



Bar Council short response to the Review of the Balance of Competences: Competition and Consumer Protection Policy

1. This is a short response by the General Council of the Bar of England and Wales (the Bar Council) to the Department of Business, Innovation and Skills consultation paper entitled Review of the Balance of Competences: Competition and Consumer Protection Policy.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. Given the complexity and breadth of issues regarding the appropriate level at which to regulate the subject matter of this report, the Bar Council has not been able to give a comprehensive answer to your questions. Rather, we provide a short summary overview of some key issues relating to competence in both the areas of competition and consumer protection, and endorse a more detailed response in the area of state aid.

Competition

5. The Bar Council wishes to endorse the response of the **UK State Aid Law Association**¹ to the consultation in the field of state aid. Members of the Bar, expert in that field, were central to the development of that paper, and we adopt same.
6. That paper does not, however, deal with the anti-trust side. In principle, effective antitrust enforcement necessarily involves cooperation and centralisation so as to ensure the effective impact of antitrust law on cross-border business. This is reflected in the active

¹ See Annex 1 to this response.

support given by UK and EU authorities for cooperation between antitrust authorities worldwide. There are inevitably aspects of antitrust enforcement better dealt with at a level below the EU and national authorities are of course very active. There will always be issues as to where and how to draw the line between the national and EU jurisdictions, and this is the subject of constant discussion and evolution. It does not strike us that there are serious flaws with the current arrangements, albeit that there will always be scope for improvement. In a counterfactual world in which the UK was not part of the EU, the UK authorities would in any event find that the activities of EU authorities would still have a substantial impact upon UK markets, but UK authorities would struggle to maintain their current level of influence over those activities.

7. We also wish to stress in relation to mergers specifically, that the current division of competence - allocating exclusive jurisdiction to the Commission to a defined class of large transactions with cross-border effects - offers business a welcome one-stop shop for dealing with cross-border transactions, while containing provisions, generally sensibly used, for transferring mergers with a particular impact on one country back to that country.

Consumer Policy

8. The Bar has participated in several EU consultations in the area of consumer protection over the past decade or more. We have consistently taken positions that support the ongoing development of a simplified and complete regulatory framework in the area of consumer protection at EU level. Despite the volume of EU legislation in the field, there remains a lack of coherence on consumer protection as between the Member States, which the EU is best placed to tackle. We have supported EU initiatives that serve to increase consumer confidence, including in cross-border purchasing, and otherwise exercising their free movement rights, provided of course that the principles of subsidiarity and proportionality are upheld, and an objective need has been shown, supported by sufficient evidence.

9. As to the level of harmonisation required to create that optimal market, we remain of the view that minimum harmonisation should be the rule, but maximum harmonisation can be acceptable only, and to the extent that, it is carefully targeted. We have previously highlighted the potential risk that its imposition would reduce the level of consumer protection in Member States that have to date applied higher standards, including the UK in some areas. In addition, the application of broad horizontal standards would inevitably leave many areas to be determined by domestic courts, with fragmentation and opacity the most likely result. Thus our prevailing view remains that that the laudable aims of maximum harmonisation (to give consumers the confidence to shop across border by assuring them of certain key standards and rights of redress) may not be achievable in practice, and in fact that consumer protection and business confidence in the internal market would be weakened if maximum harmonisation were to be applied too widely.

10. We also consider that the EU should be more sensitive to Member States' and consumer sensitivities as regards initiatives in this area, including what, when and how they are tabled and adopted. By way of example, the Bar welcomed the adoption of the Consumer Rights Directive 2011/83/EU, noting the controversy in Council which resulted in

the final text not covering key areas of consumer protection law, including in particular, remedies. However, rather than focus efforts in subsequent years on reviewing and ensuring full and correct implementation and application of said directive, and supporting the work of others who were attempting to resolve the differences in the areas not covered, the Commission quickly proceeded with an entirely separate proposal for a Common European Sales law. Many Member States and consumer groups considered this to be premature, as it had not allowed time to assess the effectiveness of the Consumer Rights Directive, and the impact of its lacunae. Moreover, and despite considerable efforts by the Commission to persuade otherwise, the consumer lobby did not consider that the use of an optional instrument would actually provide real choice for consumers, nor that it would provide a sufficient level of protection throughout the EU. For an instrument that was justified on the basis that it would promote consumer confidence in cross-border shopping, these were serious flaws.

11. Thus, in supporting the EU's competence in this field, we do nonetheless hope to see a more reflective and considered approach being taken on important legislation such as this, going forward. We also feel that it is worth pointing out that domestic reform in the area of consumer protection has proceeded apace over the past few years, much of which is yet to have a demonstrably positive impact on consumer protection. For example, the transfer of regulation of consumer credit to the Financial Conduct Authority is a huge undertaking, the likely benefit of which cannot at present be confidently assessed. The UK government also chose, in the Consumer Rights Bill, to implement wider reform of consumer sale of goods legislation than was required by the Consumer Rights Directive. UK consumer protection policy is therefore potentially vulnerable to the same gentle criticism.

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² Prepared by the EU Law Committee on behalf of the General Council of the Bar