OFFICE OF FAIR TRADING

COMPETITION COMMISSION

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By email and post

29 January 2014

Dear Mr Wright

BIS balance of competences review on antitrust and consumer rules (the Review)

I. Introduction

The Review asks a number of key questions about the interaction between the competence of the EU and the UK to take action in relation to competition and consumer matters. We set out below our views on certain elements of the balance of competences where the OFT and CC have relevant experience.

II. Overall view of balance of competences between EU and UK in antitrust and consumer matters

Our view is that the current shared competence in relation to antitrust and mergers broadly works well and should be retained. The situation with respect to consumer protection rules may be more nuanced, as we discuss below.

We consider that for the EU single market to work effectively, it is important to have a single set of EU competition rules which set the key parameters for operation of the single market in addition to specific national rules. It is also important to have central institutions like the European Commission (Commission) and the European Court of Justice to facilitate consistent application and, in the case of anti-trust, enforcement of those rules.

In competition cases relating to agreements or practices involving many Member States it may often be more efficient for the Commission rather than numerous Member States to take the case such that businesses only have to deal with one authority rather than several. Centralised enforcement in some circumstances can also ensure greater predictability for businesses and avoid the possibility in certain cases of authorities in different Member States reaching different conclusions in relation to the same case. However, as explained below, the position may be different for consumer cases, where the benefits described above may not accrue in the same way.

At the same time, there remains an equally important role for Member States competition laws and for national authorities in enforcing them as well as EU competition law. Enforcement of both national and EU rules by Member States and the ability of Member States to make national rules (provided that these are compatible with the Single Market) is crucial to allow Member States to act where a case or issue raises particular national factors or has a particular national focus. For antitrust, it also recognises the argument that it is appropriate for both EU and national authorities to share the workload in relation to enforcement of competition rules. The UK has appropriate and in our view, effective national laws in the Competition Act 1998 and the mergers and markets provisions of the Enterprise Act 2002.

III. Views on specific areas

We set out below our experience of the current balance of competences in relation to specific areas.

Antitrust

Articles 101 and 102

The Commission and Member States share competence to enforce the key EU antitrust provisions (Articles 101 and 102 of the TFEU). Member States may also apply national rules where these are complementary to the EU provisions. EU rules – primarily Regulation 1/2003 (Regulation 1) and the Commission Notice on cooperation within the Network of Competition Authorities (the Network Notice) – set out a framework for this shared competence and enforcement. They include rules on information gathering and sharing (Regulation 1) and on practical matters such as case allocation between EU authorities (the Network Notice).

The Network Notice sets out considerations for assessing when the Commission, on the one hand, and one or more national competition authorities (NCAs) on the other hand, are well placed to handle a case. Broadly speaking, under the Network Notice, action by one NCA – or parallel action by two or three NCAs – may be appropriate where an agreement or practice has substantial effects on competition

mainly in their territory or territories and where action by the appropriate number of authorities would be sufficient to bring the entire infringement to an end and/or to sanction it adequately. Conversely under the Notice, the Commission is particularly well placed to handle a case where one or more agreements or practices affect competition in more than three Member States. Notably, under Article 11(6) of Regulation 1, the Commission may relieve NCAs of the ability to take a case where it wishes to initiate proceedings.

Our experience is that this system of shared competence with respect to competition enforcement has worked well to ensure that cases are generally taken by the authority or authorities – be they EU or Member State – best placed to investigate. We note that where the Commission has taken cases, it has in our view demonstrated an effective track record. In addition, NCAs such as the OFT themselves have often been able to deal effectively with cases that are focused on, or having particular impact on their Member State, with the Commission for the most part tending to focus on anti-trust cases impacting on a number of EU Member States. More broadly, we note that working with other Member States, and the Commission in particular (a major player on the international stage, whose opinion other parts of the global competition community often give considerable weight to), through the ECN allows us to discuss and influence the development of international competition policy to an extent we might not otherwise be able to.[1]

We should add that linked with these advantages, the current balance of competence brings specific advantages to the antitrust system, including knowledge and expertise sharing, and effective liaison between competition authorities through the ECN– this is the case both vertically (with respect to NCAs and the European Commission) and horizontally (between EU NCAs) themselves.

Criminal cases

We note that the above arrangements do not prevent member states retaining other national criminal offences like the UK criminal cartel offence (which applies to natural persons). (The cartel offence, unlike Article 101 and its domestic equivalent, the Chapter I prohibition, is not national competition law within the meaning of Regulation 1/2003 and is not, therefore, subject to the case allocation mechanisms described above). In particular, it is neither a law applicable to undertakings that pursues the same objective as the TFEU competition rules, nor is it a law which is the means of directly enforcing such competition rules in the

[1] We will separately be sharing our operational experiences in the ECN with BIS, as part of the review of Regulation 1/2003.

event of an infringement.[2] We consider that, in order to maintain an optimal deterrent for criminal cartel activity committed by individuals in the UK, it is important that we retain our current ability to take criminal enforcement action in this way even in cases where the Commission is investigating the same cartel arrangements in the context of administrative proceedings targeted at undertakings under Article 101.

Mergers

Under the EU Merger Regulation (EUMR), the Commission has jurisdiction over 'concentrations with a Community dimension'. Member States may not apply their own competition laws to these mergers, except in certain limited circumstances. However, while the starting point for allocating jurisdiction between the Commission and the Member States is that mergers should be reviewed by the authority that has initial jurisdiction, the EU merger control regime has a degree of flexibility which allows for cases to be passed, in either direction, between the Commission and Member States to, broadly speaking, ensure that a merger is assessed by the authority that is best placed.

We consider that the current referral / allocation system for merger cases works well and achieves its objective of ensuring that cases go to the authority that is best placed to assess them.

Finally, we note that the Commission is proposing a number of changes to the EUMR[3] which in our view will improve the current referrals system by reducing the

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[2] A national law which imposes criminal sanctions on natural persons will only be national *competition* law for the purposes of Regulation 1/2003, to the extent that both: (i) the national law prohibits conduct by, or collusion between, one or more undertakings which restricts competition, and thereby amounts to an infringement of competition law, *and* (ii) the imposition of criminal sanctions on natural persons is the means of directly enforcing the relevant competition law applicable to undertakings, in view of the finding of infringement.

[3] See http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html. The key proposed changes are: (i) Abolishing the two stage notification procedure for parties to request transfer of cases between the Commission and Member States (under Articles 4(4) and 4(5) of the EUMR), allowing parties to notify directly to either the Commission or the Member State where the parties prefer the review to take place. This is intended to save time as the veto period will run alongside the review period; and (ii) Amending the procedure allowing Member States to request that the Commission examines a merger instead of the Member States (under Article 22 of the EUMR) so that a Member State no longer needs to join a request. In other words, unless a Member State opposes an Article 22 request, the Commission will have jurisdiction over a case (if it accepts the request).

burdens on parties liaising with authorities about referrals and allow for greater 'one-stop shop' benefits for parties.

Consumer

Consumer protection policy, including consumer credit policy, has aimed to create growth by empowering and protecting consumers so they are aware of their rights and can make appropriate decisions when purchasing goods and services across the Single Market. It has also sought to build cooperation amongst Member States to provide an appropriate degree of protection when things go wrong for consumers. Both the EU and Member States have competence to legislate in this area and have done so.

We consider that broadly this system works well, subject to a number of points below. Firstly, some EU Directives have sought to enhance confidence in cross-border purchases by creating a level playing field for business by preventing Member States laws imposing additional protections in addition to those required or permitted by the directives ("maximum harmonisation"). However, in our view such national laws can have a crucial, complementary, role to play in safeguarding consumers in Member States given the range of different market conditions and laws across Member States. We consider it is important that the current ability of Member States to legislate where the EU has not yet done so remains.

We consider that when proposing new maximum harmonisation legislation, the EU should take greater account of the need to avoid reducing pre-existing levels of consumer protection in Member States. We consider it is important to ensure that this does not reduce pre-existing levels of protection where there is evidence that local conditions and markets require different standards.

Moreover, maximum harmonisation directives may also create problems where the directive is insufficiently clearly drafted in terms of its aims and specific provisions, and therefore the outcomes they oblige Member States to achieve are insufficiently clear. (There is in our view a strong case for reviewing the process for the final stages of the production of such directives to ensure that Member States, and users within them, are clear about the obligations imposed by the directive). We recognise that maximum harmonisation may be appropriate in certain cases but its use in consumer protection legislation should be considered very carefully, taking greater account of local levels of existing consumer protection, and where maximum harmonisation is used the drafting process at EU level must be more robust.

We have supported the Commission's Review of the Consumer Acquis which was launched in 2004 and aimed to strike the right balance between a high level of consumer protection and increasing competitiveness. There are lessons however to be learnt from the process which sought to achieve maximum harmonisation across all four of the original Directives proposed to be included under the Consumer Rights

Directive (CRD). Ultimately it was necessary to restrict the scope of the CRD to two of the original directives to secure the agreement of all Member States on a maximum harmonisation approach.

As regards consumer and consumer credit enforcement, we note that while the Commission does not currently have such powers, DG Sanco is proposing that the Commission should be given them. In our view, national enforcement – enhanced by cooperation between Member States under the CPC framework – is arguably sufficient in the consumer sphere and it may not be necessary or helpful to have Commission-led enforcement. We note that although enforcement by the Commission works well on the competition side, it would not necessarily be beneficial in relation to consumer enforcement. In our view, individual Member States rather than the Commission are in a good position to assess the need for enforcement action and whether consumer law has been breached because of their familiarity with relevant local social, cultural and to some extent economic, conditions. Such conditions in our experience have a significant impact on determining whether particular commercial practices are deemed unfair but are in our view of less relevance for competition enforcement. Moreover, there is a real risk that an enforcement gap is created, where the Commission has competence to enforce, but lacks the resource to do so, given the number and variety of cases. Given the nature of consumer markets in the EU, there will be many situations where businesses trade cross border (such as travel and transport, banking, telecoms, online retail etc) simply because they are headquartered in one Member State.

Further, we note also that as part of the Commission's current review of the CPC network, an independent evaluation was carried out in 2012.[4] This concluded positively on the overall enforcement value added by the CPC framework and on the benefits for consumers, businesses and authorities. It recommended a number of clarifications and improvements in the areas of powers available to national authorities and of national procedural fragmentation. While it recommended a stronger role for the Commission, for example doing more to hold Member States to account where enforcement is below optimal levels and more to co-ordinate and facilitating multi-state enforcement, it did not recommend giving the Commission specific consumer enforcement powers.

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[4] See http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/consumer_protection_cooperation_regulation_201310_en.htm

IV. Other points

We note that there are a number of changes to the UK enforcement landscape for antitrust cases which may affect the extent to which, in practice, UK authorities might wish to explore taking significant / very large cases that could in principle be taken by the Commission for policy development or deterrence reasons and which at present the Commission typically does take.

The CMA takes on its full functions and powers from 1 April 2014 and may decide to invest additional resource in expanding its enforcement capacity. There are also changes in relation to concurrent regulators, with the Enterprise and Regulatory Reform Act 2013 giving more primacy to the use of antitrust powers and concurrent antitrust powers being granted to Monitor and the Financial Conduct Authority. The current framework should in principle allow for the possibility of UK authorities to take more very large and significant cases if they wish to do so in future but there may be more active discussions about case allocation compared to the present, including in particular in relation to cases in financial services and regulated sectors.

Yours sincerely

and

Office of Fair Trading

Competition Commission