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

Minute of meeting attended by stakeholders to discuss Competition and State Aid

NB the following views were expressed by meeting attendees

State Aid

Need for and effectiveness of the state aid regime

- The rules are needed to prevent subsidy races which would lead to inefficiencies in the market. There would be less incentive for companies to compete on products and services. It is a flag bearer of the Single Market and is doing reasonably well to level the playing field and dismantle national champions.

- Subsidy races in the US are a zero sum game – are companies as competitive in the long run?

- There is no alternative. The WTO regime is not effective.

- As an instrument of economic policy, the regime has been very helpful for the UK in tackling more industrially active Member States.

- There was a tension between the need to create a level playing field and the need to promote development; the state aid regime should be more of an economic framework than a legal framework; this would look at outcomes instead of method, with the effect that various situational guideline would not be needed and innovative policies would not suffer.

- As the UK is in favour of strong state aid rules, we generally benefit from the state aid regime, although some of the detail can cause problems

- Do you need state aid control to ensure a level playing? For example, the US does not have a state aid regime. However, the state plays a more important role in the market in the EU than in the US. The US has a federal government that can balance out any distortions, but the EU does not have this kind of budget. Additionally, EU Member States have far more discretion than US states.

- Concern over EU competitiveness was often cited as an argument against strong state aid rules, but in fact there had not been any instances of the UK losing out on projects because of state aid rules; where projects had been lost, there had been a range of reasons.

- State Aid rules do no harm; they are simply irritating because of the time processes take.

- State aid rules and maximum aid intensities are beneficial in identifying value for money, leading to better targeted aid.

- It was right to see competition as a driver for innovation; tax schemes were more important for EU competitiveness; it would be good to negotiate with non-EU states for harmonisation, such as through WTO subsidy rules.

- Without state aid control we would have huge amounts of distortion in certain sectors; our industries would be facing competitors with much bigger subsidies.

- What is the value of state aid control in regulated industries? The Commission has to second guess what the regulator has already done; however, these industries are not being regulated elsewhere, so we are being disadvantaged by choosing to regulate; Should the Commission have this effective veto?

Role of the EU

- The EU needs to act in this area rather than Member States or anyone else. Governments cannot be trusted to apply the rules and they would be acting as a judge in their own cause. Those that followed the rules would be hit harder.

- The Commission is more objective, but as the EU changes there is a risk that it may become more and more political.

- The Commission running things is good, but they need more control and should do more enforcement, undertaking sector inquiries and own initiative investigations. They should also come down on Member States that offend.

- The Commission is very reactive now; it should be more proactive.

- There needs to be more control at Commission level but also at the level of the European Court. There should be no national court involvement in the application of the rules.

- There is a role for a supranational authority to police state aid; there is a supranational policy objective so there needs to be supranational policing.

- The Commission needs to be encouraged not to focus on soft targets

- When officials and Ministers are very close to a project, they can become more and more influenced by lobbying. However, state aid rules depoliticise parts of the process, preventing undue influence of special interest groups and preventing overfunding.

National control

- If there were national state aid laws implementing the EU regime, then you could consider some national control covering activities regarded as being more local in nature.

- The issue with control by a national regulator would be variability in the capacity and integrity of the regulator.

- What is appropriate in terms of subsidiarity? We need to bear in mind that what we get back, other Member States would get back too, and there would inevitably be divergences in interpretation.

Substance of the rules

- The problem is not with the rules but their interpretation by other Member States.
- The rulebook needs to be tighter to ensure that all Member States play by the same rules.
- The legalistic nature of the rules enables other Member States to exploit loopholes.
- There needs to be a much greater focus in the rules on economics. The rules should consider genuine market failures, rather than trying to address a political or public policy problem.
- The rules are excessively complex and difficult to navigate.
- State Aid Modernisation represents an opportunity to refocus the rules to support EU competitiveness – support for skills and education should be easy to provide via Block Exemption Regulation. These issues are common to the UK and other Member States.
- State aid rules needed to balance being a tool for growth policy at EU level and implementing restrictions at local level.
- Member State control over business taxation can lead to distortions, but it would be difficult for the Commission to change this.
- There should be a better balance between stronger enforcement and small regulatory adjustments to mitigate intrusions.
- The scope of exemptions is too narrow and the Commission was too slow to widen this, particularly on infrastructure; this and judgements like Liepzig/Halle (particularly its retrospective aspect), damaged the reputation of the state aid regime; lack of Commission drive to provide for new areas and clarify rules is holding back development and causing legal uncertainty.

Scope of state aid control

- It is difficult to roll back state and still expect services to be treated in the same way as if they were delivered by the state. If you liberalise then surely you are seeking competition – why do you need to pick winners?
- De Minimis aid is set at a level so low that almost nothing can be done outside Commission control.
- The thresholds are very low for support to be considered state aid. There should be some materiality in the tests of distorting competition and affecting intra community trade.
- On the notion of aid the case law is unpredictable on selectivity, with it being impossible to detect a single test.
- Not much Commission can do on scope but extending Block Exemption Regulations might be helpful.
- State aid control is creeping and catching more, making it harder to argue the positives

- Pushing more through the GBER moves the regime towards greater Member State supervision; do we need to police state aid for the Commission? We are not in a position to do this. We would not want another audit system like the structural funds system, which is dysfunctional and disproportionate. There were huge discrepancies between the number of cases Member States brought. This would require different audit schemes, which would be a problem.

Process

- The trade-off of strict scrutiny is that cases become very long, delaying the implementation of national measures.

- While the black letter law is good, enforcement is not so good, and recovery fails miserably.

- The process is not transparent as the relationship is between the Member State and the Commission, with the beneficiary being left in the dark.

- The process could be speeded up by having a first stage and second stage as in merger control, with automatic clearance in the absence of a challenge.

- The model looks simple but in practice there are many players involved: the beneficiary, national courts, Council, often a complainant; it is therefore not enough to look at the relationship between Member States and the Commission.

- The new Procedural Regulation created a problem without supplying a solution: complainants who no longer have sufficient standing to lodge a complaint cannot go to the Commission, and are unlikely to go the national courts; they are likely to come to national government, which can monitor but is not equipped to deal with findings.

- The quality of state aid advice available from the UK legal community was poor. Beneficiaries were asked to take legal advice when receiving aid but the legal opinions received were frequently incorrect.

- The Market Information Test was a positive addition to allow for 3rd party input.

Competition

EU competence in competition law

- It is essential for underpinning the single market

- It has built in subsidarity for example the merger rules and the European Competition Network (ECN) for behaviour.

- It is an area where there the most harmonised adoption of the rules. This has happened voluntarily, with the EU leading rather than forcing member states to a single system. This has positive impacts for business that do not have to try and comply with 28 different systems of law. There is some divergence but there are mechanisms, such as the ECN and ECJ, to resolve this.

- The balance is right; with EU taking decisions in cases which have material influence in others, whilst national agencies take decisions in smaller cases (small mergers, etc).

- There was a slight concern that the EU seems to be trying to extend its remit for example looking at 'material influence' – possibly for political reasons (e.g. Commissioners up for election next year).

- Although competition is an exclusive EU Commission competence, this doesn't quite reflect the reality on the ground, as national competition authorities play a role at national and at EU level. This means that national views are accommodated but that the Commission ensures consistency. The EC does listen to the UK along with other leaders (eg Netherlands, France and Germany).

- Whilst some other member states may not take the same approach to competition law, which might lead to more interventions being permitted, this doesn't necessarily mean that we should take their approach or that more powers should be decentralised to member states.

- The Commission has less regard for national economics, which means that they are able to target abuses of dominance by national champions which would be treated more leniently domestically. Given the low threshold for EU competence, these are most likely to be dealt with a Community rather than national level.

- There is less transparency in soft law, despite strong impact. Would like to see more about why decisions have been made / principles behind them. On the other hand there is a very high intensity of scrutiny of EU legislation on a very detailed level.

- The EU system of competition law is being adopted by many countries around the world, eg Japan Africa, China. This is because the US' law, the obvious alternative, doesn't travel as well as it is based in historical circumstances. This allows the ODT to make links with foreign enforcers based on EU law.

Benefits for the UK of EU membership

- EU competition law has dismantled natural barriers – which has been good for the UK.

- Where national regulators haven't acted to promote competition the EC has, for example unbundling.

- It reduces the burden on business, for example mergers are cleared just once.

- Without EU law there would be more parallel cases and this would be inefficient.

- It allows our citizens & companies to complain against EU corporations – would otherwise require two processes, one UK and one EU. It is also a boon to the UK legal industry as we are the gateway to EU for other English speaking countries and can advise on EU law. The UK is also the lead venue for EU private actions. This could dwindle if UK left EU. We would however have a lot of 'me too' cases, which just seek to also cover the UK.

- UK standalone system would duplicate the EU system, rather than replace it, and there would be strong incentives to still follow the EU rules. However, there would be strong

scope for divergence as UK could decide cases differently. Under the pre-EU system, there was greater freedom to intervene on 'national champion' grounds. This doesn't help markets to be competitive or to get best deal for consumers.

- However, competition law can get in the way of other objectives such as environmental ones. For example the Dutch plan to shut down some dirtier generation is at risk due to anti trust rules. Irish beef was another example of where competition rules could interfere with other legitimate objectives.

- UK competition law would be worse were it not for the EU. The EU's rules involve clear prohibitions whereas the UK would have a less certain tinker and see approach. Also noted that the CMA's target for completing phase one of merger control is 40 working days compared to the EC's one month.

- Only areas even talked about are at the fringes, eg intellectual property, suggesting the core of the rules work well.

- One drawback is National Competition Authorities (NCAs) get less case experience. This also reduces the ability to sell the importance of NCAs to people in the Member states.