

Review of UK and EU balance of competences: call for evidence on competition and consumer policy

British Chambers of Commerce submission

Introduction

The British Chambers of Commerce (BCC) is an influential network of 53 Accredited Chambers across the UK, representing tens of thousands of businesses with millions of employees nationwide.

No other business organisation has the geographic spread or multi-size, multi-sector membership that characterises the Chamber Network. Every Chamber sits at the heart of its local business community, providing representation, services, information and guidance to member businesses and the wider local business community.

Safeguarding the interests of UK business is critical to the debate on the future of Britain's relationship with the EU. The BCC continues to lead this debate within the business community and conducts the only quarterly poll of business sentiment towards the EU and associated issues¹.

The BCC welcomes the opportunity to respond to this consultation on the review of UK and EU balance of competences in competition and consumer policy. The BCC supports the goal of UK and EU competition and consumer policies, including state aid rules, to help markets work well for businesses and consumers. However, Chamber member companies tell us that inconsistent implementation of these rules across member states can work to the detriment of UK firms.

Competition policy

A strong and fair antitrust adjudicator at the EU level gives a relative advantage to British businesses, due to the UK's well-developed competition infrastructure and high compliance record. The UK is rigorous in enforcing competition policy. One measure of this is the very limited number of cases for which the UK has been ordered by the Commission to recoup illicit aid paid to operators without first notifying the Commission as the Treaty requires.

The EU's competence for competition, at least for business behavior and transactions which have EU-level effects, is a factor in ensuring that the Single Market constitutes a level playing field for UK businesses. The EU's competence for competition and state aid also helps the EU to impose similarly strict disciplines on third countries when the EU negotiates trade deals.

In trade negotiations with third countries, the EU should push partner countries to enact competition and state aid rules which are analogous to those applicable in the EU. This is increasingly the case, which is positive. In particular, the recent trade deal with Colombia and Peru was a good example of this in that it included provisions to ensure that competition rules are adhered to not only by the national authorities of these countries but also by sub-national authorities.

¹ The Business EU Barometer

There is a need for the EU to press for multilateral competition rules and enhanced subsidies rules in the World Trade Organisation. This would serve to create the beginnings of a global level playing field, which would benefit UK businesses that must already adhere to strict disciplines at home.

Implementation of EU legislation across member states is in some cases inconsistent, and the UK – by and large considered as a fair player in terms of implementation of EU rules – is often confronted with less diligent EU partners. This applies to competition and consumer policy, as well as to state aid rules, which is covered in greater detail below. Ensuring consistent implementation of rules across the EU with regard to both consumer and competition policy is vital to UK interests.

The lack of resources at the Directorate-General for Competition to ensure proper policing of market behaviour by companies and, for state aid, by government authorities is important to note. Equally, the absence of adequate recourse for companies when the Commission is considered to have failed in its treaty duty to ensure fair competition is significant for UK businesses and should be addressed.

Consumer policy

The harmonisation of consumer law benefits, to an extent, both UK businesses and consumers as it simplifies and therefore helps to enable cross-border commerce. The UK is a leading e-commerce provider in Europe and clarity in consumer protection rules across the EU encourages consumers from other member states to shop with UK-based e-commerce businesses. At the same time, UK consumers can be confident of their protection when shopping on sites in other member states. This in turn increases consumer choice, availability of goods, and value for money. The Single Market could function without harmonised consumer protection rules but it would be less efficient and not encourage business-to-consumer cross-border trade as much.

The BCC does not believe that more action is needed on EU consumer protection rules. The emphasis must be on ensuring that existing rules are enforced and applied correctly across the Single Market so as to remove remaining distortions and barriers to cross-border commerce. Equally, the BCC does not believe that more action at a national level is necessary. This would lead to increased fragmentation of the Internal Market and could undermine consumer and business confidence in cross-border trade. This would increase compliance costs and legal uncertainty for businesses, especially smaller firms.

It is important to note that despite some benefits from the harmonisation of consumer and competition policy across member states, Regulations and Directives emanating from Brussels have a significant effect on UK businesses. Compliance activity costs businesses time and money that could be used more productively. Excessive, ill-conceived or badly implemented regulations can impose significant costs often with little or no benefit.

Many small businesses do not have the resources to maintain large compliance functions; this can lead to owners and managers spending significant amounts of time on paperwork rather than on the production of goods and services. Equally, most small companies use external support on an ad hoc basis to help with regulation at significant cost.

Brussels is putting increasing emphasis on examining the costs to smaller firms when designing new regulations. But many new regulatory proposals still include measures that place disproportionate

burdens on smaller businesses, with some regulations seemingly designed with only large firms in mind.

It is vital that the flow of new rules originating from Brussels across all business policy areas is reduced and that the administrative burden of existing regulation in all areas including competition and consumer policy, is taken into account as part of this balance of competences review. Chamber member companies, particularly smaller firms, tell us that it is not always one particular piece of legislation that costs them needless time and money – rather it is the cumulative volume of regulatory changes that emanate from Brussels that causes them problems. This issue must be taken into account when considering the effect of competition and consumer policies on UK firms, as well as the wider balance of competencies between the UK and the EU.

One of the areas in scope of this review is whether the UK would benefit from the EU taking less action in these areas, or from more action being taken at the national rather than EU level. In this context, it is worth noting that the current UK Consumer Rights Bill contains a clause that gold-plates the recommendation made by the Commission in this area – despite the UK Government committing not to gold-plate any further laws.

The Bill introduces an opt-out collective actions regime and an opt-out collective settlement regime - both of which involve a case being brought forward on behalf of a number of claimants to obtain compensation. Cases would be able to be brought by representatives on behalf of individuals and/or businesses. The proposals go further than the recommendations from the European Commission in this area, with the Commission favouring opt-in collective redress.

State Aid

EU rules on state aid are supposed to help ensure that competition across the Internal Market is not distorted. In reality, and as with the implementation of several Directives, a level playing field does not exist with EU member states having varying approaches when transferring EU State aid policy into their national systems. The experience of British businesses trading in other EU markets is that their local conventions are routinely assisted, in contravention of EU state aid rules. In contrast, the UK rigorously enforces EU state aid rules. As with the implementation of wider EU rules, it is important that state aid rules are enforced consistently across member states.

The rules surrounding state aid relate to the totality of assistance that a company receives. But this can be problematic to regulate if the provision and receipt of state aid is fragmented. For example, a company could receive a loan from local government, or an arms-length body majority owned by the state, and a further grant from a central government sponsored scheme that individually are state aid compliant but collectively are not. Similarly, companies with complex structures with subsidiaries may collectively be in receipt of excess state support through grants and loans to different companies within the same group.

A recent allegation of abuse received by the BCC from a Chamber member business highlights how this might work to the detriment of British firms. In this case, a Finnish competitor received considerable state aid through various channels which appeared to bypass state aid rules. This

Finnish company used significant injections of equity capital to initiate its growth, using subsidiaries and multiple state aid actors. The majority of funding for one of this group's companies had come from Finnfund, which is 91.2% state-owned. Funds were provided to this firm to open oil spill bases in Russia. These bases were then equipped with spill equipment purchased solely from the holding company in Finland – thus increasing its order book, revenue and profit. The company received further investment from another state-owned investment company, Finnish Industry Investment Ltd, to help R+D activity in return for a 20 per cent stake in equity terms. In addition, one of the group's companies also received a loan from the European Bank for Reconstruction and Development for almost \$45 million for the same project that Finnfund were involved with. UK authorities are generally very rigorous in establishing the overall state aid situation of potential grant or loan recipients. Other member states are perceived by business to be less rigorous – as this alleged example of abuse demonstrates.

Redress for UK firms wishing to make a complaint about inconsistent application of state aid is a problem for companies, especially SMEs, in any dimension of EU law, not only in state aid. Individual companies therefore band together to challenge aid, which is still expensive and of uncertain outcome, or bring their case to the Commission to follow up with the offending member state. Where the Commission is asked to challenge the member state, companies face no legal expense. However, the Commission retains its discretionary right not to follow up on resource grounds or, if it does follow up, may take many months – even years – to force the member state to recover the illegal aid from recipients. This situation is highly unsatisfactory for businesses, especially smaller firms, which may suffer the negative impact of the aid for an unacceptably long time, or even go out of business before the playing field is levelled again.

One case which the Commission refused to act upon such a complaint was the Salt Union case. This involved a Dutch regional investment aid scheme under which a Dutch salt firm obtained state aid for new capacity despite the salt sector having developed severe overcapacity. A competitor complained to the Commission, then to the Court, however the Court stated that the Commission was free to decide how to keep aid under review and that its inaction in this area was not open to challenge.

The Commission failed to challenge the existing aid to the company even though market conditions had manifestly changed, arguing that only the Commission was entitled to define what 'keeping aid under constant review' entails, and that the Commission had in fact done so in the case at hand. The competitor concluded, reasonably, that no possibility of challenge meant effectively no review. This non-contestability of inaction by the Commission can be of detriment to British businesses and is unacceptable. This case demonstrates the discretionary power of the Commission in state aid matters and the lack of any realistic channel of appeal for companies in cases where the Commission chooses not to sponsor a complaint about illegal aid.

The BCC remains keen to engage further as this review progresses. The BCC will continue to poll our members on issues relevant to this review and we will communicate our findings as soon as they are available.