



Department
for Business
Innovation & Skills

*Review of the
Balance of Competences*

**GOVERNMENT REVIEW OF THE
BALANCE OF COMPETENCES
BETWEEN THE UNITED KINGDOM
AND THE EUROPEAN UNION**

**Call for evidence: Competition
and Consumer Policy Review**

OCTOBER 2013

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Call for evidence

On the Government's Review of the Balance of Competences between the United Kingdom and the European Union

Competition and Consumer Policy Review

Closing date: 13 January 2014

Introduction

1. The Foreign Secretary launched the Balance of Competences Review in Parliament on 12 July 2012. This takes forward the Coalition commitment to examine the balance of competences between the UK and the European Union. The review will provide an analysis of what the UK's membership of the EU means for the UK national interest. It will not be tasked with producing specific recommendations, and will not prejudge future policy or look at alternative models for Britain's overall relationship with the EU. 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.

2. The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by the Government, but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners, and the EU institutions, are also invited to contribute. The process will be comprehensive, evidence-based and analytical. The progress of the review will be transparent, including in respect of the contributions submitted to it.

Scope of report

3. This report covers Competition and Consumer policy including State Aids. UK competition and consumer policies share the same goal; to help markets work well for consumers and legitimate enterprises. Consumer policy empowers consumers (by giving and informing them of their rights) 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. As a result strong competition between firms generates more choice for consumers. While competition policy promotes competition between suppliers, consumer policy covers the protections given to consumers when purchasing a product or a service. Rules on State Aid are a subset of competition rules to prevent market distortions as a result of government support. This review covers all State Aids granted under the general State Aid rules i.e. it only excludes those granted under sector specific rules in transport and agriculture. The general rules cover areas from financial State Aid to State Aid in support of broadband, and aid in

respect of those public services that are provided in a market which are covered as Services of General Economic Interest (SGEI).

4. This report will not cover:

- procurement policy (covered in The Single Market: Free Movement of Services report - semester 3)
- transport State Aid rules (covered in the Transport report - semester 2)
- agriculture State Aid rules (covered in the Agriculture report - semester 3)
- areas such as product safety (covered in the Free Movement of Goods report – semester 2).

5. 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 review. Sectoral economic regulation will be covered in the relevant sector specific review; for example the regulation of the energy sector will be covered in the energy review.

Full details of the programme as a whole can be found on the FCO website, via www.fco.gov.uk/en/global-issues/european-union/balance-of-competences-review/

What is competence?

6. For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the EU Treaties give the EU competence to act, including the provisions giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other action. But it also means examining areas where the EU Treaties apply directly to the Member States, without needing any further action by the EU institutions (European Commission, European Parliament and European Council).

7. The EU's competences (ie, its powers) are set out in the EU Treaties. These provide the basis for any actions the EU institutions can take. The EU can only act within the limits of the competences conferred on it by the Treaties. Where the Treaties do not confer competences on the EU, they remain with the Member States.

Types of competence

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.

8. 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 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.

A brief history of the EU Treaties

The Treaty on the European Economic Community (EEC) was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. The EEC Treaty had a number of economic objectives including; establishing a European common market as well as provisions on competition policy and government aid to business (State Aids). Since 1957 a series of Treaties has extended the objectives of what is now the European Union beyond the economic sphere. The amending Treaties (with the dates on which they came into force) are: the Single European Act (1 July 1987), which provided for the completion of the single market by 1992; the Treaty on European Union – the Maastricht Treaty (1 November 1993), which covered matters such as consumer protection, justice and home affairs, foreign and security policy, and economic and monetary union; and the Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

Following these changes, there are now two main Treaties which together set out the competences of the European Union:

- The Treaty on European Union (TEU);
- The Treaty on the Functioning of the European Union (TFEU).

Competition policy

Competition policy and the EU

9. Through competition policy, governments aim to ensure that society benefits as far as possible from vigorous competition between firms. Strong competition can benefit consumers through lower prices, better quality and more choice as firms vie for their business. There are wider economic benefits too as competition puts pressure on firms to be efficient or else lose ground to rivals, and provides a strong incentive for firms to innovate. Government intervention is necessary to ensure that this competitive process is not undermined or distorted by anti-competitive behaviour by firms. For example, without a framework of competition law, a group of firms might have an incentive to fix prices rather than competing, leading to higher prices for consumers. Similarly, large firms with significant market power might have an incentive to behave in a way which prevents potential competitors from entering the market.

10. Competition rules have been a part of European law since the inception of the European Economic Community (EEC) and the core articles 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 as well as ensuring strong competition between firms across the EU as described above, to the benefit of consumers and the wider economy.

11. Both the UK Government and the European Commission believe 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, supported by the UK, has been at the forefront of these trends.

12. More specifically in the EU context, the competition rules have also played an important role in helping to establish a single market. This is based on the recognition that 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). Partially with this single market imperative in mind, the Commission has been given strong investigatory and fining powers through the Treaty on the Functioning of the European Union and Council Regulation to enforce competition rules within the EU.

Consten and Grundig

German electronics manufacturer Grundig granted an exclusive right to sell their products in France to a French firm Consten. The agreement also gave Consten and gave the French firm absolute territorial protection and prevented it 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)).

Current balance of competence

13. Competition rules necessary for the functioning of the single market fall within the exclusive competence of the EU. This is clearly stated in Article 3(1)(b) of the Treaty on the Functioning of the European Union (TFEU). More detail on these rules is given in Articles 101-106.

14. There are two central competition rules - Article 101, which broadly prohibits agreements that restrict competition (with some exceptions), and Article 102, which broadly prohibits dominant firms from abusing their dominant position. These are explained below:

- Article 101 - A ban on agreements that restrict competition: This is a prohibition on all agreements and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, (although as set out below there are some exceptions). This rule prohibits firms from colluding to the disadvantage of consumers, for example through establishing price fixing or market sharing cartels (see car glass cartel box). The legality of commercial agreements between firms, for example distribution agreements, is also decided by reference to Article 101. National competition rules must not allow agreements that EU law bans or ban agreements that EU law allows.

Exemptions to Article 101:

- Where agreements or practices satisfy certain conditions (specified in Article 101(3)) they will be exempt from the prohibition detailed above. This allows agreements that benefit consumers by, for example, improving distribution or innovation. For example, an agreement between two producers to cooperate to develop a product would be exempt if the product would not otherwise be developed (for example if neither firm individually could devote the resources necessary). The exemption operates in two ways. Firstly, the agreement might benefit from one of a number of Commission's pre-approved types of agreements (referred to as block exemptions). These protect agreements such as some vertical agreements and those between very small firms. If a block exemption does not apply, the undertaking must self-assess whether their activity satisfies each condition detailed in Article 101(3). Only the European Council has the authority to issue block exemptions; this authority is often delegated to the Commission.

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. The cartelists were fined over €1.3bn; Saint Gobain alone was fined €880m, which included an uplift of 60% increase because of its previous involvement in cartels.

- Article 102 - A prohibition on dominant firms abusing their position: This precludes firms that dominate a market from abusing that position, by for example charging unfair prices, by limiting production, or by refusing to supply competitors to the prejudice of consumers. This rule is designed to stop firms that do not have strong competitors from taking advantage of their position to the disadvantage of consumers. This disadvantage can be either direct, for example through high prices (exploitative behaviour), or indirect, for example through stopping future competitors from emerging (exclusionary behaviour).

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 co-operate 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 anticompetitive practice Intel engaged in was to pay computer manufacturers HP, Acer and Lenovo to stop or delay the launch of specific products containing rival's chips. Intel's behaviour diminished competitors' ability to compete. The Commission fined Intel €1.06bn and ordered Intel to stop the above practices.

15. Both Articles 101 and 102 apply where there is an actual or potential and direct or indirect effect on trade between Member States. If there is such an effect only the EU has the power to act independently. Where there are no cross national implications the EU cannot act to deal with the infringement of competition rules. This test is important as it defines the boundaries between EU and national competition law. As the conduct of firms frequently has an ability to affect trade between Member States and so European competition law often applies. EU law is least likely to apply in small localised markets for example there have been cases under UK law involving bus services in Cardiff and involving local newspapers in Aberdeen.

16. Articles 101 and 102 are enforced by the Commission national competition authorities and national courts (see paragraph 18). The Commission has broad powers to assist it in the investigation of possible breaches of these 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.

17. Where firms breach these rules there can be serious consequences, including potential fines of up to 10% of worldwide turnover. Since 2010, the Commission has imposed fines for cartel infringements totalling €5.5bn. This includes fines of €1.5bn for firms producing cathode ray tubes, a key component of TV and computer monitors. Both Intel and Microsoft have been fined over a billion euros for abuse of dominance (see Abuse of dominance box). Even these fines are below the maximum level of 10% of turnover. Fines are increased for repeat offenders as in the case of glass manufacturer Saint Gobain (see Car glass cartel box), while reductions are available for firms that cooperate with the Commission. Further fines can be levied for failing to co-operate or comply with rulings, as in the case of Microsoft. All fines go into the EU budget. Appeals against Commission decisions may be brought before the EU courts.

18. While these rules have always been directly enforceable by national courts,¹ since 2004 Member States have been required to designate competent bodies, for example a national competition body, to apply Articles 101 and 102 as a result of changes made by the Modernisation Regulation (Regulation 1/2003). Part of the objective of this regulation was to reduce the case load of the Commission. When a national competition authority applies domestic competition rules it is also obliged to apply European rules where there is an effect on inter-state trade. Infringement decisions by national competition authorities in such cases will make a finding in respect of both domestic and European rules. National competition authorities do not however have the power to find that an agreement has *not* infringed EU law. That is they cannot tie the hands of the Commission on by guaranteeing an agreement was allowed, instead, a declaration of non infringement can only be made by the Commission. It should also be noted that the Modernisation Regulation prohibits national competition authorities from applying stricter rules on their territory in relation to Article 101, but this prohibition does not apply to rules in relation to unilateral conduct under Article 102.

¹ For example in *Garden Cottage Foods Ltd vs Milk Marketing Board* 1983

19. EU competition rules may also be enforced by private entities in the UK courts. Companies and individuals are, for example, able to sue for damages for another party's breach of competition rules. There are currently proposals at both the EU and UK level to introduce further measures to make such private actions easier for companies.
20. The UK's competition regime is currently being reformed. From April 2014 the UK's sole national competition authority will be the Competition and Markets Authority. It will bring the competition functions of the current authorities, the Competition Commission and the Office for Fair Trading, into a single organisation.
21. Since the Competition Act 1998 entered into force in 2000, the UK national competition law in these areas has been closely modelled on 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 key reasons for this was to ease the burden for business. Articles 101 and 102 of the TFEU form the basis for Chapter I and Chapter II of the Competition Act 1998 prohibitions on anti-competitive agreements and abuse of dominance respectively. The investigatory and sanctioning powers of national competition authorities are similar to those available to the Commission. Moreover, the Competition Act (section 60) 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 abuse of dominance.
22. As well as agreements between firms, competition policy also addresses whether firms are able to merge. The Commission also has the power to block mergers of firms where it is incompatible with the common market because it significantly impedes effective competition; for example the Commission blocked the proposed merger of two Swedish automotive firms Volvo and Scania. Under the EU merger rules,² mergers with an 'EU dimension', which is calculated by reference to turnover, must be notified to the European Commission. This means that firms with large operations in the EU that wish to merge need to notify the Commission which assesses the proposed merger. There are exceptions, such as where each firm earns over two thirds of its EU turnover in a single country. 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. Where mergers do not have an EU dimension, national merger rules apply; in practice the assessment of mergers under the UK regime in the Enterprise Act 2002 closely mirrors the assessment conducted in the EU, although the jurisdictional rules and procedure are different. For example, there is no obligation for the merger to be suspended while the UK national competition authority considers the case.
23. The UK also has rules that do not stem from the EU and have no European parallel. The UK's Market Investigation Regime allows the competition authorities to investigate whether the structure of a market, rather than its firms, distorts competition and to then take investigation or enforcement action under consumer or competition law. The UK also has a criminal cartel offence, which makes it a crime for individuals (rather than firms) to

² The main legislative texts for merger decisions are the EC Merger Regulation and the Implementing Regulation

engage in agreements not to compete between firms. Strictly this is about punishing wrong-doing rather than enforcing competition rules and is therefore outside the competence of the EU.

State Aid

State Aid control at EU level

24. A general prohibition on State Aid has existed since the original Treaty of Rome establishing the European Community in 1957. This granted the EU exclusive competence for the operation of competition rules (including State Aid rules) which *are necessary for the functioning of the single market*.

25. The rationale for this exclusive competence is that State Aid control underpins the single market by providing a level playing field for competition. Without such control at EU level, Member States could provide subsidies that would distort competition and discourage new market entry, at the expense of each other and the wider EU interest.

26. However the Commission recognises that not all aid should be prohibited and some aid is in the common European interest, and may be granted following a notification from a Member State to the Commission. As it has assessed more and different forms of aid targeting market failures and equity objectives, the Commission has developed sets of rules, effectively codifying their experience of cases, to enable them to more easily consider the notifications of Member States.

27. Over the last decade, the Commission, supported by the UK, has encouraged a trend towards less and better targeted aid. And while the UK agrees with the Commission on the need for processes to be streamlined, it has been supportive of the regime. The UK also has a good track record on State Aid with only three recovery cases since our accession.

Treaty Provisions

28. The State Aid Treaty provisions are contained in Articles 107-109 of the TFEU. The provisions are structured as an initial general prohibition followed by exceptions and procedural and enforcement provisions.

29. Article 107(1) of the TFEU (copied below) contains the general prohibition on the granting of State Aid and sets out what constitutes State Aid. The effect of this section is to create a presumption of incompatibility attaching to all aid granted by Member States

“Save as otherwise provided in the Treaties, 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 or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the single market.”

30. Article 107(2) and (3) contain exceptions to the general prohibition by listing circumstances where aid that would otherwise be subject to the general prohibition shall or

may be compatible with the single market. For example, aid to make good the damage caused by natural disasters shall be compatible under 107(2) and aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be compatible under 107(3).

31. Article 108 contains procedural and enforcement provisions and provides the Commission with exclusive competence to assess whether aid is compatible with the single market. A key provision is Article 108(3), which requires Member States to notify the Commission of plans to grant or alter aid. This provision is fundamental to the operation of the State Aid provisions. The Member State shall not put its proposed measures into effect until the Commission has made a final decision. If the Commission considers that any planned aid is not compatible with the single market, it is required to initiate the formal investigation procedure without delay. In addition, Article 108(3) has direct effect which means that a person who considers that aid has been granted before it has been authorised by the Commission may bring an action in the national court.

Current balance of competence

32. The European Commission has exclusive competence to determine whether a State Aid is compatible with the Treaty. However, in practice, Member States have a role in initially assessing whether a measure constitutes State Aid that should be notified to the Commission.

33. The Commission has developed various rules (normally in the form of guidelines or frameworks) which provide guidance as to when aid is likely to be compatible. This is aid for activities that are considered to be in the common European interest, where the market, by itself, fails to deliver. The rules set out criteria Member States should follow when designing measures, to enable swift approval.

34. The rules envisage a wide range of activities that may receive compatible aid, including, by way of example, support for energy and environmental projects, broadband, Research, Development and Innovation, financial services, public services under the Services of General Economic Interest (SGEI) rules, and investment in the underperforming regions under the Regional Aid Guidelines.

35. There are also regulations (notably the De Minimis Regulation³ and the General Block Exemption Regulation⁴) that permit aid to be granted in certain cases without the need receive an individual approval from the Commission.

36. In terms of current developments, the Commission's ongoing State Aid Modernisation Agenda is aimed at updating the State Aid rules, including a broadening of the scope of the General Block Exemption Regulation to include a wider range of

³ This enables Member States to grant up to €200k of aid to an undertaking over any three year period for any purpose apart from export related activity.

⁴ This Regulation largely reflects the Guidelines and Frameworks, but covers the more straightforward forms of aid at lower levels that the Commission considers does not require ex-ante assessment.

categories of aid. One aim is to enable the Commission to individually assess only the larger more potentially distortive aids.

37. A new Procedural Regulation intended to improve the handling of complaints, leading to a swifter, more predictable and more transparent investigation of complaints has recently been introduced. It also provides for new tools for gathering information directly from market participants and for conducting sector inquiries with the objective of enabling the Commission to obtain all necessary information to adopt well-reasoned decisions.

38. These changes will help the Commission to adopt faster and better decisions. One of the criticisms levelled at the current system is that it can take a long time to secure an approval from the Commission and that projects can be delayed. This however is usually a function of a proposal not fitting within a particular set of Guidelines. State Aid Modernisation should, however, enable the Commission to deal with a wider range of interventions.

State Aid control in the UK

39. Public authorities need to factor in consideration of State Aid at the start of the policy development process, and if they need to grant aid then they should build in time for aid to be notified to and approved by the Commission, should this be required. The sanction for granting aid in breach of the Treaty is that the Commission can order the Member State to recover the aid (together with interest). It is therefore important for recipients of aid to understand the process.

Consumer Policy

Consumer policy and the EU

40. Consumer policy aims to empower and protect consumers so they are aware of their rights and are able to make wise decisions when purchasing goods and services, and have an appropriate degree of protection when things go wrong. Empowered consumers demand choice and by exercising it, stimulate competition and innovation as well as high standards of consumer care. Without informed consumers driving a hard bargain, businesses can become complacent and lose focus on becoming more efficient or investing in better goods and services. This investment and quest for efficiency drives innovation and growth in the economy.

41. Consumers benefit from the EU's consumer policy regime as improved consumer protection (due to having more uniform protection rules across the EU (resulting from the consumer acquis)) enhances confidence in cross-border purchases for example with the Unfair Commercial Practices Directive (see box below); greater competitive pressures results in firms producing better products for consumers at a reduced price.

Unfair Commercial Practices

The Unfair Commercial Practices Directive (UCPD) (agreed in 2005) (implemented in the UK by the Consumer Protection from Unfair Trading Regulations 2008) is designed to harmonise legislation across the EU to prevent business practices that are unfair to consumers. This horizontal measure applies to all sectors where businesses interact with a consumer and sets the legal framework within which consumers must be treated fairly.

The UCPD makes it easier for traders based in one Member State to market and sell their products and services to consumers in other Member States as it ensures that businesses are subject to the same rules and obligations to provide the same level of protection to all consumers across the EU. It also gives consumers greater confidence to shop in the UK, and across borders, by providing a high common standard of consumer protection provisions.

42. An explicit provision for the protection of consumers was not contained within the original EEC Treaty (1957) as the underlying assumption was that free competition would benefit consumers. Although there were several consumer programmes which set out plans for implementation of consumer rights, it wasn't until the Maastricht Treaty came into force (1993) that consumer protection became a *policy* of the Union (now set out in Article 169 TFEU) and became an issue that must be taken account when any EU policy or activity is defined and implemented (now set out in Article 12 TFEU). Furthermore, the Maastricht Treaty also provided that when the Commission produces proposals relating to consumer protection in the cause of promoting the single market, the Commission needs to take as a base a high level of protection and to take into account any new development based on scientific facts (now set out in Article 114(3) TFEU).

43. After 1993 there then followed a series of legislative measures in the area of consumer protection which set out mandatory legal rules which gave rights to the consumer independently of the contract between a consumer and a trader, as well as enforcement mechanisms and information on unit prices.

44. Over the years, the EU has adopted a broad range of consumer protection legislation. Several 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 where there has been a lack of conformity in goods). Whereas 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).

45. There are also a number of specific financial services Directives that cater for precise situations (for example, consumer credit and the distance marketing of financial services). These Directives provide important protections for consumers in those circumstances.

46. Furthermore the procedural and enforcement rights of consumers 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) and regulatory instruments which are intended to facilitate the enforcement of consumer rights, such as the Injunctions Directive (Directive 2009/22) or the Regulation on Consumer Protection Cooperation (Regulation 2006/2004) have also been adopted by Member States.

47. The most recent regulatory instrument adopted by Member States in the area of consumer protection is the Consumer Rights Directive 2011/83/EU which will be implemented at the end of this year (see text box below).

Consumer Rights Directive 2011/83/EU

The Consumer Rights Directive was passed by the EU in October 2011. All EU Member States have to implement it into domestic legislation by 2013. This Directive aims to simplify consumer rights in certain important areas - mostly relating to buying and selling. It also brings benefits to both consumers and businesses, for example, the period within which *consumers* can cancel a sales contract increases from 7 working days (for distance sales) and 7 calendar days (for off-premises sales) to 14 calendar days for both.

Distance and off-premises *traders* will only be obliged to refund money when goods have been returned by the consumer or evidence of the goods having been sent back has been provided. Under the current regime, distance selling traders must refund monies within 30 days, whether or not the goods have been returned.

48. Despite these measures, the single market is far from being fully integrated. For example, since 2010 there has only been a 3% increase in the number of consumers buying goods or services over the internet and cross-border, as the majority of EU consumers still prefer to shop domestically. The Commission therefore wants to do more to increase the confidence of both consumers and retailers in e-commerce especially cross borders. This can be seen in the new EU Consumer Agenda which sets the strategy for EU consumer policy from 2014-2020.

Current balance of competence

49. The Consumer Protection area is an area of shared competence⁵ and relates to consumer protection when purchasing a product or a service. This includes receiving: the correct product information and clear indication of price (as part of pre-contractual information provided to consumers) price, a good quality of product, being made aware of withdrawal rights as well as having access to remedies (including refunds) and redress.

50. As an area of shared competence the EU Institutions may legislate in this area and have done so (thereby creating the consumer *acquis*). Member States may still legislate on consumer matters in areas where the EU Institutions have not yet legislated.

51. 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. Such measures can be adopted under one of two routes. If the measure is intended to further the completion of the EU single market, then the measure is adopted under Article 114 TFEU and a Member State cannot maintain or introduce conflicting national provisions, other than in very limited circumstances; if the measure is not primarily intended to further the

⁵ Article 4(1)(f) of the TFEU

completion of the EU single market, but is intended simply to support, supplement and monitor a policy pursued by Member States, then a Member State is able to maintain or introduce more stringent protective measures. To date the majority of consumer protection measures passed by the Union have been adopted under Article 114.

52. Although Article 114 provides a far-reaching power which can be used to harmonise national laws it can only be used to remove disparities between national laws if it can be shown that, for example in this context, doing so would improve the consumer protection levels in Member States. However, once such EU legislation has been passed, Member States may not act (including legislate) in a manner contrary to it.

53. Consumer policy in the UK has undergone recent changes; a new Consumer Rights Bill has been announced which will address concerns that while UK consumer law offers a high degree of protection; it is confusing and has not kept up with the digital revolution. The Bill will streamline and strengthen 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 clarify the investigatory powers of consumer law enforcers and enhance their ability to get the best outcome for consumers and businesses in the civil courts. The Bill is currently undergoing pre-legislative scrutiny in parliament following consultation with a large range of stakeholders.

Call for evidence: what we are asking for

54. This public Call for Evidence sets out the scope of the review of the balance of competences in the area of the competition and consumer policy. We request input from anyone with relevant knowledge, expertise or experience. This is your opportunity to express your views.

55. Please send your evidence to balanceofcompetences@bis.gsi.gov.uk by 13 January 2014.

56. Your evidence should be objective, factual information about the impact or effect of the competence in your area of expertise. We will expect to publish your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential, we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on answers to the questions set out below.

57. Where your evidence is relevant to other balance of competences reviews, we will pass your evidence to the relevant review teams.

Discussion events

58. As part of the Call for Evidence process we will be holding two discussion events to which you are invited. The first event on the 12th of November will focus on competition, including State Aid, policy and the second event on the 25th will focus on consumer policy.

Both events will take place in the BIS Conference Centre, 1 Victoria Street, London SW1H 0ET.

59. Attendance at these events is free and places will be limited (we may need to restrict representation to ensure a breadth of participation). To register your interest in attending one of these discussions, please email balanceofcompetences@bis.gsi.gov.uk with details of which event you wish to attend. While there is no deadline for registering your interest, letting us know as soon as possible will maximise your chance of participation.

Call for evidence: 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?
2. What evidence is there that EU action in these areas disadvantages the UK?
3. Are there any other impacts of EU action in these areas that should be noted?
4. To what extent is EU action in these areas necessary for the operation of the single market?
5. How does the EU's competence in these areas impact upon the UK's global competitiveness?

Scope and effect of particular powers

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

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?
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?

Future options and challenges

9. How might the UK benefit from the EU taking more action in these areas?
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?
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?
12. What future challenge/opportunities might we face in these areas of competence and what impact might these have on the national interest?

General

13. Are there any general points you wish to make which are not captured above?

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