# The City of London Law Society Competition Law Committee

## Response to UK Government Review of the Balance of Competences between the United Kingdom and the European Union in relation to Competition and Consumer Policy

### 1 Overview

1.1 This response is submitted by the Competition Law Committee of the City of London Law Society ("**the Committee**") in response to the UK government's consultation in relation to the balance of competences between the United Kingdom and the European Union in competition and consumer policy ("**the Consultation**"). This response only extends to competition and state aid policy.

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London who act for UK and international businesses, financial institutions, regulatory and governmental bodies in relation to competition law matters.

1.3 The Committee members responsible for the production of this response are:-

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Robert Bell, Partner, Bryan Cave, and Chairman of the CLLS Competition Committee

1.4 The Committee appreciates the opportunity to respond to this consultation.

1.5 In doing so, we take the view that the two important questions that need to be addressed are as follows:-

1.5.1 To what extent is EU competence in the competition and state aid fields necessary for the operation of the internal market and is this beneficial to the UK's global competitiveness?

1.5.2 How might the UK benefit from the EU taking less or more action in this area?

We will respond to each of these questions in detail below.

### 2 Question 1: To what extent is EU action necessary for the internal market in this area and how does it impact on the UK's global competitiveness?

2.1 **The EU competition and state aid rules are of positive benefit to the UK**:

2.1.1 **EU competition and state aid regulation are essential to the internal market:-** The EU system of competition and state aid regulation is fundamental to and underpins the internal market. It is one of the founding principles of the EU treaties. Competition policy remains important in preventing discrimination on national lines and oulawing distortions of competition by businesses or governments. An effective competition policy and effective state aid control are crucial to an open and vibrant economy and an essential prerequisite to encourage foreign investment. The competition and state aid provisions (now contained in Articles 101-109 of the Treaty for the Functioning of the European Union ("**TFEU**")) were also part of the Treaty of Rome establishing the European Economic Community, to which the UK signed in 1972.

2.1.2 As a preliminary remark, it is worth mentioning that membership of the EU also gives the UK automatic membership of the European Economic Area, which effectively extends the same competition regime to an additional three Member States. To a more limited extent, the UK also has an indirect right to ensure that third countries with which the EU has association agreements maintain similar competition rules. Thus to the extent that the EU brings about positive benefits for UK businesses and trade in relation to other EU Member States those benefits actually extend far wider.

2.1.3 **Benefits of a de-centralised competition regime:-** In 2003 in a response to the growing Community and the increased demands on the European Commission's resources, the competition law enforcement system was modernised pursuant to the Modernisation Council Regulation No. 1/2003. This saw a considerable amount of de-centralisation of the enforcement of Articles 101 and 102 to national competition authorities supported by the national courts. This de-centralisation agenda is still being followed today with the Commission's proposals for a directive to encourage private actions for damages for breach of Articles 101 and 102 in the national courts. These reforms have seen the healthy development of a UK competition law regime[1] and a greater number of cases being dealt with at a national level. However, this has been without prejudice to the predominant role played by the EU competition regulator in important competition cases which have ramifications for the Community as a whole. This precedent has shown how the principle of subsidiarity can work well when correctly applied.

2.1.4 **Benefits of a uniform centralised merger control regime:-** While the competition regime operated on the basis of concurrency, the EU Merger Regulation (Council Regulation No. 139/2004/EC) gave the European Commission the exclusive right to vet large mergers having a Community Dimension, as defined in the Regulation. This created a one stop shop for the clearance of major transactions within the Community. This had a significant effect of reducing the burden on business of potentially having to notify their transactions of up to (now) 28 (31 if all EEA states are included) separate competition authorities.

2.1.5 Although the effect of this Regulation was a substantial dilution of national sovereignty, the legislation contained safeguards providing for the almost automatic referral back to Member States relevant mergers which affected a particular Member State's markets or which had implications for the public interest such as the plurality of the media or

[1] The UK competition law regime has been modernised along the same principles as EU Law with the Competition Act 1998 replacing the Restrictive Trade Practices Act 1973, which followed an approach introduced in 1956 that had become ineffective to control anticompetitive agreements

defence and national security issues. In this way, the EU Merger Regulation has so far successfully balanced national sensitivities with delivering a faster and more effective centralised merger control regime dealing with pan-European/global mergers which was and still is welcomed by business.

2.1.6 **The Commission has a strong central role to play in the enforcement of the state aid regime:-** Although there are some wrongs in the system, the EU state aid policy as enforced by the Commission is necessary and works well for the UK and the EU as a whole in breaking down barriers and protectionism. There continues to be need to avoid disruption to the internal market by Member States promoting national champions and avoiding distortions of competition between undertakings benefitting from aid and those that do not.

2.1.7 In addition, the rules have also been effective in limiting the amount of state resources that have been channelled into subsidy races between Member States to obtain the prize of a particular industrial investment or major development opportunity.

2.1.8 Therefore, the Committee takes the view that the EU state aid rules have been largely effective in creating a level playing field for Member States' companies trading within the EU. By contrast one only needs to look at the considerable amount of protectionism outside of the EU which, the GATT/WTO has not been able to effectively address and which the GATS has achieved even less in relation to services. The US is a particular case in point and it is no secret that the UK has taken the lead in supporting the European Commission in its efforts to negotiate a comprehensive free trade agreement between the two trading blocs in an effort to replicate the EU system.

2.1.9 **EU competence in competition and state aid is a major benefit to the UK economy:-** Given our above observations, we consider EU competence in both competition and state aid policy necessary for the operation of the internal market and there is no case for a sudden change. The single competition regime has helped to significantly promote the UK's global competitiveness and reduce regulatory barriers on business, such that investment in the UK economy can be made more quickly and easily. It also promoted the consummation of international trade whether within or outside the European Union.

2.1.10 **EU competition and state aid law; a major export for UK law firms:-** European competition and state aid law applies uniformly throughout the Community. This has allowed UK law firms to promote their expertise in advising on EU competition and state aid law on a Europe wide basis. Many companies outside the UK come to London to tap the rich seam of competition and regulatory expertise resident within the many international law firms with offices in the city. For law firms this has created a major stream of work which, in turn, has boosted many skilled jobs and has been positive for the UK economy. It is part of London's attraction as a major business and financial centre. Expertise in these areas has also created further opportunities worldwide in advising developing countries on the establishment of their own competition systems which interestingly, have generally preferred the adoption of EU-style competition law rather than following the US enforcement model (e.g. China).

2.1.11 **Conclusion:-** As will be seen from the above examples the competition law and the state aid competences have largely been unchanged over the years but have evolved gradually to meet the demands of a larger EU. The effective enforcement of the rules throughout the EU has been of considerable benefit to the UK economy and has made a significant

contribution in opening up markets which were hitherto closed or too difficult to contest. We believe the competition and state aid rules have been highly successful and are a testament to an area of the TFEU and former treaties that have worked well for the UK economy over many years.

2.1.12 Although we do have a number of observations and proposals about how the balance of competence in these areas might be changed (or at least clarified) the CLLS Competition Committee is strongly of the view there is no justification for a sudden or significant change in the current balance of competences in this area between the UK and the European Union.

## 3 Question 2: How might the UK benefit from the EU taking less or more action in competition and state aid policy?

### 3.1 (i) EU Merger Regime

3.1.1 **EU merger regime needs to be simplified not extended:-** The introduction of the one-stop shop merger clearance regime under the EU Merger Regulation has worked relatively smoothly and has been beneficial to both the UK and EU economies for the reasons referred to above. However the system does require some reform. The business community also requires protection from the ambitious plans of the European Commission to expand their jurisdiction in this area.

3.1.2 **Vetting of minority shareholdings should be a national competence:-** Our largest major concern in relation to competence issues relates to proposals outlined in a recent Commission Consultation aimed at extending the EU Merger Control regime to the acquisition of minority shareholdings (Commission Staff Working Paper "Towards more effective EU merger control"). We believe that if these proposals are introduced they would have a chilling effect on the economy and stock markets. We are firmly of the view that examination of these transactions is best carried out at national level.

3.1.3 If the Commission's proposals are taken forward the likely effect will be the creation of more notification requirements and red tape for UK business and the UK capital markets and investment community. The introduction of compulsory notification and standstill periods would make matters worse. Problems also exist if a voluntary notification system were implemented as this would create uncertainty and confusion between the competences of the EU and the UK regulators. There would be a considerable loss of sovereignty over UK mergers which in this particular instance we believe is uncalled for and unnecessary. We would direct your attention to the CLLS response to the EU Consultation on this subject. A full text of this submission can be found at:-

http://www.citysolicitors.org.uk/attachments/category/108/20130911%20CLLS%20EUMR%20Minority%20Interests%20Consultation%20Response.pdf

3.1.4 **Foreign to foreign joint ventures to be exempt from EU merger control:-** Another unnecessary burden upon business is having to notify mergers which have no appreciable effect in the EU but which are caught by the application of the turnover thresholds under the EU Merger Regulation. The extension of the new EU simplified merger procedure which was recently introduced by the Commission in December 2013 is unlikely to assist in removing these types of mergers from notification altogether.

3.1.5 The particular onerous yet needless application of the Regulation applies to extra EU joint ventures when the turnover of the joint venture parents trip the relevant turnover thresholds in the Regulation even if the joint venture has no possible effect or impact on competition in the EU. If two major EU companies with a combined aggregate worldwide turnover of €5 billion and €250 million each in the EU (not having more than two thirds of their turnover within the same Member State) decided to jointly purchase a coffee shop in Central America they would still legally have to notify the transaction under the EU Merger Regulation.

3.1.6 Although this is an extreme example chosen for the sake of emphasis there are a good number of transactions that fall into this category. These should be given a general exemption from the Commission's merger vetting procedures.

3.1.7 **EU Information Requests still onerous, not a blueprint for the UK CMA:-** The recent Simplification reforms introduced by the Commission, among other things, sought to lighten the load of information requests under Form CO not just in relation to the use of the Simplified Merger Notice but also where "Affected Markets" need to be reported under the full Form CO procedure. However, the Commission's view is that its reforms lessen the load of information requirements being placed upon the business community. It believes that increased use of information waiver procedures at the discretion of its case handlers will result in a reduction of the burden. However, there is real scepticism that this is likely to bring forward the advertised benefits. The system remains cumbersome and long and indeed the burden as regards the disclosure of internal documents has been increased. Although there is a statutory Phase I consideration period the increased amount of time taken up by pre-notification discussions is likely to further increase the cost upon business.

3.1.8 As a Committee we continue to be concerned about the Commission's extensive information requests in enforcing its merger control regime. However, our concerns also have a place nearer to home. **The approach the CMA seems to be adopting in setting out the type and amount of information it is requesting from merging parties appears to be following the EU model. The UK should not follow this aspect of the EU model**. We are concerned that this will result in greater burdens on business in terms of cost of notifying, the timescale for obtaining clearance in unproblematic cases and the extensive information requests which are likely to be asked of the parties.

3.1.9 **Greater EU international advocacy for merger control uniformity:-** Despite the issues raised above, we continue to believe that the EU merger regime and its widely acclaimed reputation for economic and legal analysis of mergers under the EU Merger Regulation represents a valuable export for the EU. This is a particularly so to non-EU countries particularly in the developing world. Many have already adopted EU-style merger control regimes in preference to the US model (e.g. Singapore, Malaysia and China). With a proliferation of merger control regimes in the world over the last 5 years or so, it is in the interests of the business community that both the UK and the EU use their advocacy opportunities to urge the adoption of processes and assessment for mergers similar to the EU practice in the developing world.

3.2 **(ii) Competition/antitrust enforcement**

There are a number of areas in the competition/antitrust field which need to be addressed.

3.2.1 **Greater transparency in case allocation through the ECN:-** There is no one-stop-shop system for competition enforcement similar to the merger control regime based on bright line thresholds. The de-centralisation system of competition was created by Council Regulation 1/2003 and is administered by the European Commission Network (ECN). The ECN, which comprises national regulators and the European Commission, has set out procedures regarding case allocation. However, there is no transparency about when the Commission or a national regulator has competence in any particular case. Although the system for case allocation has improved in recent years, there is still considerable room for improvement. This lack of transparency has a negative effect on the areas discussed below.

3.2.2 **Need for an EU uniform leniency application process:-** There exists a major problem in relation to claims for leniency applications made in cartel cases in different jurisdictions. As there is no single uniform leniency application process, there are problems in working out which leniency applicant is first through the door in a leniency race. As you know the first through the door is entitled to 100% immunity from fines provided they respect the terms of the leniency regime. This uncertainty results in businesses seeking to make multiple leniency applications in all relevant national jurisdictions and at an EU level.

3.2.3 Where a cartel covers several jurisdictions there is uncertainty about whether the scope, subject matter and parties involved in the cartel are the same as in other countries and whether that application in another country would provide leniency in another. There is also the worry that another party might be the first to file in another jurisdiction. In our view the system is in need of substantial and immediate reform. We would suggest that there should be a single point for the submission of leniency applications through the Commission and that once filed with the Commission, these would have force throughout the Member States. We appreciate this is an increase in the EU jurisdiction but it is a necessary step given the current structure of EU Competition law and the enforcement regime.

3.3 **(iii) State Aid**

3.3.1 **Need for a central role for the EU Commission:-** We believe there is the need for a strong central role for the Commission in the enforcement of the state aid regime. As almost all the state aid measures in dispute are granted by national governments (or local government under the auspices of their national governments) we feel it is difficult to see an effective system of de-centralised regulation relying on national bodies.

3.3.2 Although national courts do have a role in granting injunctions and enforcing recovery orders made by the Commission and limited powers to award damages against the grantor of unlawful state aid, it is only the Commission under the Treaty that has the power to authorise state aid under Article 107(3) TFEU. This should continue for the reasons explained above.

3.3.3 **Need for reform:-** Whilst we believe the EU state aid regime has done a lot to promote fair competition and prohibit discrimination on a national basis in the EU, there are aspects of the regime which do need improvement. These are as follows:-

3.3.3.1 there are long and unacceptable delays in the Commission approving state aid before appropriate state aid can take effect;

3.3.3.2 the jurisdictional limitation on which type of state aid the Commission is legally obliged to examine is put at a low level being any affect on trade. There is no requirement that that there must be an appreciable effect on trade between Member States as in Articles 101 and 102 TFEU;

3.3.3.3 the case law of the CJEU does not allow the Commission to prioritise its workload along the lines accepted under the competition rules (see Automec II, Case T-24/90, judgment of 18th September, 1992); and

3.3.3.4 beneficiaries are kept in the dark; there is no transparency before an in-depth investigation.

So how can these shortcomings be addressed?

3.3.4 **Increase in the current de minimis threshold:-** We very much welcome the Commission's efforts to broaden the block exemptions. However, identifying the categories of aid to be fast tracked for approval does not solve the central issue that too many smaller cases are clogging up the system. We believe the current de minimis block exemption which sets the threshold at which aid does not affect trade between Member States is too low at €200,000. One way to alleviate some of the burden of the Commission is to increase the threshold.

3.3.5 **Treaty change to amend Commission's jurisdiction:-** Whilst we appreciate this is likely to be more politically difficult and involved, an alternative approach would be to seek a Treaty amendment to the state aid provisions to ensure they are brought into line with the competition rules by making the Commission's competence only kick in when the aid in question appreciably affects trade between Member States. Reversing the jurisprudence of the CJEU to allow the Commission to prioritise their workload in this area would be also require Treaty amendment but we believe this could have a beneficial effect on minimising the log jam of unmeritorious cases and allowing important rulings to be fast tracked.

3.3.6 **National courts should be given greater powers:-** However, it is appreciated that the above proposals are not without risk as it could deprive smaller claimants of redress and potentially give greater licence to those more industrial policy minded member states to grant more aid than before knowing that there is no longer sufficient oversight.

3.3.7 To guard against this, national courts could be given a greater role in examining state aid. At the present time, national courts only have limited remedial powers. In addition, we know there are problems associated with enforcement as in many jurisdictions claimants have difficulty bringing a claim against their own Member State within that state's own courts. For example, we understand that in Italy there is a high bar for bringing a claim against the State in the national courts. Claimants would have to show really serious harm in line with Francovitch [1991] ECR 1-5357 and Factortame C-221/89 to ground their case. The extension of the national courts role in enforcing state aid policy would be consistent with the approach taken under the competition rules. Private parties are being enlisted as "private attorney generals" (to use US terminology) to bring private enforcement actions for damages as an additional weapon in the armoury of the EU Commission to police the rules in a fast growing Community.

3.3.8 **Delegation of small state aid cases:-** If the Commission retained its current jurisdiction, another solution might be to delegate smaller state aid cases to a specially formed legally authorised body or sub-committee of the Commission to deal with these smaller cases.

**City of London Law Society Competition Law Committee**

**15th January 2014**