Response to Call for Evidence on Balance of Competences Review Ref: BIS/13/1251

Introduction and Summary

1. This response deals with one aspect of the call for evidence in relation to competition and consumer policy - namely the EU merger control regime described cursorily in paragraph 22 of the HMG.

2. The submission made here is a simple one and responds to question 10 of the consultation. **It would benefit the UK if all mergers qualifying for investigation under UK law should fall within the exclusive jurisdiction of the UK.** This benefit would not be distinct to the UK but would be shared by all EU members with merger control regimes. The reasoning for this view is set out below but it is necessary to give some historical background first.

Rationale for EU merger control in 1990

3. It will be recalled that prior to the adoption of the specific EC merger control regulation in 1990, the EU had no merger control powers save those provided for in the Treaty of Paris in respect of raw iron and steel products. Moreover, at that time, few Member States had any merger control laws of their own. This was clearly detrimental to the Single Market as it enabled local monopolies to develop.

4. At the same time there was also concern that such national merger controls that existed, could be misused for nationalistic purposes to prevent takeovers of national champions by "foreign" EU companies. This concern was expressed by Édith Cresson the French Economics Minister who said that it was impossible to buy anything in Germany because of the BKartA. In fact the prohibition of the acquisition of British Sugar by Ferruzzi SPA appeared to give some credence to this concern for which a transnational regime could provide a solution.

5. The third feature considered as justifying transnational merger control was that mergers effecting a large number of Member States could be prohibited in one Member State but permitted elsewhere. This was considered to be unacceptable for reasons of consistency and there was some aspiration as well that on the procedural front, EU merger control would create some kind of "one-stop shop".

6. As is well known, in the time that it took for the regulation to get on to the books, the need to protect competition in local markets (where competition tends to be restricted most anyway) had been accepted by policy makers and the corporate aspiration of the "one-stop shop" was questioned as a result. There was also concern that some sort of EU industrial policy might result in too many anti-competitive mergers being permitted.

7. Therefore the jurisdictional boundaries were set in such a way as to allow Member States to exercise their own controls in respect of mergers where most of the turnover took place in one of the same Member State; and where local markets were particularly effected, Member States could request jurisdiction be granted to them by the Commission. On the other hand, Member States without their own merger control were able to request that the EC Commission exercised such powers for them.

8. The net outcome of this process was that there was a high degree of regulatory market sharing; "one-stop shopping" was not achieved and since then there have been continuing attempts to create "bright" jurisdictional lines. This led to companies and their customers being unaware of where decisions would be taken. For consumers, many decisions were taken in Brussels when mergers had an important effect on them. On top of this, there was a perceived need for Member States to retain jurisdiction over mergers giving rise to other concerns such as media plurality.

What has happened since 1990?

9. Subsequent developments have cast doubt on the rationale for the EU to have exclusive jurisdiction above the thresholds. None of these are mentioned in the very short discussion of EU merger control in the consultation at paragraph 22. The first of these is that since 1990, in the spirit of emulation, Member States have filled in gaps in the patchwork of EU-wide merger controls by introducing their own. There are now a very large number of regimes in operation in the EU. This has led to ever more complicated jurisdictional lines being drawn to try and save some elements of one-stop shopping. This has scarcely assisted clarity.

10. A second development already pre-figured in the original legislation is that different aspects of the same merger have actually been considered in two different jurisdictions. The undesirability of this outcome was brought home in the recent News Corp attempt to buy the shares of Sky TV that it did not already own. Here, plurality issues were considered locally in the UK with the competition issues having been cleared in Brussels. From the perspective of the citizen, this division of competencies seemed manifestly absurd and helps to reinforce disengagement from the political process.

11. As to the third rationale, recently there has been a merger of a prohibition falling beneath the thresholds which has been allowed in a number of other Member States. Thus, Akzo Nobel was prohibited from acquiring an Italian company by the Competition Commission in circumstances where every other merger control authority allowed it. The roof has not fallen in as a result of this.

Subsidiary now a priority

12. Putting all this together, apart from the purely private need of multi-national companies and their legal representatives to have mergers decided in Brussels (where they may wish to have their European headquarters for lobbying reasons) there does not seem to be an overwhelming need for EU competence to be exclusive. Taking subsidiarity seriously in this context means that decisions should be taken closest to the level of those who are effected by them. It would follow that it is desirable that anything that effects competition in a Member State arising from a merger should be decided by the authorities in that Member State.

13. It would be desirable that the next review of the EU merger regime be far more fundamental than any that have so far taken place. The question of whether multinational corporate convenience should continue to "trump" subsidiarity now that the rationale for EU jurisdiction in Brussels have largely disappeared needs to

be addressed.

14. The one issue that might remain if jurisdiction were to revert to Member States exclusively, is a possibility of Member States protecting national champions by the use of merger controls. Of course this can occur under the threshold without any recourse but in practice could well happen in relation to large mergers. Indeed the problem has arisen in Portugal on one occasion. There are solutions to this particular problem and it seems preferable to have those solutions specifically addressed by the Commission acting as a backstop rather than to have an EU-wide merger control regime that does not comply with the principles of subsidiarity.

Stephen Hornsby