition and Consumer Policy Report examines these areas in so far as they relate to comments made by stakeholders in relation to consumer policy.

[43] The Court's case law is unequivocal in this respect. In particular, please see: Joined Cases C-261 and 299/07 VTB-VAB [2009]; Case C-304/08 Plus Warenhandelsgesellschaft [2010]; Case C-540/08 Mediaprint [2010]; Case C-206/11 Köck [2013], judgment of 17 January 2013.

The Principle of Subsidiarity

EU legislation must comply with the principle of subsidiarity which guides the choice as to whether the aims of the measure can be better achieved at Member State or EU level. However, once the EU has acted, Member States can no longer act in ways which contradict that EU legislation.

The effect is that:

(i) Where there is EU legislation, Member States must act in accordance with it and enforce it;

(ii) Where there is no EU legislation, a Member State can exercise its own powers. But when it does so, it must do so in a way which is compatible with the Treaty provisions and the ECJ's jurisprudence.

The Principle of Proportionality

Any EU measure must also comply with the principle of proportionality, which requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties' (Article 5(4) TEU). According to established case law, an EU act is proportionate when it is suitable and necessary to achieve its declared objective.

Internationale Handelsgesellschaft mbH v. Einfhur-und Vorratsstelle für Getreide und Futtermittel, C-11/70 [1970].

3.93 There were general observations made by the Local Government Association, Scottish Government and Ofcom on the principles of subsidiarity and proportionality; in particular that the EU should legislate only when absolutely necessary, Member States should continue to have competence over consumer policy and regulation – in particular to tackle specific issues at the domestic level and that action at EU level needed to be justified on the basis of evidence.

> Rules at an EU level must comply with the principle of subsidiarity and be a proportionate response to the clearly identified problem. Processes must be rigorously observed to ensure that this is achieved effectively.
>
> (Law Society of England and Wales and Law Society of Scotland)

3.94 The Which? response to the EU Consultation on *Collective Redress* (April 2011) also suggests that limiting the effects of the subsidiarity principle to cross-border regulation benefits all Member States as national legal systems largely remain intact. However, although the Commission states that it takes the subsidiarity principle seriously, the latest draft Regulation to be adopted by the Commission which contains consumer protection provisions (the Regulation to establish the Common European Sales Law, see text box) appears to ignore concerns of Member States and stakeholders who argue that the subsidiarity principle has not been followed.[44] The overarching concern of UK stakeholders is that as there is no robust evidence that a problem exists then the Commission should not be legislating.[45] Despite calls by UK and European umbrella organisations for the proposal to be withdrawn, negotiations in Council continue and the European Parliament has recently voted in favour of the Regulation, albeit with a narrower scope, limiting the application of the Regulation to distance sales.

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[44] President Barroso, *State of the Union Address* (2013).

[45] Please see: BIS, MOJ, Scottish Government and Department for Finance and Personnel Northern Ireland, *A Common European Sales Law for the EU-A Proposal for a Regulation from the European Commission: The Government Response* (2012).

Common European Sales Law

The Commission published a proposal for a Regulation on an optional Common European Sales Law (CESL) in October 2011. The introduction of CESL would allow traders and consumers to be able to choose which law to contract under (national law or CESL) when they bought a good from another Member State. As it is a Regulation it would not require Member States to alter their national legislation, instead the CESL would sit beside 28 different consumer protection regimes and be exactly the same in every Member State. In this way a UK consumer could buy a good from any other Member State and their contractual rights, and consumer protection levels would remain the same.

The CESL is currently undergoing negotiation in the European Council and is subject to a large amount of scrutiny. This is the first time that the Commission has produced this type of legislation (an optional law which can be chosen by the citizen) and the UK Coalition Government is not in favour of it for the following reasons:

There is a lack of evidence of need for this proposal. UK businesses and consumer groups have argued strongly that the CESL is neither necessary nor practical, particularly given that the Consumer Rights Directive (which is subsumed within the CESL rules) has recently been implemented. Member States are keen for this Directive to be given the opportunity to take effect.

There would be no single source of interpretation of the CESL: this would increase legal uncertainty. Confusion would also be created for consumers as they would be faced with a situation in which different rules applied to the same products depending on whom they purchased from and where the supplier was located.

The CESL would also generate significant compliance and implementation costs; in order to make an informed decision, businesses and consumers would need to understand both CESL and national rules, then determine for each given transaction what would be the appropriate basis on which to sell or buy.

The Reasoned Opinion of the House of Commons also concluded these arguments and as a result considered that the CESL proposal did not comply with the principle of subsidiarity. The response received from the Commission disagreed with this opinion.

Enforcement

3.95 The Consumer Protection Cooperation (CPC) network, which links consumer law enforcers across the EU, helps to promote information sharing and coordination of cross-border enforcement activities under the CPC Regulations.

3.96 However, specific criticism from those who attended the Consumer Workshop was aimed at how the national enforcement bodies (their establishment is a requirement of the CPC Regulations) of different Member States differed in standards of enforcement delivery – particularly where a Member State had not adequately implemented the relevant Directive.

3.97 Furthermore the European Consumer organisation BEUC (in its response to the Commission's UCPD review) said that many of their members report that the enforcement bodies (public or private) do not have sufficient resources to ensure an effective enforcement of the Directive.[46]

[46] Unfair Commercial Practices, European Commission's questionnaire on the application of Directive 2005/29/EC, BEUC's response, 2011.

> Where EU laws are in place, there must be more effective enforcement of rules across Member States. We note that the UK assiduously implements its EU obligations, while others take a less robust approach to compliance.
>
> (Local Government Association)

3.98 Stakeholders participating in the Consumer Workshop suggested that a way to overcome this differentiation in enforcement would be to increase the role of the Commission, so it would directly enforce Directives, where a cross-border matter is involved, through its own agencies, by introducing more regulation to enable more effective enforcement or arguing for the EU to have sole competence for consumer protection.[47]

3.99 However, submissions from the Law Society of England and Wales and Law Society of Scotland, the Office of Fair Trading and Competition Commission set out that enforcement of consumer policy worked well at national level as individual Member States were better placed than the Commission to assess any breach of consumer law and need for relevant enforcement action. Indeed the Coalition Government supports the view of the UK enforcement authorities that if the Commission led on enforcement, there could be a real risk that an enforcement gap could be created, where the Commission would have the competence to enforce, but lack the resource to do so, given the number and variety of cases across the EU.[48]

EU Consumer Policy: The Effect on British Businesses

3.100 Although EU consumer policy aims to create confident and empowered consumers and thereby improve the operation of the Single Market, it is important to acknowledge that EU legislation can have a significant effect on UK businesses. A more harmonised approach across Europe can have regulatory costs as well as economic benefits.

> Sometimes EU proposals, designed to promote and harmonise consumer protection across Europe, can have unforeseen consequences for existing UK business practices that have previously been regarded as compatible with consumer protection.
>
> (Advertising Association)

3.101 Businesses who were interviewed as part of the evidence gathering process argued that for EU trade to grow, consumers needed to feel 'safe' making purchases from any country in the EU and therefore needed to be sure that their rights, the information they received surrounding the purchase, and product quality and pricing, would remain consistent regardless of the Member State they purchased from.

3.102 When discussing the EU's influence in more depth, while some felt more positively and some more negatively about the EU overall, most of the businesses expressed the same positive and negative views, and the same rationales for these views. Overall, amongst those interviewed, the prevailing view tended to be that operating as part of the EU, even if there were some concerns, was ultimately beneficial for UK businesses, and it was necessary for certain powers to be held by the EU to ensure no individual Member State was disadvantaged.[49]

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[47] Although the Commission's review of the CPC network did not recommend giving the Commission specific consumer enforcement powers.

[48] OFT and Competition Commission, *submission of evidence*.

[49] IFF Research on behalf of BIS, *UK Business Views of the Balance of Competences between the EU and the UK* (2014).

3.103 However, in their response to the call for evidence, the British Chamber of Commerce outlined concerns that there had been a lot of EU consumer protection rules in the past years that required business compliance and that many small businesses did not have the resources to maintain large compliance functions to monitor this new legislation which could lead to owners and managers spending significant amounts of time on paperwork rather than on the production of goods and services.

3.104 The Coalition Government is addressing the issue of EU regulatory burdens placed on UK businesses by, amongst other things, working to try and ensure that the European Commission strengthens the Small and Medium Enterprise Test so that businesses of fewer than ten employees are exempted from new European legislation.[50]

> The effect of the Package Travel Directive has disadvantaged our industry in the UK. The effect of the Directive is that a package consisting of a hotel stay and an activity such as a theatre trip or a round of golf is within scope and therefore the organiser must handle deposits and take out insolvency insurance in the ways required by the Directive. This has put off UK hoteliers from offering such packages. As part of the current review of the Directive, the UK Government is very helpfully supporting the industry in seeking to amend it so that such packages would not be subject to the restrictions described above.
>
> (British Hospitality Association)

3.105 Furthermore the British Chamber of Commerce does not believe that more action at a national level is necessary as it could increase fragmentation of the Single Market and undermine consumer and business confidence in cross-border trade. It could also increase compliance costs and legal uncertainty for businesses, especially smaller firms.

3.106 The Business for Britain report on the *British Option* argues that the vast majority of British businesses do not export to the EU and yet incur the regulatory burdens arising from EU regulation.[51] A British Option is proposed under which the UK would dis-apply specific pieces of EU regulation from non-cross-border trading companies. The report acknowledges that this option would require an EU Treaty change and would be a lengthy and complex process.

3.107 The subject of participation in the Single Market disadvantaging non exporting UK firms is assessed in Chapter Three of the Single Market Report (Semester One) where arguments for and against participation, based upon evidence received from stakeholders, are specified.

EU Consumer Policy: The Effect on British Consumers

3.108 This chapter has described how the EU has been active in devising consumer protection instruments and that these have broadly speaking had the effect of increasing the levels of consumer protection in the UK, as well as bringing the benefits of the Single Market to consumers. It is possible, even probable, that in some of these areas, the UK Government would have legislated anyway in the absence of EU measures.

3.109 Having said that consumer protection is a horizontal policy which cuts across the majority of the reports in the Balance of Competences Review. Aside from the EU consumer protection measures outlined in this report, UK consumers also benefit from EU measures across a vast array of competences. In most of these cases, there are specific benefits gained from legislating at the EU level which could not have been realised from purely national measures. These are often intimately linked with the Single Market.

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[50] More information can be found at: www.redtapechallenge.cabinetoffice.gov.uk/home/index/, accessed on 14 June 2014.

[51] Please also see: David Campbell Bannerman MEP, *submission of evidence*.

3.110 Foodborne illness has a significant impact on public health. There are many potential hazards in food, including foodborne pathogens, environmental contaminants or those that can result from food processing. Some foods are potentially harmful to certain sectors of the population, such as people who have allergies. Protection of consumers' health is a major focus for food law. Food law also protects consumers from sub-standard products and from being misled about the content of food.[52]

3.111 Harmonisation of standards ensures that consumers can have confidence that the food they purchase is of the same high standard, regardless of the country of origin.[53]

> National rules would be likely to create trade barriers, so restricting the range of foods on offer. Having common standards can also give UK consumers confidence when they travel within the EU.
>
> (Food Standards Agency)

3.112 EU toy safety requirements allow the consumer to be confident that toys they purchase in the EU meet a satisfactory standard, regardless of where they were made.[54]

3.113 In the airline sector deregulation has allowed growth in routes to UK regions, significantly increasing choice for consumers whilst harmonisation of safety standards has ensured that 'all EU registered aircraft are operated and maintained to the same set of rules, enhancing protection for UK consumers and airline operators.[55]

3.114 In civil law, if a UK consumer has a dispute with a trader from another country EU civil judicial cooperation measures provide certainty and predictability over how disputes would be dealt with. This in turn encourages consumers to shop and businesses to trade across borders.[56]

3.115 EU competence assures UK consumers that animals in other Member States were reared to common welfare standards to those in the UK.[57]

3.116 EU air pollution rules for cars and power stations have driven a move towards cleaning up the energy sector and making the air we breathe cleaner, and EU energy labelling has created more informed consumer citizens and helps trigger behavioural change and thus responsible citizenship.[58]

3.117 A cap on voice calls, SMS and data roaming charges that mobile phone operators impose on consumers has meant substantial savings for UK consumers when they use their mobile phones abroad.

3.118 Being part of the EU allows UK consumers to enjoy these measures when they consume EU imported goods/services in the knowledge that the protections and quality are the same as if the good/service had originated in the UK. This positive effect also applies when UK consumers are abroad. However this does not mean that UK consumers only benefit from these protections because they are part of the EU: as highlighted under the 'Alternative Approaches' section (see below), the UK would most likely have to implement

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[52] HMG, *The Balance of Competences Between the UK and the EU: Animal Health and Welfare and Food Safety* (2013).

[53] HMG, *The Balance of Competences Between the UK and the EU: Health* (2013).

[54] These include: the physical, mechanical and chemical properties of the toys; age information; and appropriate warnings.

[55] HMG, *The Balance of Competences Between the UK and the EU: Transport* (2014).

[56] HMG, *The Balance of Competences Between the UK and the EU: Civil Judicial Cooperation* (2014).

[57] HMG, *The Balance of Competences Between the UK and the EU: Agriculture*, published in parallel.

[58] HMG, *The Balance of Competences Between the UK and the EU: Energy*, published in parallel.

EU laws even if the UK were not part of the EU, but continued to retain its EFTA/EEA membership, and in this scenario the UK would have no say in shaping the EU laws it would be required to implement.

Process: How Law is Made

3.119 There were several submissions which commented upon the process of EU legislation – both at the EU level and at the UK level.

EU Level

3.120 Stakeholders at the Consumer Workshop raised concerns that the EU law-making process was lengthy and involved complex political trade-offs, and that the process of law making was opaque with negotiating deals done in the margins making it impossible to tell whether an element not covered in the Regulation or Directive in question had been overlooked or purposefully omitted as part of a wider deal.

> European institutions have political agendas which can lead to poor laws where for example, some small token changes to laws are made to show that institutions do have the power to make a change. Law-making is often based on the ambitions of EU officials – CESL is a good example of this.
>
> (Consumer Workshop on 25 November 2013)

3.121 These stakeholders also commented that there was a danger of poorly drafted law emerging (for example the Consumer Credit Directive is more loosely drafted compared to the UK Consumer Credit Act). This was because Directives are often relatively brief and at a high level in order to achieve consensus among Member States and leave Member States maximum flexibility when transposing the Directives.

3.122 Furthermore some of the Consumer Workshop stakeholders felt that the Commission's research for justifying its action was often flawed and not robust enough, leading to a gap between the proposed legislation and the problem being addressed. In the view of some respondents this resulted in non-answers to non-problems and legislation based on anecdote.

3.123 There was also concern that the Delegated and Implementing Acts provided by the Lisbon Treaty had removed oversight by the European Parliament and Council. Although these Acts allow the Commission to make only small technical amendments without going through a legislative procedure, the Advertising Association voiced the concern that use of such Acts could be open to abuse and allow the Commission to give itself significant powers while taking them away from national authorities. For example, the Commission's proposal on Data Protection Regulations included 26 provisions that granted the Commission the power to adopt Delegated Acts, with a further 19 provisions that allowed the Commission to adopt Implementing Acts. Upon scrutiny by the Council and European Parliament, the vast majority of these references were removed.[59]

UK Level

3.124 At the UK level, stakeholders commented that the decision-making process in agreeing EU laws and transposing them into UK law could be more effective. Several suggestions were made for the Government including keeping the implementation of EU competition and consumer policy in the UK under regular review (which is something the Coalition Government has committed to do) as well as identifying how other Member States implemented these policies by the Senior European Experts Group; and, by the Local

[59] Advertising Association, *submission of evidence*.

Government Association; making explicit in domestic legislation that it is wholly, or in part, transposing an EU law; and urging the UK Government to apply new EU rules in the lightest possible way (not to 'gold plate). This latter issue is examined in further detail in the Balance of Competences Single Market Report which sets out that it is the Government's policy to minimise regulatory burdens when implementing EU legislation and to ensure that the UK does not go beyond the minimum standards required.[60]

Alternatives Approaches

3.125 In this and other reports, evidence has pointed to a large measure of consensus that it is in the UK's interest to maintain access to the Single Market. Most respondents to this report argued that the current split of competences delivers essential underpinning to the Single Market on competition and State aid. A number of respondents, UKSALA and the CLLS in particular, drew attention to alternative approaches and their implications for policy and for the balance of competences in these areas, and so for completeness we briefly examine some other models or comparators they have suggested.

3.126 A question that was raised by one participant in our stakeholder events was whether the State aid regime was needed to ensure a level playing field for competition within the EU – the contrast was made with the US, where there is no State aid regime.

3.127 One answer to this is articulated in the UKSALA response, which says the State plays a more important role in the market in the EU than in the US, with much greater spending at Member State level than sub-federal level in the US. UKSALA further points out that the US has a federal government that can balance out any distortions, but the EU does not have this kind of budget. As the EU is also the only Single Market comprising 28 individual Member States, a direct comparison cannot be made with the US.

3.128 An examination of the implications of the UK not being part of the EU, but still being part of the EEA, EFTA or making bilateral trade agreements with the EU under WTO rules – all of which were postulated in the responses – suggests that these options may result in less freedom for the UK on competition, State aid and consumer law than might be expected.

3.129 The EEA Agreement provides for the inclusion of EU legislation in all policy areas of the Single Market. This covers the four freedoms (free movement of goods, services, persons and capital) as well as competition and State aid rules, but also consumer protection (as well as company law, environment, social policy, and statistics). UKSALA highlights the point that, 'in the event that the UK left the EU, and the UK were to become a Contracting Party to the EEA Agreement, this would have little material impact on the application of State aid law in the UK'. The same would largely be true of the competition and consumer protection provisions. The difference, of course, would be that the UK would have no role in negotiating the EU measures which it has to adopt under the EEA Agreement and therefore little scope to influence them.

3.130 The EEA Agreement contains specific competition provisions, principally Articles 53 to 64, which mirror those of the TFEU, including the State aid ones. The agreement implies that two separate legal systems are applied in parallel within the EEA. The EEA Agreement is applicable whenever trade between one or more EFTA States (which have ratified the EEA agreement) and one or more EU Member States is affected, as well as when trade between the EFTA states themselves is affected. Community law is applicable whenever trade between the EU Member States is affected.

[60] HMG, *The Balance of Competences Between the UK and the EU: Single Market* (2013).

3.131 The European Commission and the EFTA Surveillance Authority share jurisdiction to apply the EEA Agreement. The division of competence is laid down in the Agreement (Articles 56 and 57) and its Protocols. There are also protocols governing cooperation between the two authorities. The EFTA States have also established a court of justice (the EFTA Court) which can review decisions taken by the EFTA Surveillance Authority. In merger cases the Commission has exclusive jurisdiction in the EEA to deal with all concentrations with a Community dimension, as defined in the EUMR.

3.132 So, for example, while the UK did not have to follow the State aid rules when it was formerly a member of EFTA, this would no longer be the case under current EFTA rules.

3.133 The EFTA Surveillance Authority has similar powers to those of the Commission. So, for example, any proposed aid measures must be notified to the EFTA Surveillance Authority and the EFTA Surveillance Authority has the power to approve State aid under similar provisions to TFEU (but does not have the power to approve aid for the promotion of culture or heritage conservation).

3.134 In enforcing competition law and State aid rules, the EFTA Surveillance Authority applies the same principles as the EU and frequently refers to decisions of the Commission that are relevant – indeed it often refers to judgments of the ECJ.

3.135 On consumer policy, consumer protection measures are within the scope of the EFTA agreement and must therefore be adopted by EFTA Member States, albeit usually with a one to two year delay between their being adopted by the EU and then being adopted under the EFTA agreement. Again, therefore, EFTA membership would mean the UK being bound by rules which it had no formal part in formulating.

3.136 Bilateral trade agreements between the UK and EU would be likely to contain provisions on State aid if, as seems likely, they followed the model already used in the EU's agreements with countries in Eastern Europe and Switzerland. They may also make access to the Single Market conditional on adherence to rules on competition and consumer protection which were similar if not identical to the EU's.

3.137 The rules established by the WTO Agreements are relevant in two respects. First, the EU is itself bound by those rules. Second, even if the EU were to cease to have competence for State aid, the UK, as a party to the WTO, would be bound by the rules.

3.138 However, the substantive scope of the WTO regime is less well developed than that in the EU, and there is no body like the Commission charged with enforcement of the rules. Responses to this review suggest this would lead to adverse consequences for UK business.

3.139 The CLLS contrasts the EU's effectiveness in creating a level playing field with the amount of protectionism elsewhere that the General Agreement on Tariffs and Trade (GATT) has not been able to effectively address, and that the General Agreement on Trade in Services (GATS) has achieved even less in relation to services. Their response said: 'The US is a particular case in point and it is no secret that the UK has taken the lead in supporting the Commission in its efforts to negotiate a comprehensive free trade agreement between the two trading blocs in an effort to replicate the EU system'.[61]

[61] CLLS, *submission of evidence*.

3.140 And UKSALA in its response does 'not regard the WTO subsidies framework as offering UK business anything like the same protection from the distortive effect of subsidies by other Member States as is offered by the State aid rules. First, the WTO Agreement on Subsidies and Countervailing Measures does not extend to services, a key area for the United Kingdom. Second, save in relation to export subsidies and subsidies contingent on use of domestic goods, subsidies can be challenged only if they can be shown to cause adverse effects, which a complaining WTO Member State has to prove. Third, the WTO regime relies on enforcement by complaining Member States, and provides no mechanism for affected businesses themselves to take action about subsidies that harm them. In complete contrast, the EU State aid regime allows affected businesses both to complain to the Commission and to take action themselves in the courts of to prevent unlawful aid'.

3.141 The UK would have substantial freedom to devise its own competition regime were it just within the WTO framework, although it should be noted the current domestic regime is closely modelled on, and designed to operate in harmony with, the EU regime. Similarly, the UK would in principle have more freedom to set its own framework on consumer protection if operating solely under the WTO, but as explained above, diverging from the EU model would be likely to result in a loss of access to the Single Market.

Chapter 4: Future Options and Challenges

4.1 This chapter considers the future direction of policy on competition, State aid and consumer protection.

4.2 On both competition policy and consumer policy there are, at first glance, some similarities when considering the future options and challenges in these areas of competence. For example, the need for better enforcement which is transparent and effective; the impacts which the creation of the CMA as well as the Consumer Rights Bill will have.

4.3 However, beyond these broad headings these similarities begin to diverge; for example, on competition and enforcement, it is the Commission which has queried whether more needs to be done. On the consumer side, similar comments have been made by UK stakeholders at the Consumer Workshop.

4.4 The creation of the CMA impacts upon both areas; it will improve the quality and effectiveness of competition enforcement, whilst, as part of the wider consumer landscape reforms, help to make it easier for consumers to know where to go to seek help.

4.5 The Consumer Rights Bill, if it gets assent would further improve the UK system for private actions under competition law on the one hand and streamline rights and remedies of consumers on the other.

4.6 On State aid, the future options and challenges are quite different and very specific to this subject; for example, the scope of State aid control and the speed of process.

Competition Policy

4.7 As EU competition policy is considered by the Commission and by many of our consultees to be working well, radical change in this area is not expected.[1] The likelihood is that current trends will continue, with increasing cooperation between the NCAs within the ECN and the sharing of best practice, information on cases etc and quite possibly greater liaison in leniency cases.

[1] For example, please see: Communication from the Commission to the European Parliament and Council, *Report on the Functioning of Regulation 1/2003*, COM(2009)206 final.

An International Perspective

4.8 Increasing cooperation is spreading internationally. The EU has been a significant factor in the sprouting of competition regimes across the world in recent years, not only in the case of applicants for membership but also through its conclusion of trade agreements.[2] Cooperation and exchange of information on cases between competition authorities across the globe can be expected to grow. The ICN, which now includes 128 competition agencies from every continent, provides a forum for facilitating greater cooperation and knowledge sharing between competition authorities.

4.9 Generally, the EU system has proved to be a more popular transplant than the US one, the only feasible alternative, and many overseas competition regimes are modelled on the EU provisions. The proposed Transatlantic Trade and Investment Partnership (TTIP) provides an opportunity for the EU and the US to further embed principles of fair competition and effective enforcement which could act as a benchmark for other trade agreements.

4.10 Cooperation will become ever more important with the progressive integration of the world economy. As more and more companies operate in multiple countries it would be helpful to businesses if different competition authorities operated to the same principles and avoided reaching inconsistent outcomes when dealing with the same cases such as mergers. Meanwhile, in tackling the increasing number of international cartels, competition authorities will face the challenge of co-ordinating their investigations, for example by synchronising their inspections.

4.11 Competition policy and enforcement inherently has a cross-border element. Thus, the EU's antitrust provisions apply to agreements and conduct 'implemented' in the EU and therefore anti-competitive agreements signed or entered into overseas can be prohibited if they are implemented here. Similarly, the US antitrust laws apply (speaking broadly) to certain foreign conduct which has direct, substantial and reasonably foreseeable effects on US trade or commerce. Notably the EU Commission has taken enforcement action against a number of large US corporations such as Microsoft. The Senior European Experts commented that it was an advantage having the Commission playing this role rather than leaving it to individual states which might be played off against each other. There have been suggestions of differences of analysis between the EU and US authorities on some cases, but there are signs of increasing 'cooperation and convergence on competition issues between the two sides of the Atlantic'.[3] With increasing integration of the world economy, and with supply chains for complex products such as cars becoming ever longer and spreading across continents, cooperation and convergence will become even more important.

Developments within the EU

4.12 Turning more parochially to the EU competition regime, some developments can be foreseen in certain areas. For example the Commission has expressed concern over the 'autonomy' the current system affords to Member States in terms of institutional design and procedural rules governing public enforcement. As a result, it has been considering whether further action should be taken to tackle national institutional and procedural divergences which may detract from transparency, legal certainty and a level playing field for undertakings.

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[2] William E. Kovacic, *Institutions and Competition Policy: Structure, Conduct and Performance, Presentation given to ESRC Centre for Competition Policy* (6 June 2013).

[3] Commissioner Almunia, *New Transatlantic Trends in Competition Policy, Speech to the Friends of Europe* (2010).

4.13 As yet, there are no proposals in these areas although Commissioner Almunia has indicated he plans to make some before the end of his term in a review of 10 years of the current antitrust enforcement regime.[4] It is expected that amongst other things the proposals will address the independence of NCAs and their resources. Whilst in the absence of specific proposals it is difficult to anticipate what implications there might be for the UK, the quality of the UK's NCAs - which are on a par with the best in the world – suggests they and their procedures are more likely to be taken as exemplars and models for the NCAs in other Member States than having to be adjusted to fit a very different model.[5] The UK has recently reformed its competition institutions, combining the relevant functions of the OFT and the Competition Commission in a new NCA, the CMA, in order to improve still further the quality and effectiveness of its competition enforcement, and has given it substantial new financial resources. On the other hand, institutional reform led by the Commission might address the concerns some stakeholders had about enforcement in other Member States, although it should be noted that concerns about the ability of the UK competition authorities to prosecute enough antitrust cases in a timely fashion compared to overseas authorities was one of the drivers of the reforms which led to the CMA.[6]

4.14 The Commission also considers further action is required to stimulate 'private enforcement' of the competition rules so that consumers receive the compensation to which they are entitled and further deterrence is facilitated (a realistic prospect of having to pay compensation should weigh with would-be infringers).

4.15 The Commission takes the view that the system of damages for infringements of competition law of the Member States presents a picture of total underdevelopment. To combat this, last year the Commission published a package of measures designed to ensure that victims of EU competition infringements could obtain full compensation, including an EU Directive designed to facilitate damage claims by the victims of antitrust violations, a recommendation of non-binding principles for collective redress mechanisms for Member States and a practical guide on the quantification of harm for damages to assist national courts.

4.16 At the same time the package was designed to ensure that the interaction between public and private enforcement would be optimised—and, in particular, that leniency programmes and settlement procedures utilised by the Commission in its enforcement of the rules would not be compromised by private enforcement. The Directive has been designed to remove a number of practical difficulties confronted by victims of infringements of the EU antitrust rules when instigating damages claims before national courts.

4.17 The UK has been very supportive of the draft Directive. The UK has a relatively highly developed system for private enforcement, a high proportion of EU cases are heard here and the draft Directive is in some ways modelled on the UK regime. The draft Directive does however contain new proposals which the UK supports which we considered were best dealt with at an EU level – notably on the relationship between the leniency programmes and private enforcement. The Consumer Rights Bill contains proposals (compatible with the draft Directive) which would further improve the UK system for

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4 Developments in EU competition policy, speech on European Competition day, 10 April 2014.

5 The Global Competition Review's 2013 assessment of competition authorities rated the Competition Commission as one of six 'elite' authorities (with the likes of the 2 US agencies and the EU Commission) and the OFT as one of six 'very good' authorities. The creation of the CMA is of course intended to improve performance still further.

6 BIS, *A Competition Regime for Growth: a Consultation on Options for Reform* (2011).

private actions, including introducing a system for collective redress which is compatible with the Commission's non-binding recommendation.

4.18 Further reforms in prospect, as noted in Chapter Three, concern whether to bring minority cross holdings in another business within the EUMR. The Commission has consulted on this proposal, including on options for reform, but draft legislation has yet to emerge. The UK and some other Member States such as Germany provide for their domestic merger regimes to tackle anti-competitive effects arising from minority holdings, and these arrangements have even been applied to cases where the merger itself fell to the Commission under the EUMR.[7] The argument for allowing the Commission to deal with such cases, even when there is an operable domestic regime in place, is that it would be procedurally more efficient and time saving for the Commission to deal with all aspects of a case.

4.19 The UK has supported the aims of the proposal whilst noting that there are practical difficulties to be overcome. The UK regime, where there is no requirement to notify mergers to the authorities (so reliance is placed instead on parties voluntarily notifying or on discovering the merger and calling it in) may be better placed to deal with minority holdings than a system such as the EUMR which mandates notification of all mergers which meet the qualifying thresholds.

State Aid

4.20 As with broader competition policy, the balance of evidence we received during our consultation suggested that the regime generally works well, but we would expect continuing challenges, particularly in terms of the scope of State aid control and the speed of the process.

Infrastructure

> The scope of exemptions is too narrow and the Commission has been too slow to widen this, particularly on infrastructure; this and judgements like Leipzig-Halle (particularly its retrospective aspect), damaged the reputation of the State aid regime; lack of Commission drive to provide for new areas and clarify rules is holding back development and causing legal uncertainty.
>
> (November Stakeholder Event)

4.21 The ECJ will continue to have a role in defining and clarifying the scope of State aid and thus the areas into which the Commission's competence extends.

4.22 On 19th December 2012, ECJ upheld the General Court's decision in the joined cases of Leipzig Halle.

4.23 The court ruling confirms two legal principles:

'That the transfer of state resources to any public sector organisation that operates within a commercial market shall be subject to the State aid test and may therefore be found to be State aid; and

The construction of infrastructure with a view to its subsequent commercial use, is an economic activity, and shall be prima facie aid to the operator'.[8]

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[7] Please see: Competition Commission, Ryanair Holdings plc and Aer Lingus Group plc, *A Report on the Completed Acquisition by Ryanair Holdings plc of a Minority Shareholding in Aer Lingus Group plc* (2013).

[8] Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission Case C-288/11P [2012].

4.24 This is a significant case which has implications for how public bodies can invest in infrastructure and undertake 'direct development' works. While this is no more than a codification of existing law, it leaves public authorities with little room to claim that their development activities are free of State aid implications. This is also problematic for the Commission, because although the new Enabling Regulation gives them scope to block exempt infrastructure, they cannot do so without case experience.

4.25 This means that if Member States wish to grant State aid for infrastructure, which does not fall within any existing exemptions, then it will need to be notified for Commission approval. Public authorities and business will need to build this into their project planning. In time however, as they build up case experience, the Commission should be able to exercise the facility that they have to block exempt more kinds of infrastructure.

Public Services

> It is difficult to roll back the state and still expect services to be treated in the same way as if they were delivered by the state. If you liberalise then surely you are seeking competition – why do you need to pick winners?
>
> (November Stakeholder Event)

4.26 With the increasing role of the private sector in the delivery of public services, including education and healthcare, financial support from the state will need to be State aid proofed. This will be a challenge as the Commission will want to ensure that distortions to competition are limited. Thus, public authorities will need to either procure these services on the market, or ensure that any privatised entities are remunerated on truly commercial terms.

4.27 Alternatively Commission approval for State aid may be sought. This is unlikely to be straightforward, but legal instruments covering public services will go some way to providing legal cover. The Communication on Services of General Economic Interest (SGEI) recognises the diversity of public service delivery across the EU, but at the same time, the Commission must in its role as guardian of the Treaty ensure that any interventions by Member States are State aid compliant.

4.28 Hence we can consider how the Commission has approached UK support for the Post Office network in the past as a template for the future. The Commission has recognised that the network has a social value and is best placed to deliver a range of SGEIs, but that there needs to be a range of safeguards so as to ensure that the aid granted to the Post Office does not crowd out competition. In approving the latest funding package in 2012 as a proportionate approach, with incentives for efficient provision of public services, the Competition Commissioner said, 'the network subsidy will enable the UK post office network to continue performing its fundamental social and economic role by delivering essential public services to UK citizens in remote and rural areas without unduly distorting competition'.[9]

Process

4.29 In terms of further reform at EU level, most of the current State aid rules are now set until 2020, but we would expect the new Commission to focus on ensuring that processes run smoothly. Further streamlining will be a priority for the UK and for other Member States.

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[9] European Commission, *Press Release: State Aid, Commission Endorses Public Service Compensation for UK Post Office Ltd* (2012).

4.30 This could be through the speeding up of notifications. One option that was suggested at our stakeholder engagement event would be to having a first stage and second stage as in merger control, with automatic clearance of notified aid in the absence of a challenge.

4.31 However, it is likely that the Commission will want some kind of quid pro quo for any effective devolution of powers to Member States and reduction in Commission scrutiny. This has been evident in the State aid modernisation reforms, which have seen enlarged scope for the GBER, and more flexible Guidelines, but at the same time greater requirements for Member States to be transparent about the aid that they are granting, and put in place evaluation of aid. The UK agrees with these principles but there is the risk that they can be too prescriptive and create an administrative burden for public authorities. It is also likely in future that the Commission will need Member States to prioritise case, and while this too has benefits, it does inevitably mean that some cases would proceed at a slower pace. The Commission itself has said that it expect there to be a greater workload after modernisation. This is because it will have to look more carefully at more complex aid measures and because there will be better evidenced complaints requiring greater and more in depth investigation.

Regional Aid

4.32 Rules that will be in force between 2014-20 mean that Member States may only give regional aid to large companies in respect of new investment. The effect of this according to the Industrial Communities Alliance will be to make it much more difficult to support reinvestment in existing large firms, even where that would create jobs. It should be noted however that this limitation relates to regional aid only and there remains scope to provide support to large firms under other targeted instruments, such as Training Aid provisions.

4.33 The outlook post 2020 on regional aid is difficult to predict. It will depend on the condition of the European economy at the time, and the view of the Commission that is in place. However if there is further EU enlargement that embraces poorer Member States, we would expect a push for the regional aid rules to be more flexible there, and more restrictive in wealthier regions.

Consumer Policy

4.34 The consumer policy landscape continues to develop and evolve – one of the main drivers of this is digital technology which is diversifying the ways in which consumers can access goods and services; the huge growth in digital technologies and consumers' increasing reliance on them leads some to the view that there is growing need for EU regulation in this area.[10] A coherent and future-proofed legal framework relating to digital activity could play an important role in achieving this and the EU has made clear that they will continue to develop this as part of their work on completing the Digital Single Market (DSM).

4.35 There are several changes in the area of consumer policy occurring concurrently; the biggest challenge to both consumers and businesses will be not only to be aware of them, but also to understand their impacts.

4.36 As consumer policy is a shared EU competence; in those areas where harmonisation of EU legislation is placed at a minimum level, the UK has legislated beyond it. This type of flexibility in making law allows for the retention of particularities of Member States social, cultural and economic conditions. For example, consumers in the UK enjoy the short

[10] For a detailed analysis of DSM, please see: HMG, *The Balance of Competences Between the UK and the EU: Single Market Free Movement of Services*, published in parallel.

term right to reject a faulty product; this remedy is only available in a few Member States' national laws and is a rule which the UK is keen to preserve. Domestically, the Coalition Government is aiming to give consumers more confidence – and legal back-up – to deal with bad service or shoddy goods. A new Consumer Rights Bill is currently going through Parliament and will address the concerns that while UK consumer law offers a high degree of protection; it is confusing and has not kept up with the digital revolution. A new Consumer Rights Bill is currently before Parliament and will address key consumer rights covering contracts for goods and services clarify rights for digital content and update the law relating to unfair terms in consumer contracts. It will also create domestic legislation where currently no EU legislation exists, the reasons for this are explained in the text box below.

Why is the UK Legislating on a Consumer Rights Bill Now?

Independent research by the UK Law Commissions found there was a high degree of confusion among UK consumers about what rights they had under consumer law. The Davidson review (2006) which examined how EU directives have been implemented in the UK highlighted consumer law as an area where implementation had caused additional complexity by overlaying EU law on top of the existing domestic regime. As a result, the review concluded that the law on consumer remedies was too complex, causing unnecessary burdens on business.

On the supply of goods, UK Consumer law was thought to be unnecessarily complex and confusing. Some of this arose because it was not clear how EU law worked with pre existing domestic law. Furthermore, the Consumer Rights Directive has been implemented this year and therefore it makes sense to consider other changes to consumer rights at the same time.

On digital content, research showed that more than 16 million consumers experienced at least one problem with digital content in the UK in 2011. Legal analysis showed it was not clear what type of rights consumers had for faulty goods – in particular for intangible digital content such as downloads. This lack of clarity caused some consumers to fail to report problems with their digital content, whilst others assumed they had rights which they did not have leading to disputes between business and consumers. There is no current or proposed EU law directly addressing quality rights for digital content and the UK thought it important to act to clarify consumer rights in this significant market. By addressing this issue now, the UK will be in a good position to contribute to the formulation of EU policy using an established, workable, evidence-based regime.

On services, UK law provides some general statutory rights but little by way of statutory remedies when those rights are breached making it more difficult for consumers to enforce their rights. There is no current or proposed EU law concerning quality rights for services.

On unfair terms, the UK currently has two different pieces of legislation in this area, one EU and one domestic (which pre-dates the EU law). This law governing whether terms can be regarded as unfair is very complex, creating uncertainty for consumers and businesses. This has led to costly legal cases, which have still not fully resolved when a term can be assessed for fairness. The UK aims to simplify the law in this area whilst maintaining the consumer protection level.

4.37 At a domestic level there are many other changes occurring.

4.38 The UK must also implement the Alternative Dispute Resolution Directive by July 2015. This Directive aims to improve access to redress and increase consumer confidence whilst helping to drive competition and growth as it offers a low-cost and fast alternative to the court system, in the event that a consumer is unable to resolve a dispute following the purchase of goods or services.

4.39 The Consumer Rights Directive came into force in the UK in June 2014 via the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. These Regulations will simplify consumer rights in certain areas, mostly relating to buying and selling.

4.40 The UK Government's consumer landscape reforms, which came into effect in April 2014, are designed to ensure that consumers know who to turn to for help and advice when things go wrong.

4.41 Against this backdrop, the general view of stakeholders is that further regulation in the area of consumer policy is not necessary. Furthermore, the rationale for any future legislation should be targeted at resolving significant and persistent problems which genuinely inhibit the effective operation of the Single Market.[11]

4.42 Despite these views, since the introduction of the proposal for an optional Common European Sales Law (Chapter Three), the Commission have set up 2 expert groups; one examining barriers to cross-border trade in insurance contract law and the other to 'help to carry out complementary work on safe and fair contract terms and conditions for consumers and small firms for those cloud related issues that lie beyond the scope of the Common European Sales Law'.

4.43 The creation of these two expert groups has led to speculative concern that the Commission is keen to establish optional Regulations as alternative regimes of contract law in Member States' national legal orders (the so-called "2nd regime"). This in effect would be a way of harmonising Member States laws by the 'back door' and reducing the divergence in consumer protection provisions that minimum harmonisation does not fully eradicate. One of the future challenges for the UK may be to ensure that the individual circumstances of Member States' consumer policy are taken into account rather than a one-size-fits-all solution.

Summary

4.44 Historically the competition and consumer competences have developed differently, with competition and State aid rules being in the Treaty of Rome from the start and consumer policy gaining recognition as a competence in its own right some 26 years later.

4.45 Over time the competences have evolved. Competition and State aid rules have relied more upon the jurisprudence of the ECJ in their development, with the Commission codifying their practice through Guidelines and Block Exemption Regulations. In consumer policy the range of legislative instruments adopted have given this competence greater visibility despite the fact that this competence remains inextricably linked to the development of the EU Single Market rather than the development of consumer policy itself.

[11] Law Society of England and Wales and Law Society of Scotland, *submission of evidence*.

4.46 With the divergences in the historical context between the competition and consumer competences, the impact upon the UK has also diverged. Competition rules are considered a pillar of the Single Market, where a level playing field – which can only be achieved at the supranational level - is essential. While State aid control, is considered necessary at EU level, concerns were raised around its scope, the low level at which it is triggered as well as the length of time taken to notify measures to the Commission for approval. As consumer policy is a shared competence the UK has enjoyed a certain freedom to legislate in areas where the EU has not acted. Whilst empowered and informed consumers are considered to be an integral part of making markets work well, there is a more nuanced argument surrounding the EU process in the way the legislation is made with particular criticism about its robustness and its form.

4.47 There is a strong consensus that effective competition and consumer policies are vital to helping markets, including the Single Market, work well for consumers and society as a whole. They are mutually supporting policies with a trend towards increasing cooperation between competition authorities and the sharing of information and best practice set to continue, both within the EU and with authorities elsewhere, as support for both infrastructure and public services will be delivered through markets and will need to be approved by the Commission there will be greater pressure on the State aid regime and; technological advancements as well as a different approach to making consumer legislation will impact upon business and consumers.

Annex A: List of Evidence Received

Advertising Association

Bar Council of England and Wales

British Chambers of Commerce

British Hospitality Association

British Private Equity and Venture Capital Association

Campbell Bannerman, David MEP

City of London Law Society Competition Law Committee

Competition Commission – Jointly with the Office of Fair Trading[1]

Confederation of British Industry[1]

Davina Garrod, Bingham McCutchen

Department of Enterprise, Trade and Investment – Belfast

EDF Energy

EEF (Engineering Employers Federation – UK Steel are a division of this)

Edwards Wildman Palmer UK LLP

Hornsby, Stephen (Partner Goodman Derrick (individual)

Industrial Communities Alliance

Law Society of England and Wales and Law Society of Scotland

Local Government Association

National Council for Voluntary Organisations

National Farmers' Union

Office of Fair Trading – Jointly with the Competition Commission[2]

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[1] The consultation predated the merger between the Competition Commission and the OFT to form the CMA.

[2] Idem.

Ofcom

Producers Alliance for Cinema and Television

Royal Mail Group

Scotch Whisky Association

Scottish Government

Senior European Experts Group

Slaughter and May

Thurbin, Jeremy (individual)

Townley, Christopher (Dr), Kings College London

UK State Aid Law Association

University of Liverpool

Any references to MEPs reflect their status at the time of the Call for Evidence period.

Annex B: Engagement Events

Competition and State Aid Workshop – 12 November 2013 London

Attendees:

- BBC
- BBC Trust
- Bingham McCutchen (London) LLP
- British Venture Capital Organisation
- Confederation of British Industry
- Department for Communities & Local Government
- Freshfields
- General Motors
- Kings College London
- The Law Society
- Monckton Chambers
- National Council of Voluntary Organisations
- Northern Ireland Assembly
- Nissan
- Ofcom
- Office of Fair Trading
- Oxera
- Royal Mail
- Scottish Government
- Slaughter and May
- University of East Anglia
- University of Liverpool

Consumer Policy Workshop (attendees) – 25 November 2013 London

British Hospitality Association

British Vehicles Rental Leasing Association

Confederation of British Industries

Consumer Futures

International Air Transport Association

Law Society of England and Wales

Legal Services Consumer Panel

Office of Fair Trading

University of Liverpool

British Chamber of Commerce event: October 2013, Spain

Meeting with representatives from a local think tank and the Bulgarian Chamber of Commerce and Industry: December 2013, Sofia

Horizontal Interest Groups Workshop: 21 January 2014, London

Senior Experts Group event: 23 January 2014, London

Annex C: Other Sources

Balance of Competences Discussion Forum: Franco-British Chamber of Commerce & Industry: 11 December 2013: Paris.

HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Energy,* published in parallel.

Consumer Agenda BEUC (Bureau Européen des Unions de Consommateurs), *Note on the Commission Communication* (2012).

Bureau Européen des Unions de Consommateurs (BEUC), *Letter Sent to Commissioner Mimica – Stakeholder Dialogue on Enforcement* (2013).

Unfair Commercial Practices, European Commission's questionnaire on the application of Directive 2005/29/EC, BEUC's response, 2011.

Alison Jones, *Competence Review: Competition Law* (2014).

University of Liverpool, Competence Review Exercise: EU Consumer Law and Policy (2014).

Consumer Focus, *Response to the House of Lords European Union Sub-Committee G (Social Policy and Consumer Affairs) Inquiry into the European Union Commission's proposed Consumer Rights Directive* (2009).

Evidence received by the Social and Employment review team (Department for Business) on consumer policy issues from the Wine and Spirit Trade Association.

IFF Research on behalf of BIS, *UK Business Views of the Balance of Competences between the EU and the UK* (2014).

Reasoned Opinion of the House of Commons Concerning a Draft Regulation on a Common European Sales Law (2011).

Stephen Hyett, *State Aid – Balance of Competence Review* (2013).

UK Government, *Response to Call for Evidence on Alternative Dispute Resolution Directive* (2012).

UK Government, *Response to Call for Evidence on Timeshare Directive* (2010).

Which?, *Response to EU Consultation on Collective Redress* (2011).

Business for Britain website: businessforbritain.org/
And: forbritain.org/140113-the-british-option.pdf

Open Europe website: www.openeurope.org.uk/Page/SingleMarket/en/LIVE

Adam Smith Institute website: www.adamsmith.org/

Centre for European Reform website: www.cer.org.uk/

Fresh Start website: www.eufreshstart.org/