

Review of the Balance of Competences between the United Kingdom and the European Union: Competition & Consumer Policy

Submission by the Senior European Experts Group

Background

The Senior European Experts group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, a former Secretary-General of the European Commission and other former officials of the institutions of the EU. A list of members of the group appears in the Annex.

SEE has no party political affiliation. As an independent group, it makes briefing papers on contemporary European and EU topics available to a number of organisations interested in European issues, drawing on the extensive knowledge and experience of its members.

Several members of the group have particular expertise in competition and consumer policy issues having worked for or as the UK Representative to the EU or in the Commission or a relevant British Government department.

Questions

Impact on the national interest

1. What evidence is there that EU action in the area of Competition, including State Aid, and Consumer policy advantages the UK?

EU action in the field of competition, including state aids, has been one of the EU's biggest success stories, as has the merger regulation. The competition provisions in the Treaty of Rome have enabled a more open, more efficient EU economy to emerge with a downward pressure on prices that rewards innovation and creates jobs. For the UK, the EU's action on competition has been overwhelmingly to our benefit. EU action on competition has opened up markets for UK companies, brought an end in many sectors to state subsidies and state monopolies that gave rival businesses an unfair advantage against British ones, and given a continent-wide reach to competition policy that the UK could not have achieved on its own.

An important aspect of the EU's involvement in competition policy has been the way in which it has led to, first the acceptance of the need for competition policy in several Member States where that principle was still disputed when the Treaty of Rome was signed, and second it has mutually reinforced the development of national competition laws along similar lines to EU competition law.¹

Treaty provision on EU action in consumer protection has been more recent (the 1992 Maastricht Treaty made consumer protection an EU policy area) and on a smaller scale

¹ *The Future of EU Competition Policy*, Edward Bannerman, Centre for European Reform, 2002, p.6.

but it too has benefited the United Kingdom. EU action to protect consumers supports the Single Market by enhancing consumer confidence when purchasing goods or services across borders and provides protection against unfair practices. This is of growing importance in the context of developing online retailing. It enables the EU to provide consumers with protection against problems that cannot easily be dealt with by one Member State alone with national legislation; the Package Travel Directive 1990 is a good example.²

The inter-relationship with the Single Market is central to the value of competition and consumer policy. Having a robust competition policy which protects the consumer (who is often another business and not a private individual) from higher prices as a result of cartels and monopolies, and which reduces the market-distorting consequences of state aids, contributes significantly to creating a true EU Single Market in which the four freedoms (goods, services, persons and capital) are made real.

There is an increasingly international aspect to competition policy because of the growth of a small number of very powerful global companies who have rapidly achieved a commanding position in their sector. Taking on such businesses is not easy for a single Member State, not least because of the potential costs of legal proceedings, but also because of the ability of global companies to play off one country against another (as arguably the taxation issue with large multinationals has shown). It is invaluable to have the European Commission addressing competition issues involving large multinational companies; DG Competition has developed considerable expertise in this field and has proved effective at tackling some of the largest companies. At the end of 2012, for example, the Commission fined producers of TV and computer monitor tubes €1.47 billion for two decade-long cartels.³

In terms of State Aids, the EU has pioneered the removal of market-distorting state aids and the opening up of markets to competition. This has brought about a revolution in some sectors, for example civil aviation, where loss-making state-owned airlines for many years kept out competition through a combination of subsidies covering their losses and state control of fares and routes for all airlines. The opening up of the civil aviation sector has been of great benefit to all types of consumer with greater choice and lower prices. Many other sectors, from steel-making to shipbuilding, have benefited as pressure from the European Commission has forced EU Member States to reduce support for uncompetitive enterprises. Since 1992 the percentage of EU GDP spent on State Aids has declined from almost one per cent to one half of one per cent by 2011.⁴ However, the global financial crisis brought new pressures in the opposite direction as governments across the EU found themselves obliged to bail out financial institutions in order to avoid collapse. Dismantling these arrangements and recovering the emergency loans will take many years (including in the UK).

² 90/314/EEC

³ http://europa.eu/rapid/press-release_IP-12-1317_en.htm

⁴ http://ec.europa.eu/competition/state_aid/studies_reports/ws2_4.xls

Several pieces of consumer legislation have been of great benefit to the UK. They include the regulations covering various aspects of the sale of goods such as price marking, misleading advertising, product liability (i.e. liability for defective goods), packaging and labelling of dangerous goods and toy safety. In addition, other regulations relating to distance selling (most recently of financial services), unfair trading, package holiday travel and denied boarding by airlines (which also covers compensation for cancellation and delay) have benefited British consumers.

2. What evidence is there that EU action in these areas disadvantages the UK?

There is no evidence that we could identify which shows EU action over competition and consumer policy as having disadvantaged the UK. Clearly the existence of EU competition and State Aid rules are a factor that can constrain the Government's policy choices. However, in cases such as the Royal Mail privatisation and the rescue of Lloyds Bank, the Commission has worked hard to find solutions which have enabled Government policy to be achieved whilst also imposing requirements to safeguard competition and consumers.

Competition rules now affect public bodies and much public procurement in the UK because of the growth of outsourcing in public services. For example, the NHS Confederation has issued guidance on the effect of EU competition law on the health service.⁵ Decisions on regional policy and on State Aid to companies are influenced by EU rules and the possibility of challenge from the Commission on distortion of competition grounds. But we regard that as on balance beneficial – the same laws after all apply to the other 27 Member States and British businesses operating elsewhere in the EU would be disadvantaged if the EU did not have the power to intervene. The Commission has shown itself flexible, where appropriate, in the application of the rules. In 2013, for example, it decided to exclude a reference to nuclear power from some energy-specific guidelines after concerns, not least in the UK, that it might be preparing to bear down on public support for nuclear power.

It has been suggested that EU competition law can work to the disadvantage of digital and other innovative companies, including pharmaceutical companies, who often acquire a dominant position in the market because they have created an entirely new product.⁶ The Commission's policies towards pharmaceutical companies have been the subject of intense debate, not least because the highly regulated nature of the sector across the industrialized world creates unique challenges. But we do not believe that these issues, or other suggestions of an adverse impact of competition policy on highly innovative sectors, raise issues of *competence* but they may of course raise issues of *policy*.

The inter-action of the State Aid rules and the global financial crisis has created considerable difficulties as Member States seek to return banks rescued by the taxpayer to the private sector. It would be prudent for the Commission in due course to establish a

⁵ http://www.nhsconfed.org/Publications/Documents/Euro_Briefing_4_final.pdf

⁶ *Is EU competition policy and obstacle to innovation and growth?* Simon Tilford, Centre for European Reform, November 2008: <http://www.insme.org/files/3761>

thorough review of the crisis and how the State Aid rules operated in this sector and in this particular set of circumstances to learn lessons for the future.

3. Are there any other impacts of EU action in these areas that should be noted?

EU competition and State Aid rules have a broader impact on global trade and the promotion of open markets. International businesses who wish to operate in the EU must comply with EU rules; as we have seen with cases involving US-based global companies, most famously Microsoft, the impact on businesses headquartered outside the EU can be considerable. There is also an impact on non-EU European states; Iceland, Norway and Lichtenstein are bound by EU competition rules through the 1993 European Economic Area Agreement. Switzerland adopted a competition law in recent years closer in some respects to the EU model.⁷ The EU and Switzerland signed a Co-operation Agreement in Competition Matters in May 2013, enabling the exchange of information and mutual requesting of action against anti-competitive behaviour.⁸ This agreement went further than the competition agreements already signed with Canada, Japan, Korea and the United States. We regard these developments as beneficial from the UK point of view.

The level and sophistication of action is such that there is now a network of EU competition authorities who exchange information with one another, strengthening the system as a whole.

4. To what extent is EU action in these areas necessary for the operation of the single market?

The competition provisions in the Treaty on the Functioning of the European Union explicitly put the EU's action in this area in the context of the internal market. Effective competition laws have increasingly been seen in the industrialised world as essential to the smooth functioning of markets. Without such regulatory systems cartels can quickly emerge, choice is reduced, prices rise and innovation is suppressed. As the European Commission's annual report on competition in 2012 put it:

“Without an effective EU competition policy, the Single Market cannot reach its full potential. There would be nothing to prevent private barriers to trade and competition from replacing the public barriers that free movement rules have dismantled over more than half a century”.⁹

The distorting effects of State Aids in Europe were very visible until only a few years ago; tackling the worst excesses of State Aids was a crucial element in establishing the Single Market. Were the EU to scrap its State Aid rules or were they to be repatriated to Member States there would undoubtedly be a temptation to return to the granting of inappropriate public subsidies and talk once again of “national champions” that should be protected against the harsh winds of competition. It would not be in the UK's interest to see such a situation return anywhere in Europe.

⁷ <http://www.oecd.org/competition/36386974.pdf>

⁸ http://www.europa.eu/rapid/press.release_IP-13-444_en.pdf

⁹ http://ec.europa.eu/competition/publications/annual_report/2012/part1_en.pdf p.2

A single framework for competition, mergers and consumer policy gives a high degree of certainty to businesses operating in the Single Market.

The drafters of the original provisions in the Treaty of Rome were probably influenced by the pre-existing West German law against cartels and market dominance whose purpose was partly political as well as economic.¹⁰ The West German law was designed to prevent a concentration of economic (and thus political) power in the hands of a small number of companies and/or individuals because this absence of competition had been a feature of the Nazi era. An absence of competition is therefore seen to be against the welfare as well as against the economic interests of the citizen. The relevance of these considerations to countries that had been governed by authoritarian regimes and who later joined the EU is obvious.

5. How does the EU's competence in these areas impact upon the UK's global competitiveness?

EU action in the field of competition and consumer policy has helped to create a more robust UK economy based on open markets and the rule of law. This has made the UK economically fitter and better able to compete internationally.

As a highly popular destination for foreign direct investment, the fact that the UK operates under the same competition and (largely) consumer policy framework as the rest of the Single Market enhances our attractiveness as an investment destination. Foreign investors are likely to be highly aware of the EU competition framework and the fact that it operates across 30 European countries including the UK; and they know that compliance is largely a question of following a single set of rules.

Good compliance with EU competition and consumer law can assist British companies who trade outside the Single Market. National laws on competition have become more similar in recent years as countries adopt OECD standards on competition. A 2002 survey of competition laws found over 90 countries had adopted such legislation, over half of them in the previous 15 years.¹¹ The author referred to the fact that many of the recent adopters of competition laws were in Central and Eastern Europe; it was of course necessary for them to do so in order to be eligible for EU membership. UK businesses now have experience of national and EU competition policy and practice which strengthen their ability to comply with similar legislation outside the European Economic Area.

The extra reach derived from the EU's competition agreements with five non-EEA countries, including large markets such as the USA, Japan and Canada, are an additional benefit to British business (albeit that some of these agreements are quite limited in their scope).

¹⁰ Referred to in Tilford, op cit, p.2.

¹¹ *The Economic Effects of Competition Policy – Cross-Country Evidence Using Four New Indicators*, Stefan Voigt, University of Kassel, pp.10 and graph, p.33:
<http://www.isnie.org/ISNIE06/Papers06/09.3/voigt.pdf>

Scope and effect of particular powers

6. How have the EU's mechanisms for delivering a single market worked in these areas of competences?

We have no additional information to add to our answers above.

Differences in implementation

7. To what extent has the EU created more or less consumer protection provisions for UK consumers compared to the UK's domestic agenda? What are the effects of this?

The Consumer Rights Directive aims to balance the benefits to consumers and businesses of harmonising many consumer protection rules whilst also permitting Member States to retain high protection in specific areas such as the UK consumer's extended right to return faulty goods and get his money back.

Some EU legislation provides greater protection than UK legislation. For example, EU passenger rights for train, plane and coach passengers go beyond anything provided for in UK law and are of great benefit to the many British people travelling in Europe. Similarly, EU roaming charges regulations have benefited many UK consumers as they travel in the EU.

8. To what extent is the UK more or less rigorous in enforcing its consumer and/or competition, including State Aid, rules compared to other Member States? What are the effects of this?

The decision of the EU to decentralise much of the enforcement of EU competition policy from May 2004 could have raised concern about considerable diversity in enforcement practice across the Member States and the associated countries. This is not surprising given the wide variations in national law and practice and even the absence, in some Member States at that time, of a national competition authority within the meaning of EU law.

A survey of national competition authorities in November 2008 however found that the UK was joint sixth in a league table of the notifications made to the Commission of intention to act under EU law. France had more than three times as many notifications as the UK and Germany more than double.¹² More recent figures show the UK as having notified the Commission of fewer anti-trust cases from 2004 to September 2013 than France, Germany, Italy, Spain and the Netherlands.¹³ This does not suggest the UK has been more rigorous than other Member States.

There have been claims in this field of EU activity that the UK is applying EU law, particularly in relation to State Aid, with greater zeal. For example:

- In 2005 British Agricultural Marketing accused Defra of being overzealous in its enforcement of the State Aid rules. The Board claimed that the French Government was actively promoting home grown food in French schools and

¹² *European and National Enforcement of EU Competition Law: Sharing the Sovereignty?* Robert Lane, University of Edinburgh: http://www.jean-monnet-coe.keio.ac.jp/workingpapers/robert_lane_01.pdf

¹³ <http://ec.europa.eu/competition/ecn/statistics.html>

supporting the country's wine industry with a €90 million a year grant while Defra was taking up to 18 months to approve any British project potentially involving State Aid rules. Defra's response was that it operated within the State Aid rules and that France had a longer history of regional branding of agricultural products.¹⁴

- The Scottish Parliament's Local Government & Regeneration Committee is currently looking at regeneration in Scotland and has received evidence claiming that community groups are adversely affected by Scottish Executive officials' application of State Aid rules.¹⁵ It remains to be seen if the Committee will reach the same conclusion.
- Research published by Civitas in March 2013 claimed to show that the UK Government does not pursue a range of policies to support British industry that other Member States have adopted to boost their home industries. These include a range of measures that clearly constitute State Aids but some of those cited are in fact similar to those used in the United Kingdom (such as the German Government's support for exporters) and others are arguably not covered by EU rules anyway (such as the Swedish law on arms manufacture).¹⁶
- The UK Government's application of public procurement rules in June 2013 informed a decision to purchase new Thameslink rolling stock from Siemens and not Bombardier, provoking anger over the consequent redundancies in Derby, and claims that the French or Germans would never deny such a contract to their home industry. But the case is not so clear cut: Bombardier is Canadian owned and Siemens argues that the up to 2,000 jobs will be created in the UK as a result of them being awarded the contract.¹⁷ Defining what is or is not a "British" company has become more complex as a result of the growth of foreign direct investment. Bombardier and Siemens have both been operating within the UK for many years; their investments have created jobs, directly and indirectly, and contributed to UK GDP growth and the public exchequer.

As a matter of policy, the Business Department should keep the implementation of EU competition and consumer policy in the UK under regular review. Part of that process should identify how other Member States implement these policies so that Ministers can make informed decisions about UK implementation.

¹⁴ <http://www.fwi.co.uk/articles/11/02/2005/21103/39over-zealous39-defra-undermines-uk-food.htm>

¹⁵ <http://www.localpeopleleading.co.uk/upload/State%20Aid%20-%20paper%20to%20LGR%20Comm%20jh.doc>

¹⁶ *Gamekeeper or poacher? Britain and the application of State aid and procurement policy in the European Union*, Glyn Gaskarth, Civitas, March 2013, p.5.

¹⁷ Department of Transport press release, 27.06.13:

<https://www.gov.uk/government/news/siemens-thameslink-deal-to-create-up-to-2000-new-jobs>

Future options and challenges

9. How might the UK benefit from the EU taking more action in these areas?

The UK is going through a period of change in both competition and consumer law. From 1 April 2014 the new Competition & Markets Authority will combine the present Office of Fair Trading and the Competition Commission into a single entity. This is a major development and it will need time to establish itself. The proposed Consumer Rights Bill in the UK, currently undergoing pre-legislative scrutiny, is intended to modernise Britain's rather dated consumer laws. In addition to these two changes, the EU's Consumer Rights Directive 2011 is being implemented by Member States in 2013.

These developments suggest that from a national perspective a period of consolidation might well be in order once these various changes have been implemented. In relation to consumer rights in crossborder trading, the European Commission has plans to act because of the current low level of crossborder e-commerce in the EU. Completing the Digital Single Market is very much a UK Government objective so changes in this field might well be welcome.

This need not imply the EU gaining greater competence in this field; there is no obvious reason why that would be necessary at the present time. The most important issue is consistency of enforcement across the Member States. The European Competition Network can help with that but ultimately it requires the Commission, notwithstanding the 2004 delegation of many functions to national competition authorities, to be prepared to step in if necessary.

10. How might the UK benefit from the EU taking less action in these areas, or from more action being taken at the national rather than EU level?

We have not identified any areas where the EU taking less action in these areas would be beneficial to the UK and there are many where it would be detrimental.

11. How could action in these areas be undertaken differently e.g.

- *Are there ways of improving EU legislation in these areas, e.g. revision of existing legislation, better ways of developing future proposals, or greater adherence to the principle of subsidiarity and proportionality?*
- *Are there ways the EU could use its existing competence in these areas differently which would deliver more in the national interest?*

As said in answer to question 9, even more rigorous enforcement of the rules by Member States and by the Commission would be in the UK's interests.

12. What future challenge/opportunities might we face in these areas of competence and what impact might these have on the national interest?

Since the first conference of the World Trade Organisation in 1996 competition has been on the global trade agenda. The stalled Doha world trade round and the shift towards bilateral or regional agreements as a result mean that the WTO's long-term involvement in competition questions remains uncertain. However, the Transatlantic Trade & Investment Partnership talks between the EU and the USA will undoubtedly cover a whole raft of contentious competition and State Aid issues (financial support for large

aircraft development is one obvious example). No doubt other potential free trade agreements involving the EU and third countries will raise competition and consumer policy questions. The UK will need to continue to monitor such developments through the official-level committee on EU trade talks and ensure that any national concerns are raised during discussions about the mandate.

General

13. Are there any general points you wish to make which are not captured above?
No.

03.12.13