CBI
THE VOICE OF BUSINESS

CBI Response to the Balance of Competences Review on Competition and Consumer Policy

January 2014

1. The CBI welcomes the opportunity to provide evidence to the Government's review of the Balance of Competences between the United Kingdom and the European Union. Our response focuses on the call for evidence questions in the review of Competition and Consumer Policy.

About the CBI

The Confederation of British Industry (CBI) is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce.

The CBI helps create and sustain the conditions in which businesses can compete and prosper for the benefit of all. We are the premier lobbying organisation for UK business on national and international issues. We work with the UK government, international legislators and policymakers to help businesses compete effectively.

Competition Policy:

Competition policy is an important tool aiding the creation of a well-functioning economy focussed on encouraging growth while protecting against abuses. Given the global nature of trade, and the benefits from continuing to further the single market, it is right that competition policy is managed at the European Union level to ensure high and equal standards across Member States. While it would not be sensible to manage policy in this area at the domestic level, the UK should actively engage to share expertise, raise standards and encourage robust enforcement in case of breaches.

The European Union's approach to competition policy, as set out in Article 3 (1) (b) and Articles 101-106 of the Treaty on the Functioning of the European Union (TFEU), has created incentives for companies to innovate and to increase their position in global markets. Strengthening, simplifying and modernising the procedures for state aid, antitrust and merger control will help to avoid distortions of competition in the Single Market and must go hand in hand with a strong focus on growth. The application and enforcement of competition rules are crucial at a time when Member States are looking for growth measures with limited budgets.

The CBI welcomes the fact that the European Commission, supported by the UK, has often been at the forefront of action against anti-competitive behaviour in the EU. The UK Government has traditionally held positive relations with DG Competition, which has been accompanied by the fact that the Office of Fair Trading (OFT) has been an active voice in the European Competition Network (ECN). However, more involvement from UK civil servants at the Commission level through secondments and joint working will not only maintain relations but also increase the UK's influence. Protectionist tendencies can be found within Europe and therefore the UK must remain active against attempts to promote European champions, protect strategic national industries and weaken state aid disciplines as these will lead to distortions of competition in the Single Market.

The enforcement of the European Union's competition rules is of paramount importance and this is the role of the ECN's members, ensuring that the rules are effectively and consistently applied across the Union. A clear benefit of the ECN is that the competition authorities inform each other of

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proposed decisions and take on board comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practice.

There have been a number of recent developments regarding the regulatory set up for competition policy in the UK as the OFT and the Competition Commission (CC) are set to merge in April 2014, to form the Competition and Markets Authority (CMA), a decision that the CBI fully supports. Given that the CMA will become the sole national competent authority, it is important to ensure that the transition is smooth as this will benefit UK-EU working relations in the field of competition policy. Furthermore, the Government should encourage the CMA to keep fully abreast of domestic, EU and international legislative developments to ensure that any conclusions they draw will not lead to contradictory or confusing outcomes when set against other requirements.

Specific competition policy matters:

Antitrust is an important tool to protect European firms from practices which are damaging to their competitiveness, such as price fixing, capacity hoarding or prevention of cross-border activities. Another benefit of EU action in the sphere of competition law is that individuals and companies can bring actions for damages in UK courts based on infringement decisions of the Commission – even those which do not immediately involve UK-based companies. This enables aggrieved parties to recover losses and has also made London a centre of excellence for EU litigation.

Conversely, a power that could be given to Member States is to enable them to reach non-infringement decisions following investigations pursuant to Articles 101 and 102 TFEU. At present, national competition authorities can only reach infringement decisions or "no grounds for action" decisions. This would involve amending Article 5 of Regulation 1/2003.

Merger control is an essential tool to allow companies to restructure and to expand their global reach through mergers, whilst ensuring that European consumers and businesses are protected against price increases and other anti-competitive measures. CBI members are concerned that the Commission often asks for too much data in the context of an overly lengthy prenotification process. The Commission needs to take a balanced approach that does not stifle growth. DG Competition is currently working on simplifying the merger process, and has made some progress, aiming to reduce costs for companies by cutting forms and speeding up the process, which is an initiative that the CBI supports.

State aid control is essential to avoid distortions in the Single Market and to ensure that subsidies promote the competitiveness of sectors and companies. The European Union's state aid regime provides a framework that directs Member States' investments towards addressing clearly identified market failures.

For the most part, state aid control has worked well, but there are elements that should be improved. The CBI supports more effective enforcement and more objective and uniform application of the rules at national level, in particular through increased responsibilities for Member States in case of non-compliance. The UK must continue to engage across Europe to share best practice and support uniform application of existing rules. The process of applying for state aid clearance, and having applications assessed, also needs to be streamlined with the introduction of business relevant timescales to ensure cases do not extend introducing unnecessary costs and leading to missed commercial opportunities. At times, the state aid process has become unbalanced, tilted towards process at the expense of achieving positive outcomes.

Another element requiring improvement is the continuing failure of the Commission's state aid procedure to allow beneficiaries of state aid to play a proper role at any stage of the process although it is they who bear the risk for failures by Member States to apply the rules correctly.

The state aid rules are playing an increasingly prominent role in business activities in the UK and this can add to uncertainty and disrupt decision making. There are a number of reasons for this, all of

which require urgent review: the ever broader interpretation of the rules by the Court of Justice of the EU, the very low thresholds for the criteria of distortion of competition and effect on trade, the de minimis threshold which remains unchanged at EUROS 200,000 and the use of guidelines. Commission guidelines, which are often difficult to interpret, indirectly bind business without providing a sufficient degree of legal certainty.

The Commission retains a monopoly over the approval of proposed aid but has limited resources so is focusing on the worst cases. This leaves a significant middle ground between priority cases and de minimis which cannot adequately be covered with guidelines and block exemptions and where business is in need of significantly more clarity. The UK should work with the Commission to ensure that resources are maximised to deal with the worst cases without unduly delaying others.

Consumer Policy:

Effective competition policy at the European Union level has direct benefits for European consumers as companies that operate within the European Union are encouraged to offer the best available products at the cheapest possible prices.

Consumer protection and confidence is vital for the further development of the Single Market, highlighted by the prioritisation of consumer confidence as one of the key pillars for the completion of the Digital Single Market. It will stimulate more consumption which is a driver for job creation and a strong economy. Increasing consumer confidence cannot be accomplished without an adequate and effective enforcement of consumer rights which is why it makes sense to support effective and easy access to consumer redress.

European consumers have benefitted from a long-term vision from the European Commission, with multi-annual strategies having been adopted to set out the challenges facing consumers and priorities for action. The Commission regularly monitors the policy landscape for consumers in Member States and published the latest edition of the Consumer Conditions Scoreboard in July 2013. This scoreboard monitors Member States' consumer conditions and the integration of the Single Market from the consumer perspective. While the results showed that consumer conditions vary greatly across the Union, the UK comes out with the joint-most favourable conditions for consumers in the EU, well above the EU average.[1] Our existing strengths leave us well placed to engage across Europe and increase consumer standards which as previously noted can increase consumption and drive growth.

The frameworks of regulations and standards that help create a pan-European market have also created significant consumer benefits, such as protection from unfair treatment, ensuring that products meet acceptable standards and enabling redress in case of problems. Some of these have come from direct pan-EU regulation intended to bring consumer benefits – such as recent moves to bring down mobile phone roaming charges and the use of standards defining voluntary agreements on common mobile phone chargers – or as a result of the extensive consumer benefits that come from increased competition – for example, the pan-European open skies agreement has led to a sharp decline in the cost of air fares across the EU and a significant increase in the number of options for customers.

Significant legislation aiming to improve consumer protection and confidence was passed in 2011 in the form of the EU Consumer Rights Directive. The European Commission published this proposal for a maximum harmonization Consumer Rights Directive in October 2008, with the aim of amending four existing consumer Directives relating to unfair terms in consumer contracts, distance selling and consumer sales and guarantees.

There have been some notable policy developments in the UK's legislative process, in particular through the UK Consumer Rights Bill as a result of the Directive. The Department for Business,

[1] http://ec.europa.eu/consumers/consumer_research/editions/docs/9th_edition_scoreboard_en.pdf

Innovation and Skills (BIS) had initially indicated that the UK Consumer Rights Bill would itself implement the EU Directive in its entirety into UK legislation. However, aspects of the EU Directive also went into the UK Consumer Rights Regulations in 2012, the recently drafted Consumer Contracts Regulations and the Consumer Protection from Unfair Trading Regulations.

The UK has in the most part adopted a 'copy-out' approach to the Directive, although the government has decided to gold-plate the scope of the EU Directive and the application of the rules on payment surcharges, hotline rates, and pre-ticked boxes. Meanwhile, the UK Bill proposes an opt-out collective scheme for competition private actions which contradicts the EU's position, recommending only opt-in collective actions. The European Commission has observed in its Communication[2] on Collective Redress that "the 'opt-out' system gives rise to more fundamental questions as to the freedom of potential claimants to decide whether they want to litigate" and that "an 'opt-out' system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them." By grouping potential claimants together indiscriminately, these 'opt-out' actions fail the growth test and will fuel a litigation culture in the UK. It is absolutely right that the victims of competition law breaches are properly and swiftly compensated but there are better ways to do this than resorting to litigation, like using alternative dispute resolution.

[2] http://ec.europa.eu/consumers/redress_cons/docs/com_2013_401_en.pdf