

Review of the Balance of Competences – Consumer and Competition Policy Report.

Minute of meeting attended by stakeholders to discuss consumer policy 25 November 2013

The following views were expressed by meeting attendees

Context

- This discussion has to be seen in context of the Review of the Consumer Protection Cooperation Regulation
- Consumer policy driven by EU which can be eccentric
- UK has not had its own consumer policy since the 1970s.
- Without EU consumer law there would be less consumer protection and it would be less comprehensive.

Single Market

- Current low levels of cross border trade the result of other factors such as distances, different languages and culture.
- Interest of consumers is at the heart of the single market, as without consumer confidence, fostered by high level of consumer protection, it can't work. And consumer confidence derives from a harmonisation of the rules.
- Still some formal barriers for example ebay redirects you to national websites and UK consumers can't get on some ebook websites in other Member States.
- People tend not to invest in learning the differences between consumer laws
- Single market can be said to work well when the high cost of mobile phone roaming is sorted.
- EU speeds up process of harmonisation
- The law is broadly harmonised; don't suppose this would have come about without EU. The US has not got harmonised consumer law but uses litigation instead. This involves a different philosophy and has a higher cost. As an example, the EU system of unfair contract terms is better than the US.

- Single Market treaty 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. Article 169 sets the minimum standard to promote the interests of consumers and to ensure a high level of consumer protection. 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.

Overall impact

- Single consumer policy helps cross border trade by reducing the cost of navigating consumer law.
- Consumers are more confident as a result.
- It reduces the burden on business as legal differences are costly. The cost to business of different laws is particularly felt by small businesses.
- EU competence as it exists creates uncertainty for businesses as is another factor for them to consider (as well as applicable domestic law)
- Regulations do not have longevity – constant review by the EU creates lack of consistency to which businesses must constantly adapt – making future planning difficult. Therefore some argument for the EU to have sole competence – i.e. just one set of rules for businesses to consider
- One rule is much simpler both for companies based in multiple locations and for those trading into Europe
- Businesses are also consumers so also benefits in the same ways consumers do.
- Single EU consumer policy helps the UK get a lot of investment.
- Harmonisation is better but involves countries giving up things they prefer. The EU creates uniform minimum standards. Consumers cannot be relied upon to read the Ts and Cs therefore minimum standards (e.g. of contract terms) are necessary.
- Harmonisation can lock in bad law for the EU 28.
- Where countries have different priorities or characteristics the law should be different for example some countries have more sales online and laws should take this into account.
- Are laws actually what encourage people to buy across border?

- There are other barriers to cross border selling/buying which can be more important, but would be worse without EU law. Is negative integration enough or do we need positive integration.
- Being part of EU allows us to negotiate as equals rather than receiving the result as a *fait accompli*.
- If there was more of a mindset of subsidiarity there would be less need for sweeping legislative change – issues could be resolved through toolboxes or responsibilities could be entrusted to Member States.

Enforcement

- CPC regulation requires Member States to have national enforcement bodies. Prior to this there was a problem of where UK enforcers should go to resolve a scam in another Member State, for example with Dutch scams. This is still a problem elsewhere in the world for example trying to resolve issues in India.
- There are different standards of enforcement bodies and so there is still scope for enforcement shopping.
- One option on enforcement is to have the Commission directly enforce, but this might slow things down considerably. EU-directing enforcement priorities would be difficult – how would you identify which (MS) consumers are most in need? Priorities not always going to be the same in every MS
- There are issues of enforcement where Directives are not adequately implemented, as there is no horizontal direct effect. More could be done through Regulations? Could be argued that EU should have sole competence for consumer protection.
- Enforcement is much more relevant to the domestic / national context
- The Commission could set down a minimum level of resource at national level and direct Member States to enforce. They could also make resource available for cross-border enforcement.
- Individual enforcement makes EU laws more accessible to people in the member states
- There is a question around how consumers can navigate enforcement bodies.
- Citizens Advice helps as does the European Consumer Centre. But can consumers be bothered and there are still language barriers.

- EU-level action in enforcement has helped – there is greater ability for enforcement agencies to act across borders however, improvements are needed. Commission could make co-operation between national enforcement bodies easier, for example funding cross border enforcement or improve information and evidence sharing.
- UK agencies are very well resourced compared to those of other Member States. Enforcement issues are largely due to money and resource pressures. More EU-level enforcement could see sharing of resources in tough economic times
- Apple case highlighted issue that infringement action (re warranty sales) in one country did not mean said unlawful activity by Apple was prevented in other MS because although big trusted brands have a presence in many countries the consumer is not generally shopping across border. Coordinated enforcement action across EU was more effective.

Process

- Laws at EU level can be poorly drafted for example the Consumer Credit Directive compared to the better drafted UK Consumer Credit Act. This is because directives are briefer focusing on the desired end point - i.e. the legislation is done at a high level. Also the EU doesn't use professional drafters relying on generalist civil servants instead. This comes about partially as a result of the intrinsic problem of disagreements over what is meant.
- Commission research forming the justifications for action is often flawed and not robust enough. There can be a gap between proposed legislation and the problem they are trying to address, resulting in non-answers to non-problems – legislation based on anecdote.
- Member States then copy EU laws rather than ensuring a well drafted conversion. This is because why redo what has already been done at the EU level and concerns over gold plating. Also only the ECJ can arbitrate on whether the law complies with the directive.
- The Commission is not always joined up for example between infrastructure and consumer areas. Sometimes it is unclear whether the impacts of laws in one area for example e-communication take into account case law in others for example unfair contract terms.
- Horse-trading means it is hard to understand why particular parts of laws have been accepted. As the process is opaque it is hard to know whether something has been overlooked or is part of a wider deal.
- Directives are implemented differently for example “basic rate” means something different in different EU countries. There is also different

enforcement. However the differences are smaller as a result of EU consumer policy.

- 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.
- Everything has to go through the ECJ and this slows things down. This will be a particular problem if this is the case for the Common European Sales Law
- EU law-making process can be lengthy, and there is a lack of certainty for business on how to prepare. It is easier to judge how long legislation will take in the UK and it is less political.

Other Issues

- The UK doesn't intervene as much as other countries due to resource issues. This can be a problem for example there is a risk that the ECJ will overturn parts of the unfair contract terms legislation but the UK is not intervening.
- Subsidiarity doesn't seem to always be followed for example instead of CESL could have national consumer law hubs (like the sale of goods act and distant selling hubs).
- How to ensure greater adherence to the principal of subsidiarity and proportionality? – Lobby! Bring challenges on validity and subsidiarity direct to the European Parliament
- Air passenger rights legislation has been done badly and not always proportionate to actual prevalence of a problem (e.g. delayed boarding). The Commission is less good at listening to stakeholders. For example a proposed rule to put all the cost of delay on the first carrier. The legislation for this is rushed.
- No frills carriers don't compensate and so are cheap. Some in the EU want more compensation for delays, but without going into more detail they risk making the situation worse.
- There was disagreement about whether to proactively improve market or wait for market to correct itself.

Future issues

- Future challenges will come through further EU expansion: Serbia, Turkey, Macedonia all seeking to join. Ultimately depends on what type of Europe we want.
- There should be more emphasis on complete systems of consumer law.
- The Commission could do more on consumer education.
- There are some discrete areas where integration could be improved for example comparison websites and parcel delivery.
- UK should be more involved in EU negotiations and drafting as should enforcers. The UK process for consulting on EU proposals is well meant but needs to get into more detail. There is not much consultation in some other countries.
- Could increase use of optionality, but are consumers informed enough to make this work.
- E-commerce Regulation is an opportunity; particularly if it decreases roaming costs.