EDWARDS
WILDMAN

GOVERNMENT REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM (UK) AND THE EUROPEAN UNION (EU)

-

Competition and Consumer Policy

-

Response of Edwards Wildman Palmer LLP

Introductory comments

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 15 other locations across the United States, Europe and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting Government with its Balance of Competences Review. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the BIS website.

- Since our practice is focused on competition law, our response does not address consumer protection matters. Our response also concentrates on the behavioural antitrust and merger control aspects of EU competition law, rather than State aid enforcement.

- The rather high-level nature of some of the questions contained in the October 2013 Call for Evidence document is not always well-suited to addressing what is a complex and very fact-specific area of law. This has made it difficult to provide a full response on some of the issues addressed by the Call for Evidence. In addition, client confidentiality considerations can preclude the provision of detailed examples to illustrate our points. We have therefore concentrated in this response on providing general arguments as to the impact of EU action in this area, with illustrative examples where possible.

- The Call for Evidence is often couched in terms of assessing whether action by "the EU" (understood in this context to refer to the European Commission) is good or bad for "the UK" or "the national interest". It is difficult for us to respond to such general terms, given that enforcement action is typically directed at individual undertakings and the impact of an individual case on the British national interest is likely to be indirect at most. In seeking to answer the questions by reference to our own experience as legal advisers to British and foreign businesses, and as a business ourselves, we have therefore focused on whether action by the Commission is likely to benefit or harm *businesses operating in the UK* (irrespective of whether the UK is their main place of establishment or whether they are British owned). It seems to us a reasonable premise that something that benefits such businesses is likely to benefit the British economy as a whole, and by extension improve the general economic wellbeing of the population of the UK. Whether this is actually the case in any specific case will depend on the facts and is likely to be a question that we, as lawyers, are in any event not well placed to assess. We would, however, suggest that

a stable and effective EU competition regime, in which enforcement action by the Commission and Member State authorities is reasonably predictable and proportionate and has the shared objective of ensuring and maintaining competitive markets across the EU, is likely to be of benefit to British business.

- We have assumed in our response that the key question is whether the European Commission should be more, or less, active in the areas of competence covered by this Call for Evidence.[1] We have also assumed that any alternative scenario in which there is less activity by the European Commission would envisage correspondingly more enforcement activity by the UK (or other Member State) competition authorities (where they have competence to act), rather than less competition law enforcement overall. In other words, we assume that the question is less about whether EU or national competition law is 'a good thing' and more one of which competition authority should be enforcing it, namely the European Commission or a Member State authority.

- We have also assumed that the counterfactual against which the current situation should be measured would be one in which the UK remained a full member of the EU, enjoying its full rights and subject to all relevant obligations under the EU Treaties. We have not speculated as to the extent to which any changes to the current balance of competences between the EU and Member States (including but not limited to the UK), whether or not they would require a change to the Treaties, would be practical or achievable.

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?***

1.1 Before addressing this question directly, it is important to note at the outset that, in the area of behavioural antitrust, a system already exists that aims to ensure the appropriate allocation of cases between the Commission and the Member States (in the form of their National Competition Authorities (**NCAs**)).[2] In our experience, this system generally works well and ensures that only matters of genuine significance for several Member States are considered by the Commission, rather than NCAs. To name only a few examples, we would suggest that it was clearly appropriate for the Commission (rather than individual NCAs) to take enforcement action in the *Microsoft, Intel* and *Ebooks* cases, given the size of the parties and the scope of the conduct investigated. It is also understandable that the Commission is responsible for enforcement action against large,

[1] Although Member State competition authorities can and do apply the principal EU competition law prohibitions directly, the degree of similarity between these prohibitions and those contained in the national competition laws of the Member States means that it may be relatively unimportant in practice which law is being applied.

[2] Namely, Regulation 1/2003 and the supporting procedural and institutional framework, including in particular the Commission's *Notice on cooperation within the network of competition authorities* (OJ [2004] C-101/03) and the European Competition Network (**ECN**).

international cartels, such as those involving automotive wire harnesses, interest rate derivatives and cathode ray tubes (to name only some recent examples), all of which were international in nature.

1.2 While some international cases can be successfully dealt with by coordination between NCAs (typically where the conduct concerned affects only two Member States), action by the Commission is likely to be more efficient and effective in most cases where conduct affects several Member States.

1.3 It is fair to say that the threshold for the application of EU competition law, namely that the conduct under examination may affect interstate trade, has been applied rather expansively by the Commission and European Courts, with the result that EU competition law may apply to conduct that is largely domestic in nature, such as local arrangements for the distribution of newspapers. It does not necessarily follow from this, however, that an expansive application of EU law in this area is contrary to the UK's national interest. It may in fact be desirable for the Commission to retain the ability to take enforcement action in circumstances where conduct affects the territory of a single Member State, for example if the responsible NCA has been unable or unwilling to address the issue itself. Based purely on the extent to which British businesses are active across the EU, the ability of the Commission to intervene in a situation that affects the territory of a single Member State may well benefit those businesses more than it hinders them. For example, if a British business is being excluded from the market in another Member State due to the abusive behaviour of a local dominant company but that business is unable to gain redress from that Member State's NCA, the Commission needs to be able to intervene to help that business, if this is justified by the circumstances, as that may be the only way of addressing the problem. The national courts may not be equipped to hear a competition law claim by the affected British company and the UK competition authorities would clearly be unable to assist the company in such a situation, since the harm to competition would arise on markets outside the UK and hence be beyond their jurisdiction. In such a scenario, enforcement action by the Commission would be a good thing for British business.

Article 101

1.4 It is of great benefit that EU competition law applies uniformly across the EU. For example, the fact that an agreement that is compatible with Article 101 TFEU cannot be ruled incompatible with national competition laws[3] gives a business a degree of confidence that, once it has assessed the compatibility of an agreement with Article 101, it will be safe from competition law challenge and hence be enforceable across the EU. Similarly, a business knows that it can use the same legal grounds to challenge an anticompetitive agreement before an authority or court across the EU. This benefits businesses, by increasing legal certainty and reducing the need to seek separate legal advice in each Member State.[4]

[3] Article 3(2) Regulation 1/2003.

[4] It is perhaps an unfortunate side-effect of the modernised EU competition law regime that an NCA can no longer issue a non-infringement decision with respect to conduct to which EU competition law applies (as confirmed by the CJEU in 2011 in the *Tele2 Polska* case). The ability of NCAs to reach a reasoned decision

Article 102

1.5 The situation is less clear-cut for unilateral conduct, given the ability of Member States to impose more stringent rules in this area than those provided for by Article 102 TFEU. While this outcome can increase undesirable uncertainty as to the legality of certain unilateral behaviour, and necessitate separate local legal advice, it also recognises the desire of some Member States to regulate the conduct of economically powerful (though potentially not dominant) companies. In arriving at this solution in Regulation 1/2003, and allowing the Member States concerned to maintain such rules, the Commission was arguably recognising the principle of subsidiarity, as well as acknowledging the difficultly of achieving legal uniformity in this area.

1.6 As noted above, British businesses can be confident that, when doing business elsewhere in the EU, they are operating in an environment where cartels and the abuse of dominance are uniformly prohibited. On balance, this is likely to ease their entry into new markets across the EU and make doing business there easier, which is a good thing. It should also not be forgotten that UK businesses benefit from more competitive markets *in the UK*, which are at least in part ensured by the existence of EU competition law and enforcement action by the European Commission.[5]

State aid

1.7 As noted in the introduction, this response does not address the detail of the State aid regime. We would note, however, that the Commission clearly has a crucially important role to play in the policing of that regime. Member States cannot realistically be expected to take on this role in the Commission's place, given that they are the ones granting the potentially unlawful aid. State aid decisions can be highly political and it is important that they are made by a single referee, which is able to enforce the rules with the EU interest in mind, rather than that of any single Member State.

Merger control

1.8 The existence of a single EU merger control regime for large, cross-border transactions affecting the EU is a significant benefit for businesses. While not all aspects of the regime are perfect,[6] the ability of merging parties to make a single merger notification to the Commission, to the exclusion of national merger control rules, significantly reduces complexity and costs and increases certainty on large transactions. This system does not just benefit merging parties, since those that are likely to be adversely affected by a

---

that there are "no grounds for action", however, as confirmed by Article 5 of Regulation 1/2003, means that, in practice, the result may be very similar to a non-infringement decision (see, for example, the OFT's 2011 decision concerning *IDEXX Laboratories*).

[5] See, for example, the outcome of the European Commission's investigation of the Football Association Premier League, which improved access to rights for the coverage of football matches by competitors to the incumbent pay-TV operator BSkyB.

[6] For example, we would suggest that the Form CO notification procedure may be excessively burdensome in straightforward cases. Pre-notification discussions may become unduly drawn out, leaving uncertainty as to when the parties may safely file the notification. The EUMR regime may apply to the creation of very small joint ventures by large parent companies, even where there is no conceivable impact within the EU (although we note with approval that the Commission has now introduced a 'super-simplified procedure' for such cases).

merger also benefit from the ability to engage with one competent reviewing authority, with the power to prohibit an anticompetitive transaction, rather than having to complain to several individual national authorities. The Commission has introduced a number of incremental improvements to the EU merger control regime over the years, such as the recent Merger Simplification Package, which have reduced the notification burden for straightforward transactions.

1.9 We do have concerns, however, over the Commission's proposal to enable it to review transactions involving the acquisition of non-controlling minority interests. We consider that this be an unwelcome step away from the current, clear-cut approach based on control/decisive influence and significantly reduce legal certainty. We would suggest that, to the extent that individual Member States wish to maintain regimes for the review of minority interests[7] they should be free to do so, but this is an area in which EU competence should not be extended.

Indirect benefits

1.10 The unified nature of the EU competition law framework also has an indirect benefit of enabling law firms based in the UK to advise clients based across the EU on EU competition law, whether from their offices in the UK or from local offices in other Member States. Expertise in EU competition law has also enabled UK law firms to advise companies outside the EU on how their own countries' competition laws should be applied. This has certainly contributed to London becoming a leading centre of EU competition law expertise (possibly even eclipsing Brussels), which must benefit the UK economy.

1.11 The existence of EU competition law has had the indirect benefit of encouraging the modernisation of domestic competition law in the UK. The replacement of the (largely discredited) Restrictive Trade Practices Act 1976 (**RTPA**) by the Competition Act 1998, the main provisions of which were closely modelled on Articles 101 and 102 TFEU, marked a clear qualitative improvement in the UK competition law regime. In particular, the move from a cumbersome, retroactive administrative system to an enforcement regime, based on relatively clear-cut prohibitions, enabled businesses to formulate their commercial strategies with greater certainty, while providing for a more predictable and efficient enforcement environment. Although it is impossible to know how the UK competition law regime would have developed in the absence of EU competition law, we would suggest that EU law has provided a better model in this field than the purely administrative tradition on which the RTPA, Fair Trading Act 1973 and Competition Act 1980 were based.

[7] The UK merger control regime provides for such review, based on the lower 'material influence' threshold. While the rather vague nature of this threshold can cause some problems in practice, the fact that the UK regime has no mandatory notification and stand-still requirement moderates the impact. In contrast, any combination of minority interest review with a mandatory filing regime (such as that maintained by the EUMR) is likely to be excessively burdensome for businesses (particularly those holding a significant number of minority stakes, such as private equity funds).

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

2.1 We are unable to produce any evidence that, as a general proposition, EU competition law enforcement disadvantages the UK.

2.2 It is notable that the modernisation of EU competition law has led to a situation in which NCAs are often obliged to apply EU competition law, as well as or instead of national competition law. In such cases, the NCA is also required to consult with the Commission before adopting any final decision.[8] The result of this is that the Commission now has a direct influence over the contents of competition enforcement decisions by NCAs, whereas this was not previously the case.

2.3 It cannot be automatically assumed, however, that the resulting expansion of the Commission's competence in this area necessarily disadvantages the UK. Rather, the ability of the Commission to review NCA decisions before adoption, and where required to intervene to propose revisions or even to prevent their adoption, should be viewed as a necessary means of ensuring the coherence and predictability of the EU competition law regime (as enforced by all NCAs as well as the Commission), which should work to the benefit of businesses across the EU.

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

3.1 We have nothing further to note.

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

4.1 For the reasons set out above, enforcement action by the Commission may be necessary to ensure the smooth functioning of the single market. It is nevertheless the case that, at times, single market considerations may lead to a rather formalistic approach to enforcement by the Commission (and, indeed, the European Courts), which may fail to take full account of the economic or factual circumstances of a case. While it may be argued that such an approach can sometimes be justified by the circumstances, we would generally be wary about the use of EU competition law as a policy instrument to fill gaps in the EU legal framework that are better addressed by EU legislation.[9]

4.2 That said, if Member States (through the Council) fail to act to address issues of concern, it is understandable if action is ultimately taken by the Commission, as the guardian of the Treaties and by extension the single market. Without action by the Commission to break

[8] Under Article 11(4) of Regulation 1/2003.

[9] For example, we would suggest that the challenges of adapting the current EU copyright regime for the digital age need to be addressed through timely and properly considered revisions to EU law through legislation. Attempts at judicial law-making, such as the suggestion by Advocate General Kokott in the *Karen Murphy* case that the exhaustion of rights principle could simply be extended to services without further ado, are inherently less predictable and are likely to raise more questions than they answer.

down barriers to trade imposed by undertakings, whether through agreements or abusive conduct, British businesses may find it harder to enjoy the benefits of the single market.

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

5.1 As noted above, we consider that the existence of an effective EU competition law regime, enforced where necessary by the Commission, helps UK business to remain competitive.

Scope and effect of particular powers

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

6.1 We consider that EU competition law has been a very important, and broadly successful, tool for delivering the single market.

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?***

7.1 For the reasons set out above, we have chosen not to answer this question.

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?***

8.1 We have insufficient information to enable us to offer a view on this question.

Future options and challenges

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

9.1 While there are bound to be individual situations in which greater enforcement activity by the Commission could benefit UK businesses, the Commission's resources are constrained and it must prioritise how it uses its resources. As noted above, in our view the current framework generally provides for appropriate allocation of cases between the Commission and NCAs.

9.2 We would however suggest that the Commission could be more active in enforcing Article 101 TFEU in the context of vertical agreements. Under the pre-modernisation notification-based regime, the Commission's resources were excessively focused on the evaluation of the legality of individual vertical agreements, many of which had limited impact. While the modernisation of EU competition law, and the ending of the notification regime, was a very welcome and sensible development, as it reduced the burden on business and enabled the Commission latter to concentrate its resources on tacking the most harmful forms of anticompetitive conduct such as cartels, one side-effect has been a substantial reduction in activity by the Commission with respect to vertical agreements.

9.3 As well as leading to a lack of new legal precedent which could otherwise have developed the law away from some of the older, more formalistic cases, this development has reduced the ability of the Commission to clarify the law and has therefore left some issues of pan-European concern unaddressed. In particular, the Commission appears to have failed in practice to take action against potentially anticompetitive selective distribution arrangements, where necessary by withdrawing the benefit of the Vertical Agreements Block Exemption, notwithstanding its own guidance setting out the circumstances in which it is likely to do so.[10]

9.4 While the relative lack of activity by the Commission in this area has to some extent been addressed by action by NCAs,[11] some uncertainties over the law remain. Private enforcement is unlikely to be a solution in this area, since a court is unable to remove the 'safe harbour' protection provided by a block exemption.

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?***

10.1 For the reasons set out above, we do not consider that less enforcement of EU competition law by the European Commission is likely to benefit the UK.

[10] See, for example, paragraph 176 of the Commission's 2010 *Guidelines on Vertical Restraints*.

[11] See, for example, investigations by the German Federal Cartel Office of Adidas, Asics and Sennheiser, enforcement action by the French competition authority against cosmetic company Pierre Fabre and enforcement action by the UK Office of Fair Trading against producers of mobility scooters. It is notable that activity against similar provisions by the European Commission took place under the pre-modernisation regime – eg in the 2002 *B&W Loudspeakers* case.

EDWARDS WILDMAN

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?

11.1 Overall, we consider that the current allocation of competence between the EU and Member States in this area is broadly appropriate.

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

12.1 We have insufficient information to enable us to offer a view on this.

General

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

13.1 No.

Edwards Wildman Palmer LLP
13 January 2013