

Balance of Competences Consultation Response

Competition and Consumer Policy

January 2014

This is a joint response from the Law Society of England and Wales and the Law Society of Scotland (the Law Societies).

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

The Law Society of Scotland is the professional body for Scottish solicitors, established in 1949. It is not only the representative and regulatory body for all practising Scottish solicitors but also has an important duty to work towards the public interest.

Introduction

- I. UK membership of the EU has brought significant benefits to solicitors, law firms and their clients, most particularly through the ability to trade, provide services and establish across the EU and to seek effective redress to cross-border legal issues.
- II. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £27.2bn¹ in turnover to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.
- III. The UK legal services sector is globally focussed with offices and lawyers based throughout Europe and the world. Law firms exist in order to service the needs of their clients; these are commonly British businesses trading throughout the Internal Market and increasingly non-British clients doing business in the Internal Market.
- IV. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields, ranging from commercial transactions, intellectual property and competition law to employment law, civil and criminal justice and dispute resolution.
- V. It is for these reasons that the Law Societies and the legal profession have an interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making.
- VI. The Law Societies nevertheless accept that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the other reviews of the balance of competences of most relevance to the legal profession.

¹ <http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/2011-revised-results/index.html>

Impact on the national interest

Question 1 - What evidence is there that EU action in the area of Competition, including State Aid, and Consumer policy advantages the UK?

Competition

1. EU competition law lies at the heart of the Internal Market and is essential in ensuring private actors do not resurrect barriers between Member States removed by market integration, for example partitioning markets along territorial lines between one or more competitors. EU competition law, and its effective enforcement, has been one of the more successful outcomes of EU membership for the UK.
2. The EU competition rules have also been taken up as the template for national competition law in many, if not all, EU Member States. This ensures a broadly consistent approach to all competition cases whether national or cross-border in nature.²
3. EU competition law is not designed to advantage one or other Member State particularly. The rationale of EU competition law is, as mentioned above, to prevent private actors from resurrecting market barriers otherwise dismantled by internal market integration. Further, competition law is created on the assumption that it renders markets more effective and dynamic, incentivises innovation, increases choice and reduces prices to the benefit of consumers. On this basis it is advantageous to have a common EU law applied in cross-border cases according to the same set of criteria and in a consistent manner, either through the European Competition Network (ECN) or by the Commission. It ensures that companies are treated equitably and that there is little scope for national authorities to apply the law in a manner that would protect or favour "national champions".
4. An additional advantage 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. This enables aggrieved parties to recover losses and has also made London in particular a centre of excellence for EU litigation.
5. The fundamental rules in competition law have remained in essence the same since the Rome Treaty. However, the way they are applied has changed, notably with the 2003 Regulation delegating a large proportion of cases to the ECN.

² (a) What is now Article 101 TFEU has been very effective at breaking down intra-EU and global cartels, where in the past national industries often ran "no-poaching" understandings with their competitors in other Member States;

(b) The EU Commission has operated as an efficient enforcement body, with strong powers to detect and deter restrictive practices at EU level;

(c) Competition law is now accepted as a key tool of economic development in its own right across the EU; all EU Member States now have national legislation mirroring the EU competition rules;

(d) The EU merger control rules are effective at controlling larger mergers with an EU wide impact; a patchwork of national merger controls showed itself less well able to deal with large mergers affecting several EU markets;

(e) Further, the rule that the effect of a merger on competition is the only criterion used at EU level to decide whether to approve a merger has greatly reduced the practical ability of individual Member States to block mergers on protectionist grounds or to favour their "national champion". (In line with this approach, the UK's powers to control mergers on the grounds of national interest under the Industry Act have been revoked).

Further, while the law has not changed it needs to be applied in a continuously changing environment, necessitating clarifications and development of guidelines to make sure the law is applied in a consistent manner.

6. Notably, the conditions around when Member States can control mergers to safeguard national security and freedom of expression and to ensure financial stability (banking, insurance, etc) could be clarified.³
7. The scope for Member State intervention in mergers subject to the European Commission Merger Regulation (ECMR) - other than in referral cases - should continue to be very narrow in order, *inter alia*, to prevent certain Member States from protecting National Champions.
8. The existing three categories have been seen to work well and practitioners have pointed to a number of cases where Article 21 ECMR has been sensibly and effectively utilized by the UK.⁴
9. The same cannot necessarily be said for other countries and it would be useful for the Commission to clarify the use of this provision, although most practitioners would not view this as a matter of urgency. Whilst there have been attempts by certain Member States to widen the scope of intervention to energy cases (so-called "security of energy supply" cases), the Commission and Court of Justice of the EU have correctly prevented this to date.

State aid

10. An effective state aid regime is necessary to prevent subsidy races which would distort the market, particularly in areas where other Member States were willing to offer greater subsidies to national champions. This is seen as having made a significant contribution to the ability of UK business to take advantage of the Internal Market.

Consumer policy

11. The Law Societies take no general view on where the balance of competences sits best in relation to consumer policy and note that this is largely a political decision. Under the Treaties consumer policy is a 'shared competence'. Measures tend to get introduced under both the single market and the consumer protection articles of the Treaty. The most important consideration is that policies introduced comply with the principles of proportionality and subsidiarity.
12. The Law Societies are not aware of comprehensive quantitative data establishing direct advantages or disadvantages and such research would likely need to be done on a sector by sector basis. The choice to purchase and sell cross-border is complex and will be determined by a wide range of factors of which the law and regulations on consumer rights will only be one aspect. Other factors of importance tend to be language, issues of convenience, delivery mechanisms, perception, familiarity, brand and trust.

³ See Article 21 of the EC Merger Regulation (Council Regulation 139/2004 on the control of concentrations between undertakings) which allows exemptions to the Regulation in the case of "legitimate interests" including public security, plurality of the media and prudential rules.

⁴ See for example the *NewsCorp/BSkyB* and *HBOS* cases and various defence mergers.

13. In assessing which actions in the area of consumer policy might and might not be relevant and appropriate, and those actions' cost-benefit to the UK, all relevant factors that constitute barriers and drivers of shopping cross-border should be evaluated, regulatory as well as non-regulatory, according to which are of most importance to consumers and businesses themselves. The Societies would urge the Government, as part of this exercise, to undertake detailed research into the issues raised in this response.
14. In the answers given below the Societies aim to outline some of the possible advantages and disadvantages in relation to how the EU consumer *acquis* interacts with consumer and seller behaviour and the domestic legal framework. (For disadvantages see response to question 2.)
15. From the point of view of consumers, removal of barriers to cross-border trade has the potential to promote choice for consumers and lower prices. In this indirect sense, internal market and competition law rather than consumer policy *per se* may be said to bring benefits to the consumer.
16. As regards EU legislation on substantive consumer law it brings the advantage of legal certainty as it gives consumers some confidence in what they can expect from a seller (e.g. in terms of the right of return) when purchasing from a seller established in another Member State. A seller is also likely to have a clearer idea as regards standards with which to comply when selling to other Member States.
17. Further, EU legislation on choice of law provides a degree of legal certainty in cases where disputes arise. The provisions on consumer contracts under Rome I protects consumers in terms of the rights they are able to call upon in the case of a dispute with the seller. Any further change to this situation in the form of additional harmonisation and the possible consequences for UK consumers would need to be considered carefully.
18. The EU has also created opportunities for consumers to access redress in other Member States through the establishment of a framework for cooperation between advice, regulatory and judicial authorities for example the European Small Claims Procedure, a European Payments Order system⁵ and a European Enforcement Order measure⁶. While the statistics suggest that uptake is not high, there is a trend of increasing use. Over time, such a trend is likely to result in significant numbers of consumers being able to access redress in other Member States for example for breach of contractual terms. In line with our other comment in paragraph 13, we consider it would be useful to evaluate the effectiveness of these measures as part of an overall assessment potential benefits for UK consumers from EU action in the area of consumer law.
19. The level of consumer protection in the different EU Member States varies and therefore, apart from the new Consumer Rights Directive - which is limited in its scope precisely for these reasons - EU legislation in this area remains minimum harmonisation in order for high level protection countries are not forced to overall reduce their level of protection.

⁵ Europa (No date given). 'European order for payment procedure', pub: EU institutions: Brussels, accessed at:
http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l16023_en.htm

⁶ Europa (No date given). 'European enforcement order for uncontested claims', pub: EU institutions: Brussels, accessed at:
http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33190_en.htm

20. The balance between the needs and interests of business and consumers and whether this balance currently is appropriate is a political choice outside the scope of this exercise. It does not relate to whether the level of competence is appropriate but whether one does or does not agree with the political choices made in the legislation enacted.

Question 2 - What evidence is there that EU action in these areas disadvantages the UK?

Competition

21. The Law Societies do not consider that EU action in relation to competition disadvantages the UK.

State Aid

22. As a general rule the state aid regime benefits the UK and supports the continuing competitiveness of UK businesses.
23. However, as with all systems where an element of discretion is involved, there may be specific decisions which are disadvantageous or on which the UK might take a different view.
24. There are also problems surrounding interpretation by other Member States but this is a matter of enforcement rather than a problem with action being taken at the EU level.

Consumer policy

25. The Law Societies consider that the following disadvantages may arise but consider that these need to be as rigorously evidenced as the possible benefits before their extent can be properly assessed and thus whether these outweigh the potential advantages.
26. One possible disadvantage is where the process of harmonisation leads to a "one-size-fits-all" system across all Member States, in turn leading to a lowest common denominator approach⁷ and diluting consumer rights in the UK. This, however, is more something to take into consideration when legislating rather than in assessing whether the EU should have competence in the area or not. As far as the Societies are aware, existing EU legislation in the area has not in practice lowered the level of UK consumer protection
27. Another consideration is that in some instances the EU enacts legislation which is more broadly drafted, leading to less clarity or less effective rules.⁸
28. The Law Society of England and Wales points to the fact that EU consumer law measures may use varying definitions which can impact upon legal certainty. A particular example is the definition of 'consumer' itself. There are similar issues with some of the tests used in the legislation, such as the 'average consumer' test which may not be applied in a consistent way.

⁷ Majone has observed that this is inevitable in a large and diverse EU. Source: Majone, G (2009). *'Europe as the would-be World Power: the EU at fifty'*, pub: CUP.

⁸ This lack of clarity can be seen in Directives such as the Unfair Contract Terms Directive, where issues persist over what constitutes a core term of a consumer contract.

29. However, the Societies also note that broader drafting can also allow a degree of flexibility. For example, the definition of digital content⁹ is left open so as to allow it to adapt to technological change. Furthermore, clarification may be sought by way of a preliminary reference to Luxemburg. This can still create uncertainty and delay but such challenges are inherent in all legislation, including domestic legislation.
30. A lack of clarity can cause further problems if and when such uncertainties are incorporated into UK law. Some create persistent problems. Others require to be clarified through the court system, which can increase the costs for business of regulation. It can also result in the incorporation of less effective concepts than those which exist in domestic legislation, particularly the case in relation to maximum harmonisation measures.¹⁰ This is not strictly speaking a question of competence but is nevertheless a problem which should be addressed in ensuring that the EU functions as efficiently as possible in promoting consumer interests.

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

Competition and State Aid

31. The Law Societies do not offer examples of any other impacts of EU action in relation to competition and state aid.

Consumer

32. The Societies points out that there may well be situations in which the harmonised EU law is not noticeably better than the pre-harmonisation law of a particular Members State, especially in cases such as UK consumer credit where that state pioneered the safeguards in question. The gain to the state in such cases is not therefore so much for its consumers but rather for businesses expanding in the rest of the single market.
33. The rationale for future legislation needs to be clear and rigorous and should be targeted at resolving significant and persistent problems which genuinely inhibit the effective operation of the single market. Legislation put forward must be based on a thorough understanding of how market competition works and should adhere closely to the principles of proportionality and subsidiarity.
34. The current system which tends towards enforcement at a national level works well and importantly ties in with subsidiarity and proportionality. It should therefore be preserved, not least because it allows flexibility in cases such as advertising standards to protect consumers which also reflect public opinion and may therefore need to be updated more often and more quickly than is required in other areas.

⁹ See Directive 2011/83/EC at Article 2(11) in light of preamble paragraph 19

¹⁰ This may be a particularly salient risk in the future, once the UK Government's draft Consumer Rights Bill becomes law, as this significantly improves the current UK legislative framework.

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

35. It should be noted that although one of the aims of competition policy is to benefit consumers, consumer policy encompasses a much wider scope.

Competition and State Aid

36. As indicated above, effective competition and state aid regimes are essential to the smooth functioning of the internal market. A single market could not operate with a multiplicity of different and incompatible national competition laws because competition, by definition occurs (or does not occur) on a "market". EU action is indispensable to create and keep the market "single". Equally, a uniform set of rules governing state aid is a pre-condition for any competition in the single market to be level.
37. The EU competition rules have been absolutely key in making sure that as tariffs and quotas were abolished on trade between EU Member States, such restrictions were not replaced by private agreements or cartels between national undertakings to keep out of each other's home market. Proper enforcement of the competition rules is necessary to prevent private compartmentalisation of EU national markets by undertakings.

Consumer policy

38. Common rules, are important in the context of consumer protection. Remaining divergences in consumer protection rules can pose a supply-side barrier¹¹ to cross-border trade in goods and services, although significant harmonisation already exists. It is hoped that the Consumer Rights Directive,¹² by placing on traders clear information obligations and offering some rules which will govern distance selling in particular, will go some way to reducing a number of these problems.
39. In the case of some products, the assurance that the end-user benefits from a reliable set of rules which the trader has to abide by may make it more likely that cross-border offerings will be taken up. This can help businesses by broadening their customer base. The lack of confidence and trust of consumers is a key challenge to cross-border sales in the Internal Market in services and e-commerce,¹³ although (as noted above) the extent of these causal relationships is not clear.
40. Rules at an EU level must comply with the principle of subsidiarity and be a proportionate response to the clearly identified problem. Processes must be rigorously observed to ensure that this is achieved effectively.
41. The Law Society of England and Wales has identified a number of concerns in this respect regarding the current Commission proposal for a Common European Sales Law (CESL). The Society supports efforts to improve the functioning of the Internal Market but does not agree that a need for the CESL has been shown. It believes that there are more important factors in determining whether individuals

¹¹ As a general rule standardisation is not required from a consumer perspective as consumer markets thrive on differentiation, innovation and choice.

¹² The Directive on Consumer Rights (2011/83/EC)

¹³ The Law Society considers that consumer markets do not need a general principle of harmonisation although this may be appropriate for practical reasons to be assessed on a case-by-case basis, where it resolves a particular problem in the market.

and businesses enter into cross-border trade, such as access to effective redress, differing advertising rules, tax, etc. It is concerned that this initiative would cause uncertainty, not only in the interpretation of the new instrument but also in its scope of application, in its relationship to existing law and whether there is a legal basis under the treaties to create it. The Law Society of England and Wales also considers that the introduction of the instrument is likely to create additional costs ultimately to be borne by businesses and consumers.¹⁴ Furthermore, it would be detrimental if this idea of an "optional instrument" were to be taken up and applied in other policy areas, replicating the problems outlined here.

42. The Law Society of Scotland has consistently supported CESL.¹⁵ It considers that a uniform text would enable both consumers and SMEs to refer to an official translation without the need for SMEs to seek foreign legal advice on translation services. The CESL is intended to cover simple transactions and as such an in-depth legal understanding on the part of consumers or SMEs themselves is not required. A single system is preferable to a proliferation of national laws to cover the transactions envisaged.

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

43. EU competence in the area of competition law from an early stage has benefited UK businesses as they have become accustomed to external competition and compliance with a competition regime and have therefore been able to adapt further in order to operate on a competitive basis globally.
44. In the context of consumer policy, the Societies reiterate the need for clear evidence on which the Government can make a decision and as such offer no view on this question as it relates to consumer policy.

Scope and effect of particular powers

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

Competition

45. The competition regime is considered to be one of the major Internal Market success stories and has delivered significant benefits to UK businesses and the UK as a whole. Overall, it can therefore be said that the mechanisms for delivering EU competition law have worked well, although further improvements might be made and, as always, modernisation may be required to take account of future developments.

¹⁴ See further latest joint comments by the Law Society and Bar Council on the Common European Sales Law (April 2013): http://international.lawsociety.org.uk/files/Law%20Society%20and%20Bar%20Council_CESL%20briefing%20for%20MEPs%20April%202013.pdf

¹⁵ See http://www.lawscot.org.uk/media/492984/obl-moj_call_for_evidence-common_european_sales_law-law%20society%20of%20scotland%20response.pdf

State aid

46. It is logical that action be taken at EU level in this area, not least because Member States themselves are subject to the rules in a more direct way than in some other areas of EU competence. For further comments see section 11.

Consumer Policy

47. EU consumer law has thus far primarily been delivered through directives and minimum harmonisation and mutual recognition through Rome I setting in place rules on the applicable law. This means that domestic consumers can rely on their domestic protections when purchasing from a seller in another EU country, who is deliberately targeting sales into the consumer's Member State. This approach enables consumers to a certain extent to rely on their knowledge of their own domestic consumer protections.
48. While this is satisfactory for large businesses and consumers who have made purchases from them, it is not satisfactory for SMEs deterred from selling outside the UK. Lack of knowledge and lack of resources to acquire knowledge about the law of the consumer's residence may present a barrier to trade and lessens the choice available to consumers.
49. As regards harmonisation, the EU has legislated to a very large degree across a wide range of consumer areas either providing horizontal protections or regulating specific types of products and services, for example the Consumer Rights Directive, product safety rules, and those on timeshares, travel and financial services.
50. The Consumer Rights Directive is the first departure from the minimum harmonisation approach although a directive remains the instrument of choice. Implementation must take place and further time will be required for the new rules to settle and for any teething problems to be dealt with before a proper assessment of its effectiveness can be carried out.

Question 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?

51. In some areas the EU has created new or more extensive consumer rights - with corresponding obligations on traders - than existed in UK law prior to the introduction of the respective EU legislation. A good example is Consumer Protection from Unfair Trading Regulations 2008 (CPRs) which went beyond that which had existed domestically previously, for example in general contract law, the Sale of Goods Act and the Trade Descriptions Act.
52. The Law Societies note that, because the CPRs are results-focussed rather than creating clear legal duties, these have proved difficult for regulators to utilise in practice and it is also difficult for businesses to determine with certainty whether they are complying or not. This raises questions as to their efficacy compared to the relevant pre-existing domestic laws and regulations. To get a more accurate picture of their effectiveness, a rigorous analysis based on evidence of efficacy and a credible counter-factual scenario would be required. This might look, for example, at what was already being achieved through the Trade Descriptions Act and compare the evidence of its effectiveness with evidence on the effectiveness of the CPRs. On the other hand, lack of certainty may be viewed as a trade-off with the advantages to business in facilitating expansion by requiring compliance with a single system.

53. In addition, when EU laws are introduced it is difficult to know what may have happened otherwise i.e. the UK may have legislated anyway in that particular area and may have legislated similar rights but in a more focussed and appropriate way. This counter-factual must be considered.
54. Efficacy is an empirical question. The data on effectiveness is scarce and needs to be much more robust before clear judgements can be made.

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?

55. Broadly speaking the UK is seen as one of the leading Member States for competition law enforcement. This results in disciplined pricing and strong innovation in many markets. Transparency in decision-making is also high. The Competition and Markets Authority (CMA) is focused on continued rigorous competition law enforcement, learning from the experiences of the OFT (Office of Fair Trading) and CC (Competition Commission) which formerly employed many CMA current employees.
56. The UK has generally achieved a sensible balance between rigorous enforcement activity and avoiding unnecessary and potentially damaging interventions.
57. As for state aid, the problem in the UK seems to be the recognition at lower levels of public authority that something is indeed a state aid.
58. The Law Societies do not offer any evidence on this point in respect of other countries' enforcement of consumer laws.

Future options and challenges

Question 9 - How might the UK benefit from the EU taking more action in these areas?

Competition and State Aid

59. The current systems work well as a general rule. Action should be taken as and when the need arises.
60. One area where further action could be taken would be to consider subjecting continental notaries to the full rigours of EU competition law, thus reducing the potential for national or local monopolies and anti-competitive scale fees, both in relation to property transfer and succession services, and opening up these markets from appropriately qualified and experienced lawyers from other Member States
61. Specific action to address the current inflexibility of the market might be of benefit to the UK. Since the competition regime was introduced, a number of national distinctive institutions have emerged, including within the UK, which have developed close working relationships and collaboration processes, resulting in the need for Commission intervention being diluted.
62. The Law Society of England and Wales¹⁶ considers that the concurrency model which enables UK sectoral regulators (eg Ofcom, Ofwat) to enforce competition law is a positive development. Among other things it enables the OFT and CC (soon CMA) to focus on enforcement priorities and sectoral regulators have the

¹⁶ The Law Society of Scotland has no position on this point.

industry knowledge to apply competition law most effectively in areas such as communications, energy and water. The CMA is keen to empower sectoral regulators to actually utilize their Competition Act powers (and not just apply regulation) and the Societies expect positive results in the medium term. If the concurrency model further evolves into a fully-fledged mechanism for competition law enforcement then the Commission should consider the benefits of using this as a model for cross-border cases (taking into account, *inter alia*, the lack of resources and expertise of some of the newer Member States). It would be premature for the Commission to impose concurrency models across the EU at present but might be appropriate at some point in the future. There would be obvious benefits to British companies doing business in the EU if other countries were encouraged to follow a similar approach.

63. The Law Societies note that a review of the GBER II regime is currently taking place.

Consumer policy

64. The immediate benefit of more EU action in consumer policy is hard to gauge for the reasons set out elsewhere in this response.
65. The existing stock of EU law, in particular the Consumer Rights Directive, must be given time to take effect before a proper evaluation can be carried out. Therefore the Societies would like to see the implementation of the ADR Directive and Consumer Rights Directive before further action is considered at the EU level. Further action should not be taken until this assessment has been carried out.
66. As with all EU legislation any further action should be tested against the principles of proportionality and subsidiarity.

Question 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?

67. The Law Societies support the current position.
68. In the context of competition, the Societies note that the Commission does not dictate the nature of merger control law and enforcement at national level. The UK's merger regime (voluntary, with a market share threshold) has afforded much-needed flexibility, and has not become an additional burden for business.

Question 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?

69. The Law Societies support the role of the Commission as the decision-making body in state aid cases. However, due to limited resources the Commission focuses on the most serious infringement cases, leaving a significant middle ground between priority and *de minimis* cases. These are not adequately covered by existing guidelines and current block exemptions; business is in need of significantly more clarity.
70. These concerns could be addressed through improvements to EU legislation such as changes to the Procedural and De Minimis Regulations and block exemptions as well as through much more clearly drafted guidelines.

71. This response has emphasised the importance of correct application of the proportionality and the subsidiarity principles to EU legislation. Concerns have been raised that these are not always applied as rigorously as they should.
72. In the view of the Law Society of England and Wales, the latest and most obvious example is the CESL, which it believes is a disproportionate policy response to an unclear problem and which infringes the subsidiarity principle by not having considered alternative solutions which could be effected horizontally at the Member State level. The Law Society of Scotland does not agree with this assessment of the CESL.
73. The corollary of better adherence to proportionality and subsidiarity principles is more emphasis on properly measuring the effectiveness of existing policies and measures after they have been implemented. This should be complemented by a greater willingness to repeal poor legislation which is not achieving the ends it was supposed to achieve and reforming the existing body of rules where there is poor drafting or there are inconsistencies with other legislation, for example the multiple definitions of the same concept, such as "consumer".
74. One important way of better influencing EU policy and legislation, including ensuring that EU action occurs only where appropriate, is encouraging more people from the UK to consider working in the EU institutions.¹⁷

Are there ways the EU could use its existing competence in these areas differently which would deliver more in the national interest?

75. The Societies would suggest that it in relation to competition the problem is not the EU legislation but its enforcement in the Member States. Cooperation through the ECN could be strengthened and used to apply peer pressure to bring about better enforcement.

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

Competition and State Aid

76. It is in the national interest that UK businesses are not kept out of markets in other Member States and therefore means that UK barriers to the import of goods and services should also be avoided.
77. There are obvious challenges in achieving a level of prudential regulation that enables financial services in particular to be available across the single market and to ensure that consumers can have confidence in them.
78. The UK has a strong knowledge economy, and should be allowed to continue to foster and reward innovation while taking active steps to ensure that the Commission effectively recognises the critical role of technology and innovation to EU economies. Competition policy in this area should therefore not unnecessarily restrict royalties and compensation and ensure that innovators obtain a fair return on their investment. Furthermore it is important to facilitate effective enforcement of intellectual property rights.

Consumer policy

¹⁷ The Law Societies understand that the UK Government is currently working on this.

79. Further e-commerce related legislation, as well as consumer credit, e-payments/money and the interaction between consumer policy and other policy areas such as intellectual property could provide a challenge in terms of ensuring consistency between such pieces of legislation.
80. Due care should always be taken to ensure new legislation brings added value, is proportionate and respects the subsidiarity principle. With that in mind initiatives in the area of intellectual property and digital agenda could potentially also bring significant benefits to consumers and UK business as the UK domestic market is further developed than those of some other Member States.

General

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

81. The creation of the single market must take into account the general principles of EU law from subsidiarity and proportionality to equal treatment and transparency. The "national interest" is in a level playing field and the removal of barriers that have no objective justification.

