Response to Consultation

Review of UK and EU Balance of Competences (Competition and State aid)

1. Introduction

1.1 This paper is submitted by the Slaughter and May Competition Group in response to the call for evidence by the Department for Business, Innovation & Skills ("**BIS**") in relation to the Government's review of the balance of competences between the UK and the EU, published on 21 October 2013 (the "**Government's Review**"). The call for evidence particularly concerns the competition (including State aid) and consumer policies. Our response only focuses on the first. It follows our participation in the stakeholder event organised by BIS on 12 November 2013 (the "**Stakeholder Event**").

1.2 We welcome the opportunity to provide evidence in the context of the Government's Review. We consider it important that a broad range of stakeholders are heard and evidence is reviewed carefully before action, if any, is proposed following this review.

2. Specific Comments regarding Competition[1]

2.1 In common with most stakeholders who attended the Stakeholder Event, we consider that, overall, the current balance of competences in the competition area works well. In particular, we do not believe that the current arrangements give rise to any major issues that would require a radical overhaul or shift of competences from the EU level to the Member State level or vice-versa.

2.2 As discussed at the Stakeholder Event,[2] there are significant advantages for businesses of having an EU-wide regime (and related institution) in place in addition to 28 individual regimes (and authorities) at national level. In particular, the "one stop shop" in merger control allows businesses that meet the specified thresholds to submit one merger filing with the European Commission rather than multiple merger filings with the relevant national competition authorities ("**NCAs**").[3] This can result in direct efficiencies for the businesses involved because it avoids the time and costs associated with preparing multiple filings. The system already contains a number of checks and balances in order to ensure that this regime is not operated in an overly formalistic way and that cases are considered by the appropriate authority. In particular, the EU Merger Control Regulation

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[1] We understand this term to encompass both the merger control and antitrust (Articles 101 and 102) rules, as described in the BIS call for evidence document.

[2] And reported in the minutes of the meeting (circulated on 22 November 2013), p. 4.

[3] In particular, the "one stop shop" rule means that the European Commission has exclusive competence to assess concentrations where certain turnover thresholds are met (i.e. that have an "EU dimension") and that, as a result, the companies concerned need only make one notification within the EU. Below the thresholds, concentrations are subject to any relevant national merger control regimes that may exist. Following the entry into force of the 1994 Agreement on the EEA, the Commission's exclusive competence for concentrations meeting the thresholds was extended to cover the whole EEA territory.

("**EUMR**") includes referral mechanisms that allow jurisdiction to be reallocated in specific cases where appropriate (e.g. if the only competition issues of any significance are limited to one Member State).[4]

2.3 On the antitrust side, under the regime introduced by Regulation 1/2003 (the "**Regulation**"),[5] the European Commission shares competence to apply Articles 101 and 102 of the TFEU with the NCAs and national courts. NCAs and national courts can also apply domestic rules in the competition field. Regulation 1/2003 includes rules to ensure convergence and consistency in the application of Article 101/102 TFEU by the various authorities.

2.4 However, there are two areas where we believe the balance of competence between the Commission and the Member States as set out in these rules could be clarified or improved:

- the use of Article 11(6) of Regulation 1/2003, where there is little transparency as to when the Commission will intervene to relieve a NCA of its competence to apply Article 101 or 102 TFEU. This results in a significant degree of legal uncertainty for businesses; and

- the operation of the various leniency programmes across the EU, where the absence of an EU-wide system of fully harmonised leniency programmes or "one stop" leniency programme within the EU means that businesses are forced to make multiple parallel leniency applications across the EU, which gives rise to inefficiencies and (unnecessary) litigation. In addition, there are discrepancies between the different programmes that may discourage potential leniency applicants from applying for leniency.

2.5 Each of these is discussed further below.

Article 11(6)

2.6 Article 11(6) of Regulation 1/2003 states that the initiation by the Commission of proceedings for the adoption of a decision under this regulation relieves the NCA of their competence to apply Article 101/102 TFEU. This means that once the Commission has opened proceedings, the NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant market.[6] This provision also provides that, if a NCA is already acting on a case, the Commission

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[4] In 2004 procedures were introduced that allow cases to be reallocated at the initiative of the parties (Articles 4(4) and 4(5) EUMR) (pre-notification reallocation of jurisdiction). The EUMR also maintains procedures allowing for notified cases to be referred from the EU level to the national level or vice versa (Articles 9 and 22 EUMR) (post-notification reallocation of jurisdiction).

[5] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 2003 L1/1.

[6] The Notice (as defined below), para. 51.

shall only initiate proceedings after consulting with that NCA. Some guidance on how these rules should be interpreted and applied is provided in the Commission's Notice on cooperation within the Network of Competition Authorities ("**ECN**") on the re-allocation of cases between NCAs and the Commission (the "**Notice**").[7]

2.7 In practice, however, there is little transparency regarding the Commission's decision to take up a case or not and the Commission does not appear to apply the principles of the Notice in a consistent manner. This is illustrated by the approach taken in the recent investigation into sales of e-books and the on-going investigations into certain agreements in the online hotel bookings sector. Both involve a number of different Member States and raise similar substantive issues relating to allegedly anti-competitive agreements or practices in internet retailing.

2.8 In the case of e-books the Commission announced, on 6 December 2011, that it had decided to initiate antitrust proceedings (within the meaning of Article 11(6)) to investigate whether international publishers Hachette Livre, Harper Collins, Simon & Schuster, Penguin and Verlagsgruppe Georg von Holzbrinck (owner of *inter alia* Macmillan) had (possibly with the help of Apple) engaged in anti-competitive practices affecting the sale of e-books in the EEA.[8] The Commission investigation resulted in Commission decisions whereby the Commission accepted commitments offered by the publishers and Apple to address its concerns (in particular, that they may have contrived to limit retail price competition for e-books in the EEA, in breach of EU antitrust rules).[9]

2.9 In contrast, the Commission has (at least so far) not intervened in relation to the hotel booking sector, which is subject to several parallel antitrust investigations by NCAs across Europe (including the NCAs of the UK, Germany France, Austria, Sweden and Italy). These investigations relate to vertical arrangements between hotels and online travel agencies regarding the online offering of hotel accommodation that may be in breach of Article 101 TFEU and/or the corresponding national rules.

2.10 It is unclear to us why the Commission decided to intervene in the e-books sector but not in the online hotel bookings sector. We consider that businesses could benefit from the Commission (together with NCAs) providing a clearer steer or further guidance as to when it will intervene and take up a case that is being investigated by an NCA or several NCAs in parallel. A consistent and transparent interpretation and application of the rules in this area could significantly increase legal certainty for businesses.

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[7] *OJ* 2004 C101/03.

[8] This announcement followed unannounced inspections by the Commission, in March 2011, at the premises of several companies active in the e-book publishing sector in several Member States. It also followed a parallel investigation by the OFT in the UK. The Commission's press release specifically indicates that, before the Commission opened formal proceedings, the OFT had closed its investigation on grounds of administrative priority but had made a substantial contribution to the e-books investigation and would continue to co-operate closely with the Commission going forward. Commission press release IP/11/1509 of 6 December 2011.

[9] An overview and links to the relevant Commission decisions are available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847

2.11 A clearer steer could also help undertakings to plan and decide (i) where to apply for leniency (i.e. with the authority or authorities that are most likely to investigate the practices because they are best placed to deal with the case) and (ii) in relation to which practices/markets (see further below).

Leniency programmes

2.12 In a system of parallel competences between the Commission and NCAs, and in the absence of an EU wide system of fully harmonised leniency programmes, an application for leniency to one authority is not to be considered as an application for leniency to another authority.[10] However, the absence of such an EU wide system or "one stop" leniency programme within the EU means that, to ensure maximum protection, undertakings are required to apply for leniency both with the European Commission (if the conduct has or could have an effect on trade between Member States) and with the NCAs of any Member State that has or could have a nexus with the relevant conduct (and may therefore also be considered well placed to act against the conduct).

2.13 This approach leads to duplication of efforts (and therefore costs), inefficiencies and (unnecessary) litigation. The latter is illustrated by the *Henkel and Henkel France v Commission* cases before the European Courts.[11] Both the European Commission and the French Competition Authority investigated Henkel, Unilever and Procter & Gamble for conspiring to fix the price of laundry detergent. They both handed out fines in 2011.[12] Henkel received full immunity in the Commission's investigation but, in France, Unilever secured such immunity from the French authority whereas Henkel received a reduction in fine from this national authority. Henkel is challenging the French authority's decision, arguing in essence that both authorities were investigating the same conduct.

2.14 In addition, making multiple parallel leniency applications across the EU is a complex exercise given (i) the considerably greater benefits that are available in most programmes for the first successful application and (ii) the existing discrepancies between the different programmes. The Commission itself has recognised that the discrepancies may have adverse effects on the effectiveness of individual programmes.[13]

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[10] See also the Notice, paragraph 38.

[11] Cases T-607/11 and T‑64/12 and Cases C-283/13 and C-284/13 (appeal) (on-going).

[12] Autorité de la Concurrence Decision 11-D-17 of 8 December 2011 (*Décision relative à des pratiques mises en œuvre dans le secteur des lessives*) and Commission Decision C(2011) 2528 of 13 April 2011 relating to a proceeding under Artilcle 101 TFEU (Case COMP/39.579 – *Consumer detergents*).

[13] Explanatory Notes to ECN Model Leniency Programme, para. 6.

2.15 In this context we note that the ECN Model Leniency Programme[14] (as revised in November 2012), which is designed to encourage alignment of the respective programmes of the ECN members, appears to have little effect on the ground. Wide discrepancies currently remain, including in relation to the requirements of the leniency programmes (i.e. the conditions that leniency applicants must meet in order to benefit from immunity or reductions in penalty). For example, certain programmes, such as the OFT leniency programme, require leniency applicants to admit to participation in cartel conduct, including an acceptance that such conduct amounted to an infringement of the competition laws.[15] Others, such as the EU programme, do not contain this requirement. However, a requirement to admit to wrong-doing could discourage potential applicants from applying for leniency, not just in the jurisdiction in question, but also in other jurisdictions, because of the potential use of this admission in the context of possible follow-on/private damages actions.

2.16 We would welcome further efforts to align the leniency programmes within the EU and come to a more integrated or uniform leniency system to ensure that potential leniency applicants are not discouraged from applying for leniency and inefficiencies and costs associated with such applications are minimised as much as possible.

3. Specific Comments regarding State Aid

3.1 We agree with the views expressed at the Stakeholder Event that the State aid rules are key to prevent the promotion of "national champions" and subsidy races, which could lead to disruption of the internal market, distortions of competition and therefore market inefficiencies. We also consider that the nature of the State aid regime means that the European Commission should retain its exclusive competences in this area given that Member States are direct stakeholders in State aid cases.

3.2 However, there are ways in which the operation of the State aid regime could be improved and the burdens on business reduced. The regime as currently operated is extremely broad in scope and this, combined with the procedural obligations on the Commission, means that cases are difficult to bring and slow to progress. In particular, we refer to:

- the broad interpretation of the concept of State aid, which has resulted in a broadening of the Commission's competence in this area. Factors that have contributed to this are:
    - the "effect on trade between Member States" condition in Article 107(1) of TFEU, which has been interpreted broadly by the Commission and the

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[14] The programme is available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf. According to paragraph 3 of the programme, ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme.

[15] See http://www.oft.gov.uk/shared_oft/reports/comp_policy/OFT1495b.pdf (p. 11).

European Courts.[16] Generally, if there is a distortion of competition the "effect on trade between Member States" condition is also considered to be met. Although specific Commission guidance on the notion of State aid is expected to be issued as part of the Commission's on-going State aid modernisation ("**SAM**") process and this guidance may go some way in resolving this issue, given its status, it will not be able to reverse the Courts' jurisprudence in this area; and

- the very low de minimis thresholds (i.e. EUR 200,000 per undertaking over a three year period).[17] The scope for exemption on this basis is therefore limited. The new De Minimis Regulation, adopted by the Commission on 18 December 2013, maintains the low thresholds.[18]

- the obligation of the Commission to conduct a "diligent and impartial" examination of complaints even if it is clear that they have no to little merit.[19] It should be noted, however, that, as part of the SAM, some steps have been taken towards addressing this issue. In particular, the new Procedural Regulation[20] contains requirements for the form of a complaint. It also requires complainants to demonstrate that they are 'interested parties'. The Commission considers that this should reduce the in-flow of complaints and allow it to prioritise and focus enforcement on the cases with the biggest impact on the internal market. Further action in this area would require further legislative change (i.e. the Commission cannot address this matter directly/on its own).[21]

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[16] Even where the aid beneficiary does not export its products or services, but operates only at a local level, the aid may still affect inter-State trade by increasing domestic production, with the effect that undertakings in other Member States have less chance of exporting their products to the markets in that Member State. See Case 102/87 *France v Commission* [1988] ECR 4067, para. 19; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para. 27 and Case C-280/00 *Altmark* [2003] ECR I-7747, para 77. See also Commission decision of 21 December 2005 in Case N542/2005 *(Individual aid for literary periodical*).

[17] These thresholds are set out in the De Minimis Regulation, which relates to small aid amounts that fall outside the scope of EU state aid control because they are deemed to have no impact on competition and trade in the internal market. Measures that fulfil the criteria of the Regulation do not constitute "state aid" in the meaning of Article 107 TFEU and therefore do not need to be notified to the Commission for approval before they are implemented.

[18] Commission Regulation 1407/2013 on the application of Articles 107 and 108 TFEU to de minimis aid (*OJ* 2013 L352/1), replaced Commission Regulation 1998/2006 from 1 January 2014. The European Commission concluded that increasing the ceiling would bear important risks for competition and trade in the single market, in particular due to the aggregate effect of a potentially widespread use of the exemption in the current economic and financial context where Member States' budgetary capacities vary widely. (Source: Commission press release, IP/ IP/13/1293, 18/12/2013, available at: http://europa.eu/rapid/press-release_IP-13-1293_en.htm).

[19] See for example, Case C-367/95P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, para. 62.

[20] Council Regulation 734/2013 amending Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, *OJ* 2013 L204/15.

[21] More details on this exercise are available at: http://ec.europa.eu/competition/state_aid/modernisation/index_en.html

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