Liverpool European Law Unit

UNIVERSITY OF LIVERPOOL

Review of UK and EU balance of competences: response to the call for evidence on competition and consumer policy review

Lead contributor

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Note: this report addresses the call for evidence questions on competition law only, leaving aside consumer protection and state aid issues.

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http://www.liv.ac.uk/law/research/liverpool-european-law/

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Impact on national interest

Q1 & Q2 – What evidence is there that EU action in the area of competition law advantages/disadvantages the UK?

Competition law is not an area in which direct financial/monetary assets are distributed at the EU level. The EU has **robust competition rules** as reflected in Arts.101 and 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU) as well as the EU Merger Regulation. EU competition law enjoys **a strong enforcement system** set forth in Regulation 1/2003. The European Commission and the national competition authorities enforce the competition rules **in cooperation** under the framework of the **European Competition Network**. This system involves safety valves against the potential enforcement of competition rules with a national bias. Extreme cases of parochialism might even result in the European Commission taking a case away from a national authority.[1]

Thus, any advantage/disadvantage of EU action in this area on the UK's national interests will be **indirect**. The key indirect beneficiary of EU action in competition law is **the UK's legal services industry**. The EU competition regime is implemented in a wide geographical area that goes beyond the current twenty-eight Member States. As EU competition law regime is significantly less costly to implement than the US regime, it provides a natural template for **newly emerging competition regimes around the globe**. Likewise, the EU spreads its competition regime to its periphery through **enlargement conditionality**. As a result, many dynamic and growing economies around the globe, including Turkey and China, adopted competition law regimes that follow the EU regime almost word by word. The UK's legal services industry, with its vast experience in EU competition law, enjoys enormous first-mover's advantages in these **newly emerging legal markets**. Likewise, the draft proposal for a Directive on damages actions in competition law[2] and the European Commission's initiatives to establish an EU-wide private enforcement regime are likely to **further benefit the UK's legal services industry**: the UK government has been one of the first in the EU to take action to provide a hospitable legal climate for damages actions.[3] Thus, the UK is likely to be the one of the **preferred forums** in the EU for plaintiffs of damages actions. This will be particularly so if the UK government successfully implements its plans to establish an efficient, fast-track damages actions regime before the Competition Appeal Tribunal, a specialised court, for simpler cases. For similar reasons, the UK's legal services industry will enjoy an advantage in organising cross-border claims and bringing them before the Competition Appeal Tribunal. It is very difficult to think of any disadvantage EU actions in competition law might cause to the UK's national interests.

Q3 – Are there any other impacts of EU action in these areas that should be noted?

As mentioned in the answer to questions 1 and 2 above, the national authorities and the European Commission enforce Arts.101 and 102 TFEU in cooperation. In fact, EU law requires the national authorities and courts to enforce EU competition rules when they come

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty, Art.11(6).
[2] Proposal for a Directive of the European Parliament and the of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Strasbourg, 11.6.2013, COM(2013) 404 Final.
[3] Department for Business Innovation & Skills, Private Actions in Competition Law: a consultation on options for reform – government response, January 2013.

across a potential breach of them.[4] Likewise, national authorities that enforce competition rules are expected to enjoy a certain level of resources and independence to ensure robust and effective enforcement. As a result, the EU competition law regime imposes certain **enforcement costs** on the Member States. These costs, however, are **minimal when it comes to the UK**: the Office of Fair Trading (that is to be replaced by the Competition and Markets Authority in April 2014) is among the most resourceful, professional and influential authorities in the European Competition Network. Likewise, the UK has achieved maximum harmonisation with EU competition rules with the 2002 Enterprise Act and the 1998 Competition Act.

Q4 – To what extent is EU action in the area of competition law is necessary for the operation of the single market?

EU competition law regime is the **strongest pillar of the single market** alongside the rules on free movement. This is why competition law constituted one of the very few substantive areas regulated directly in the original Treaty Establishing the European Economic Community in 1957. If an effective centralised competition law regime did not exist, the internal market would be open to **serious impediments**: national cartels and monopolists would be able to protect their market against foreign entrants through anticompetitive activity; and the Member States would be able to apply national competition rules strategically to favour national firms and/or to punish foreign firms. Additionally, the internal market naturally requires an EU-wide competition law regime, as most anti-competitive activities affect various national markets at the same time. For this reason Arts.101 and 102 TFEU apply to infringements affecting the 'trade between member States'. Likewise, the EU Merger Regulation applies to concentrations with an EU dimension.[5] EU Courts' case-law is built on the connection between competition rules and the internal market. This connection is embraced in old cases such as *Consten and Grundig*[6] as well as more recent ones such as *GlaxoSmithKline*[7]. Likewise, the aforementioned proposed Directive on damages actions takes its legal basis not from Treaty rules on competition law (Art.103 TFEU) but from the single market (Art.114 TFEU).

Q5 – How does the EU's competence in these areas impact upon the UK's global competitiveness?

The EU competition law regime **significantly contributes** towards the UK economy's global competitiveness. The rigorous enforcement of competition rules at the EU and national levels ensures that the UK companies perform well purely on the basis of **economic efficiency**, and not because they employ anticompetitive strategies to escape the disciplining forces of supply and demand or because they receive favours from the government. Thus, UK companies are trained at home to be **fit to compete at the global level**. Similarly, UK companies have vast experience in compliance with a world-class competition law regime. Resources required for such compliance is a natural element of their cost structure. As a result, when they enter into markets with newly emerging competition law regimes, UK companies enjoy **competitive advantages** over domestic and other international companies who are less experienced in compliance with competition rules.

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[4] Regulation 1/2003, note 1 above, Art.3.
[5] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Art.1.
[6] C-56&58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*.
[7] C-501, 513, 515, 519/06, *GlaxoSmithKline v. the Commission*.

Scope and effect of particular powers

Q6 – How have the EU's mechanisms for delivering a single market worked in these areas?

The EU has been **very successful** in achieving a **level playing field** in competition law. Competition law is one of the most harmonious substantive law areas across the Member States. The level of harmonisation achieved in the EU appears particularly significant considering that competition law regimes in federal countries, such as the US, still suffer from abundant divergences between the federal and state competition law regimes and between different state competition law regimes.

The harmonisation in the EU has occurred largely on a **voluntary basis** and through **cooperation** between the European Commission and the national authorities. When the EU competition rules came into force in 1957, the original six Member States – apart from Germany and France – did not have competition rules at the national level. Most of the other Member States, particularly the Central and Eastern European Countries that joined the EU in 2004, 2007 and 2013, first came into contact with competition rules through their accession to the EU. As a result, the EU regime provided **a natural template** for the national regimes to draw lessons from. Thanks to this high level of harmonisation, supremacy conflicts that are replete in other substantive areas have literally been non-existent in competition law. Having said this, under the EU principle of supremacy, national rules regulating anticompetitive agreements can be neither stricter nor laxer than the EU standard, whereas in unilateral conduct the Member States enjoy flexibility to adopt stricter standards than the EU standards.[8] When it comes to mergers, central enforcement of the EU Merger Regulation by the European Commission to concentrations with EU dimension rules out any potential inconsistencies.

National authorities and the European Commission **cooperate in the context of various platforms** that support the soft voluntary harmonisation process: in addition to the aforementioned European Competition Network, national and EU officials take part in global platforms, such as the OECD, UNCTAD and the International Competition Network (ICN). In such platforms, national and EU officials act as members of one harmonious group. Finally, to avoid potential discrepancies between the judicial enforcement of competition rules in different Member States, the Commission has developed mechanisms for the national courts to ask for the Commission's opinion in competition law cases.[9] Those opinions are without prejudice to preliminary rulings to the Court of Justice of the European Union from the national courts.

Differences in Implementation

Q7 – To what extent has the EU created more or less competition provisions for UK consumers compared to the UK's domestic agenda?

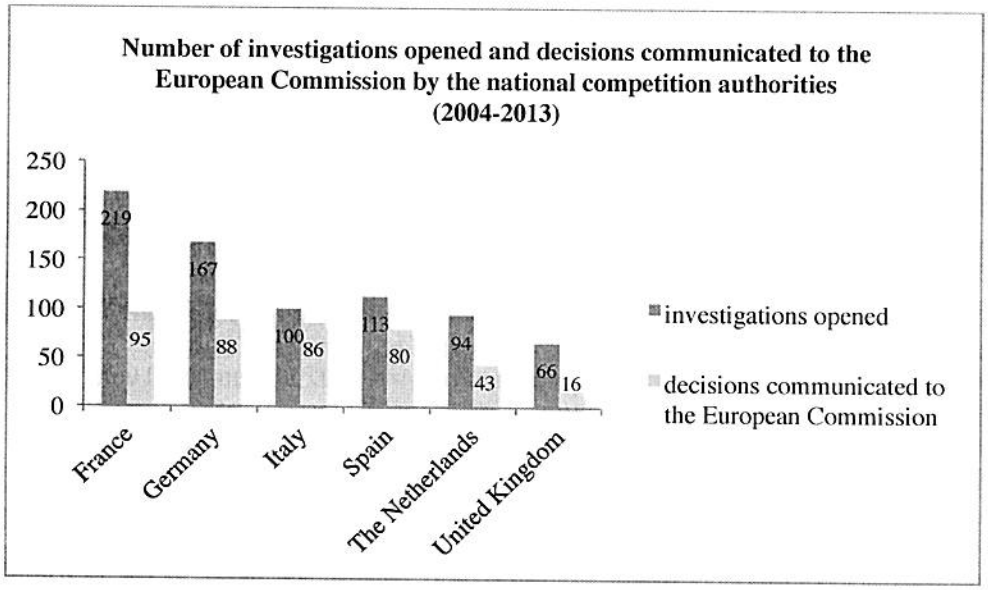
The UK currently enjoys **a world-class competition law regime** enforced by strong, prestigious and independent authorities. However, this has happened after the UK became a member of the EU and after it harmonised its competition law standards with those of the EU with the 1998 Competition Act and the 2002 Enterprise Act. Before then, the 1973 Fair

[8] C-14/68 *Walt Wilhelm and others v Bundeskartellamt*; Regulation 1/2003, note 1 above, Art.3(2).
[9] Regulation 1/2003, note 1 above, Art.15; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2004/C 101/104, chapter 3.

Trading Act used to be the key source of UK competition law that established **an old-fashioned political regime**: in this regime decisions were ultimately taken by the Secretary of State; room for judicial review was limited at best; and there was no possibility for private actions for damages. In the future, policy developments at the EU level will most probably continue to be the **key source** of influence that keeps UK competition law regime up to date with **robust modern standards**. This is obvious from recent reforms initiated by the European Commission to bring EU standards in line with modern economic principles,[10] as well as the Commission's efforts to establish an EU-wide private enforcement regime.

Q8 – To what extent is the UK more or less rigorous in enforcing its competition rules compared to other Member States? What are the effects of this?

According to the Global Competition Review's June 2012 competition authority rankings, the European Commission, France's Autorité de la Concurrence, Germany's Bundeskartellamt and the UK's Office of Fair Trading respectively occupy **the first four positions among all competition authorities around the globe,** ranking above the US Federal Trade Commission that came only fifth. There has been a level of convergence between these elite competition authorities of Europe in terms of their approach to substantive issues as well as their enforcement activity levels. The graph below shows the number of investigations opened under Arts.101 and 102 TFEU by some national competition authorities and the decisions they communicated in such investigations to the European Commission in the light of Regulation 1/2003 Art.11(4).



Source: the European Competition Network statistics – available at http://ec.europa.eu/competition/ecn/statistics.html.

The statistical data provided in the table above illustrate the convergence in enforcement levels. Even though the UK's Office of Fair Trading appears less active compared with some

[10] See e.g. Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02; Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices; Commission Notice, Guidelines on Vertical Restraints, Brussels, 10.5.2010 SEC(2010) 411 final.

other national authorities, this could be the result of various factors: e.g. the Office of Fair Trading might be devoting its resources to the most serious infringements; it might be more successful than other authorities in targeting infringements with a principal effect in the UK market and leaving other infringements to be addressed by the European Commission; or the UK market might simply be to the victim of a smaller number of infringements. The definite reason could only be identified after a substantive analysis of cases dealt with by the Office. What matters for the purposes of this report is that **the UK is not significantly more/less rigorous than other authorities in competition law enforcement**. Thus, there are no costs imposed on the UK economy or companies by over- or under-enforcement of competition law.

The EU Merger Regulation foresees **one-stop-shop** enforcement by the European Commission with regard to concentrations with an EU dimension. Under very exceptional circumstances, if the national market constitutes a 'distinct market' under EU Merger Regulation Art.9, a national authority may ask the Commission to refer the case to be dealt with by that authority. Thus, cross-border mergers are unlikely to be dealt with at the national level unless exceptional circumstances exist. In any case, there is **no evidence of over- and/or under-enforcement of merger provisions or enforcement with national bias** by the UK or other national authorities in a way that would jeopardise the UK economy and companies. There have been examples of conflicts between the European Commission and national authorities in cases of mergers that involve significant national interests to which national governments attempted to involve politically: such examples include the French involvement in the Suez/Gaz de France merger,[11] Italian involvement in the E.On/Endesa merger[12] and Polish involvement in UniCredit/HBV merger[13]. However, such conflicts are the **exception** rather than the rule, and the European Commission is prepared to bring **infringement actions under Art.258 TFEU** against such economic protectionism by the Member States, as happened in the case of UniCredit/HBV merger.

Future options and challenges

Q9 – How might the UK benefit from the EU taking more action in competition law?

Art.3 TFEU defines competition law as an area of **exclusive EU competence**. Arts.101 and 102 regulate anticompetitive agreements and the abuse of dominance directly. The EU Merger Regulation applies **exclusively** to concentrations with EU dimension. There is an extensive body of EU legislation in the form of delegated Commission block exemption regulations as well as soft-law that further deals with anticompetitive activities in detail. This extensive body of EU standards provide a natural template for the harmonisation of national competition law regimes. The proposed Directive for damages actions requires further harmonisation of national procedural standards applicable to damages claims. Thus, it can be argued that the EU action in competition law has already reached **the limits of EU powers** available in this area. It is not realistic to expect the EU to take more action than it already does.

Q10 – How might the UK benefit from the EU taking less action in competition law, or from more action being taken at the national rather than the EU level?

Due to globalisation, most economic activities result in positive and negative externalities in various markets. As a result, competition law involves a significant **cross-border dimension**

[11] European Commission, Press Release, IP/06/1558, 14/11/2006.
[12] European Commission - MEMO/08/147, 06/03/2008.
[13] European Commission - IP/06/276 08/03/2006.

that results in **extra-territorial application**. This naturally imposes enormous costs on international businesses. There have been various attempts to reduce such costs through harmonised action at the **international level**, including an attempt to address competition law issues under the World Trade Organisation framework. Even though this effort has failed primarily due to US objections, competition authorities and officials coordinate their activities in the context of various **international platforms**, including the OECD, UNCTAD and the ICN. The European Commission is supportive of such coordination. Thus, even if the EU agreed to delegate some of its powers in competition law, that delegation would probably be to the **benefit of international rather than the national level**. Similarly, due to the aforementioned cross-border effects, even if the UK decides to leave the EU, the UK competition authorities will most probably continue to coordinate their activities with the European Commission and the Member State authorities, as do the current members of the European Economic Area.

Q11 – How could action in these areas be undertaken differently (with regard to the principles of subsidiarity/proportionality and the current division of competences)?

Competition law is one of the key pillars of the single market. EU action in this area takes mostly the form of soft-law and delegated legislative acts by the European Commission, rather than harmonisation of national standards through directives and regulations. Thus, EU action in this area is easily justified on the basis of subsidiarity and proportionality. Likewise, the strong cross-border dimension of competition infringements justifies extensive EU competence. One potentially problematic development in terms of respect for the division of competences and the principles of subsidiarity and proportionality is the proposed Directive for damages actions. The Directive foresees **harmonisation** of national procedural standards that apply to damages claims against the violations of **not only the EU but also the national competition laws**. The European Commission justifies the extensive harmonisation by taking **internal market (Art.114 TFEU)** rather than competition law (Art.103 TFEU) as the **basis** of the Directive. Nevertheless, the approach taken in the Directive could be criticised for meddling with **national procedural autonomy**. Thus, the Directive is likely to cause debates in the European Parliament and the Council in the spring of 2014. Similarly, the Commission Recommendation on collective redress,[14] which complements the Directive, asks the Member States to bring their standards in line with those foreseen in the Recommendation. Those standards include opt-in class actions for mass compensation claims, as well as permanent and ad hoc appointment of representative bodies to bring damages actions on behalf of consumers.

Q12 – What future challenge/opportunities might the UK face in this area of competence and what impact might these have on the national interest?

The key future challenge for EU competition law will most probably be to establish a **damages actions regime that benefits consumers**. Damages actions in competition law are costly and complex. They involve difficult questions such as the quantification of damages caused by anticompetitive activities affecting various markets for a long time. Individual consumers who suffer only a small fraction of the harm neither have incentives to bring damages actions nor enjoy the necessary means to employ high quality legal and economic expertise to prove their case. The Commission proposals in this area foresee certain mechanisms to support consumer actions that include indirect purchaser standing and opt-in collective and representative actions. Nevertheless, it is ultimately for plaintiffs to prove and

[14] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law.

for national courts to decide on the most difficult issues that require expensive economic expertise, such as the quantification of damages.

As mentioned above in response to question two, the UK is likely to be a popular forum with its efficient and effective damages actions regime and its experienced legal services industry. Nevertheless, the UK might need to revisit some of its national procedural standards in the light of standards proposed by the European Commission: for instance, the Commission Recommendation on collective actions favours the principle of opt-in collective actions in order the avoid an excessive litigation culture[15], whereas the UK government has been planning to establish a limited opt-out collective actions for UK-domiciled plaintiffs[16]. Likewise, the Recommendation foresees the prohibition of punitive damages, whereas the UK Competition Appeal Tribunal has awarded exemplary damages in a recent case[17].

[15] Commission Recommendation, ibid, para.21.
[16] Government Response, note 3 above, p.6.
[17] 2 *Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.