EEF the manufacturers' organisation – Written evidence (CMP0016)

1. EEF, the manufacturers’ organisation, is the voice of manufacturing in the UK, representing all aspects of the manufacturing sector. Representing some 20,000 members employing almost one million workers, EEF members operate in the UK, Europe and throughout the world in a dynamic and highly competitive environment.

GENERAL

What should competition policy in the UK set out to achieve? What guiding principles should shape the UK’s approach to competition policy after Brexit?

2. The question posed by the committee suggests that after Brexit the UK will have the freedom, alone, to set its own competition policy in isolation and determine the principles for this new policy. The reality of the position of the UK, post-Brexit, is currently undetermined, but it seems increasingly unlikely that the UK will not have the ability to act unilaterally.

3. In terms of the objectives to be achieved, businesses are unlikely to want to see any change in the current objectives to UK competition policy. Businesses do not want to see markets distorted but do wish to see practices or agreements that have an anti-competitive effect dealt with robustly. The extent to which the UK could, post-Brexit, fashion an independent policy will for many businesses depend upon the UK’s future trading relationship with the EU and other states which the UK hopes to strike future free trade agreements with.

4. Many UK manufacturers have an inherent interest in regulatory cooperation and regulatory convergence, and an inherent disinterest in having to comply with competing regulatory regimes. UK manufacturers then are accustomed to the current UK competition architecture, which is a reflection of EU law. They may not see it as EU law, but their compliance is based on EU law. Businesses are then unlikely to want to see any rapid change to objectives of EU competition law.

5. One area which the UK will need to give some consideration to is the context of competition policy. EU competition policy, in keeping with the general approach of all EU law, is founded upon certain principles which, post-Brexit, are unlikely to be accepted by the UK. For example, EU law is framed upon the establishment of a common union, a social market economy, promoting harmonious and balanced economic activity with high levels of employment, social protection and equality. The objective, in part of EU competition policy, is
the raising of living standards and economic and social cohesion amongst the member states. Cohesion represents the larger part of EU spending.

6. UK competition policy, post-Brexit, will need to re-examine whether the wider objectives of EU policy, briefly described above, remain appropriate. Business will want stability and certainty, but the fundamental premise of all EU - the promotion of cohesion and a social market economy - and unlikely in the long term to remain the basis of EU completion law.

ANTI-TRUST

Post-Brexit, to what extent should the UK seek to maintain consistency with the EU on the interpretation of antitrust law? What opportunities might greater freedom in antitrust enforcement afford the UK?

7. Manufacturers will need a large degree of regulatory certainty for a substantial period of time after Brexit. The backdrop to this inquiry is the European Union (Withdrawal) Bill. There are a variety of estimates of the extent of EU law that will come element of correction after Brexit, as highlighted in a number of research briefings provided by the House of Commons library.

8. It seems likely then that the task of converting EU law into UK law, with only those amendments needed to allow continued operability, will be substantial and require some considerable adaptation from business. This will be in addition to any changes in the UK trading relationship with the EU, which is likely to be the primary area of interest for UK businesses which rely on imports and exports from the EU. The UK’s longer term approach to anti-trust law is therefore unlikely to be their primary consideration, rather, in the context of considerable regulation upheaval and concern of the preservation of trade, the continuation of UK anti-trust law is likely to be the strong preference of UK manufacturers.

9. Many manufacturers are based in the UK and the EU. For them, regimes which offer different approaches are highly unlikely to be preferable. The prospects of such businesses deriving benefits from a different UK anti-trust approach which is sufficiently tangible as to outweigh the attendant increase in compliance burdens is slight.

Will Brexit impact the UK’s status as a jurisdiction of choice for antitrust private damages actions?

10. The question will largely be impacted by the approach which the UK takes to EU law and the Court of Justice of the European Union after Brexit. This is currently unclear. The EU (Withdrawal) Bill seeks to both repeal the 1972 European
Communities Act and preserve EU law, which is then to be termed EU derived law. With the platform set out in the EU (Withdrawal) Bill, it seems very unlikely that there will be any substantial organic change in UK competition law for some considerable time. Change will depend on new primary legislation and/or the view of the UK Supreme Court, which will still apply pre-Brexit EU law. The stability then of this approach is likely to make the UK an attractive jurisdiction in the future.

11. The complicating factor, however, is whether the UK will have the ability to proceed on the basis set out in the Bill. There is considerable uncertainty as to what the legal basis of the UK’s EU withdrawal will be. Whilst, eventually, this resolution is likely to be more helpful to position businesses and render the UK more, not less attractive, as jurisdiction (as it seems that, if anything, the UK will concede to the jurisdiction of the CJEU or an EFTA style Court during a transitional period), the lack of certainty of this will undermine the position of the UK in the meantime.

*Post-Brexit, what is the likelihood of UK authorities conducting parallel investigations with the European Commission or national competition authorities of EU Member States? What would the implications of this be?*

12. Whilst not a matter of particular concern for UK manufacturers, competition investigations are often based in more than one jurisdiction. Cooperation between regulators is essential and in the UK’s interest. Anti-competitive practices which span across Europe can only be effectively dealt with by an investigation which covers both the member states and the markets concerned, which, alone, the UK can undertake.

*Will it be necessary for the UK and EU to agree a transitional arrangement for antitrust enforcement after the UK’s withdrawal from the EU? If so, what transitional issues would such arrangements need to address?*

13. Transitional arrangements are essential for the UK after Brexit on a range of issues. Whilst the principle of adequate transitional arrangements now appears to be widely accepted in the UK, and something which businesses organisations have long called for, the area of cooperation by enforcement agencies is unclear. The stability of UK competition law, which we have commented on above, does not reflect the matter of its enforcement. EU derived competition law can be enforced by private individuals, the European Commission or national agencies. It seems likely that after Brexit, a new arrangement will be needed, as the EU (Withdrawal) Bill foresees an end to the role of the European Commission and for a re-assertion of UK competence, but the solution to the supra-national role of the Commission is unclear from the framework proposed by the UK. Equally problematic is the UK’s approach to the Court of Justice of the European Union as the UK’s rejection of any role of the CJEU after Brexit therefore excludes any straightforward form of enforcement.
14. The preferred approach of UK manufacturers, particularly those operating in the EU post-Brexit, will be one of consistency and uniformity, even if this requires that during the transitional period the UK retains the competence of the European Commission and the roles of the CJEU until the UK’s future relationship with the EU is settled. It seems very unlikely that competition policy could be addressed in a standalone way, and far more likely that the enforcement of UK competition law will be determined firstly by the terms of the UK’s withdrawal agreement and secondly by whatever free trade arrangement the UK enters into with the EU over the longer term.

**STATE AID**

*Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?*

15. It is almost inconceivable that some form of agreement over future state aid arrangement would not feature in a future trade agreement between the UK and the EU. The EU has systematically included state aid provision in all FTAs negotiated since 2006 (now around 40) and a UK-EU FTA is unlikely to be any different. Precisely what such arrangements will look like in practice is still subject to considerable uncertainty, provisions vary significantly between different FTAs, but it is likely to sit somewhere between mirroring/following EU guidelines on state aid on the one hand, and using the more flexible guidelines/rules that the WTO has established.

16. WTO rules on state aid are established in the WTO Agreement on Subsidies and Countervailing measures. Certain subsidies are outlawed completely and can be challenged by other WTO members, these include; export subsidies and import substitution subsidies. Other ‘actionable subsidies’, defined on the basis of their adverse effects on other WTO members, can be counteracted by the imposition of countervailing duties. Finally, there are what is known as ‘non-actionable’ subsidies which are permissible and these include: assistance to R&D, assistance to aid adaptation to new environmental standards and aid to disadvantaged regions. Importantly whilst there is a reporting obligation for new measures, the WTO does not need to approve measures exercising no ex ante control over members. A successful challenge against a state aid measure from another member can result in the requirement to withdraw the measures, but there is no requirement for beneficiaries to repay aid received to date. Many countries, such as Australia, rely exclusively on these guidelines with no recourse to further regulations or the establishment of a specific body to oversee/approve proposed state aid measures.
The EU state aid framework is more rigorous and regimented than that of the WTO and limits the movement of EU member states far more than those outside. Unlike the WTO, the EU starts from a point of view that all state aid is illegal (defined by four criteria, all of which must be met) accept for those specific categories (such as some forms of environment protection) that it provides block exemptions for. With the exception of those exemptions, the Commission must be notified of all state aid proposals and must approve them before they can come into operation. Where notification has not been made and the Commission finds state aid not to be compatible with the rules, it can force Members States to withdraw the measures and for recipients of that aid to pay back, with interest, any money wrongly received.

Without directly calling for any specific increase in the provision of state aid to industry in the UK post-Brexit, our preference would naturally be for the UK to operate a more flexible approach to state aid outside the jurisdiction/control/influence of the Commission. This would not only allow the UK a greater degree of flexibility to provide state aid, where appropriate and where economically sound reasons exist for doing so, but just as importantly it would allow the UK to move far more quickly and dexterously when called to do so.

The example of the UK’s experience in providing compensation/exemptions to energy intensive industry from the costs of renewable energy subsidies has shown that frustrations with the EU state aid framework are often with bureaucracy rather than the regulations/guidelines themselves. The UK government has actually chosen to take a more stringent approach to awarding compensation than the EU guidelines require, but the significant delays and frustrations have been caused by the overly pedantic and legalistic approach Commission officials have taken to considering applications based on a very specific reading of the guidelines rather than any rational concern for negative impacts on competition.

Where the UK’s state aid framework ends up between these two positions is of course subject to some uncertainty at present but there are some useful places we can look for clues:

- The European Commission has already made it clear that it intends for any future trade relationship with the UK to be one of equal terms. It’s “guidelines following the United Kingdom’s notification under Article 50 TEU” stated that “It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.” A strict reading of this could be that the EU would insist on the UK adopting its definition of state aid and
enacting it into law and perhaps even having the Commission as a statutory consultee in any future proposed state aid measures.

- Supporting this view would be the fact that bilateral trade arrangements between the EU and many countries (such as Switzerland, Turkey and South Africa) all mirror state aid provisions. Moreover, the EU-Singapore and the EU-Korea FTAs had specific chapters in them on competition and subsidies. The EU-Korea FTA required quite substantial changes to Korea’s state aid regime, including, greater transparency, and the removal of subsidies causing distortion to competition, before the FTA could be agreed.

- Closer to home the “Deep and Comprehensive Free Trade Agreement” between the UK and the Ukraine, established as part of the Ukraine’s position as a candidate country for EU membership, prohibited state aid measures which could affect trade between the EU and Ukraine, required the Ukraine to establish a domestic State Aid control system and operational independent authority to manage it, and required the Ukraine to align with EU acquis. Given the UK government’s desire (supported by business) to retain the current economic benefits of the single market, this model could provide some clues as to what the EU may ultimately be looking for from the UK with regards to state aid arrangements.

- Finally, the Comprehensive Economic Free Trade Agreement between the EU and Canada does provide some hope for a more light touch model. The CETA provisions require the EU and Canada to notify each other every two years in relation to the form, legal basis and level of certain forms of state aid measures. The EU and Canada are also required to provide information and respond to questions relating to particular instances of government support related to the trade in services where a party requests it. It contains a non-binding consultation mechanism, whereby parties must try to minimise adverse effects of the subsidy on the complaining party’s interests. Importantly, CETA does not, however, require the parties to implement domestic subsidy legislation or for subsidies to be pre-authorised in the way that they are under EU state aid law. Such a model for state aid alignment would be preferred by manufacturers.

- Finally, it is worth noting that additional flexibility on state aid for the UK would not necessarily lead to any greater level of such measures being used. The UK government has always been one of the strictest adherents to EU state aid guidelines, far more so than countries such as France and Germany. In 2015 the UK spent an estimated 0.35% of GDP on state aid schemes compared with 0.65% in France and 1.22% in Germany. Despite common ministerial protestation that their hands are tied by EU state aid requirements, there is also a strong element of the UK government’s unfavourable disposition towards state aid that limits the level at which it is used.
Will the UK require a domestic state aid authority after Brexit?

21. In theory there is no reason why the UK would need its own state aid authority after Brexit. Countries such as Canada and Australia have no need for them and if the UK were simply to rely on WTO rules it arguably would not need one either. The UK may want to establish state aid guidance of its own and use officials within BEIS to provide guidance to other departments on whether possible state aid was in line with such guidance, but there is certainly no strict need to go any further.

22. However, as noted above, ultimately it could come down to UK-EU negotiations on a future FTA. The EU has required that the Ukraine establish an authority as part of the EU-Ukraine FTA and it is conceivable that the UK may be required to also do so. EEF’s preference would be for a light touch approach that did not require the establishment of such a body.

What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK’s ability to support industries, or individual companies, through favourable tax arrangements?

23. Again, as noted in the answer to the first question, WTO rules on state aid are significantly less rigorous than those of the EU. In theory if the UK were to just rely on WTO guidelines it would have far more flexibility in the levels and forms of state aid it could provide to industries, and importantly it could enact measures far more quickly than currently where it must go through a lengthy and laborious process of notification with the EU Commission. For example, whilst the government has provided some forms of exemption/compensation to energy intensive industries to reduce the impact of renewable subsidies on industrial electricity bills, it has been severely limited in both the level of support it can provide and which industrial sectors it can provide it to. WTO rules would not be an issue at all if the UK wished to go further in this regard.

24. Moreover, the UK would have far more flexibility, if it wished, on public procurement rules. For example, in June the New York State Assembly passed legislation to mandate the use of American steel in major public infrastructure projects. Specifically, the legislation, entitled the “New York Buy American Act” requires that contracts over $1 million awarded for the construction/upgrade/repair of any roads or bridges must contain a provision that the steel used shall be produced (or substantial part of) in the United States. Such legislation would be entirely incompatible with EU state aid.

25. However, we must again note that the ultimate restriction on the use of state is more likely to be the UK government’s lack of desire to use it as a tool.
How will the Government’s industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission’s state aid policy limited interventions that the UK Government may have otherwise pursued?

26. It is difficult to see anything in the government’s current industrial strategy that is limited by state aid; the UK government does not show a strong desire to implement measures that are currently prohibited by state aid guidelines and it seems unlikely that should more flexibility be provided outside of the EU that it would use it to any great degree.

Will it be necessary for the UK and EU to agree a transitional arrangement for state aid matters after the UK’s withdrawal from the EU? If so, what transitional issues would such an arrangement need to address

27. Given the high degree of uncertainty about what the UK state aid framework would look like as part of a UK-EU, it makes little sense for the UK to deviate from EU requirements on state aid during any transition period if the ultimate requirement of an FTA were to ensure continued alignment with EU guidelines. If the transition arrangement was for the UK to remain part of the single market (EEA) then there are straight requirements on state aid set out in the Agreement on the EEA.

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