

A World Class Competition Regime

A Survey on the Key Aspects – September 2001

In July the Government published a White Paper on the reform of UK competition law entitled "A World Class Competition Regime" (CM5233). The White Paper put forward a number of far reaching proposals for strengthening the legislative framework within which the UK competition authorities (in particular the Office of Fair Trading) operate.

CMS Cameron McKenna thought it useful to consult individuals interested in competition law on a few of the most important issues on which the Government has sought views, together with another - the principle of introducing criminal sanctions for breach of competition law – which, although not a matter on which views are sought in the White Paper, seems to us to be sufficiently controversial to make it important to express a view to Government.

It would be our intention to inform the DTI of the answers to this questionnaire but only on an aggregated basis and not to indicate the responses of any particular individual or organisation.

We set out below the six issues on which we would value your views. The survey should take only a few minutes to complete as in most cases responses need only be expressed as a "yes" or a "no". References to paragraphs are references to paragraphs in the White Paper.

We would be grateful if you could complete the survey and return (fax or post) to **Richard Taylor** by **Friday 28 September 2001**. Should you have any queries regarding this survey or any of the issues it covers please contact Richard on +44 (0)20 7367 2108.

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Thank you in advance for your participation. All respondents to the survey will be sent a summary report of the findings.

Your details

Name	Address
Job Title
Organisation
Email
Industry sector	Postcode
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1 Voting rules for the Competition Commission enquiry panels (paragraphs 5.30/5.31)

At present, Competition Commission enquiry panels need a two-thirds majority to take decisions on whether a merger operates against the public interest and recommend remedies. The Government invites views on whether to replace the two-thirds majority with a simple majority. The White Paper does explain that any change to the required majority will have increased significance in future when the Competition Commission, rather than the Secretary of State, takes final responsibility for decisions on mergers. It seems to us that a real difficulty in changing the present two thirds majority requirement is the current lack of any way of challenging the Competition Commission other than by way of judicial review, a form of redress which is difficult to obtain and which in any event, is concerned more with observance of procedural requirements such as the right to a fair hearing than the merits of the case. It seems to us that it might be reasonable to allow majority decisions provided that the legislation were amended also to bring in a right of appeal on the merits against the most drastic remedies, e.g. divestment decisions.

Should the Competition Commission be able to take decisions by simple majority?

- ☐ Yes
- ☐ Yes - provided that appeals are possible against divestment decisions
- ☐ No

Other comments:

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2 Role of Ministers in market enquiries - Divestment (paragraph 6.47)

The proposed Competition Commission market enquiry procedure will replace the present machinery for the investigation of complex monopolies. So far as remedies are concerned, the Government wishes to follow its general policy and make the Competition Commission the decision maker not only on the substance of the case, but also on the appropriate remedy. However, the Government recognises that the ordering of divestments in market enquiry cases is particularly onerous. It differs from mergers where the parties know from the outset that their transactions may be blocked or reversed. The Government's White Paper does state that it will be "necessary for the Commission to demonstrate that divestment remedies are necessary and proportionate". But it is not clear whether this will be a legal requirement and, if so, how a breach of it can be sanctioned. As with Issue 1 it seems to us there is a strong case for introducing the possibility of an appeal against a divestment remedy decision on grounds which are wider than the narrow grounds on which judicial review can be obtained. For example, an appeal might be introduced on the ground that the remedy ordered is not "necessary and proportionate". Instead the Government believes that retaining some degree of ministerial involvement and responsibility might be a suitable protection and has asked for views on whether Ministers should retain a role in relation to "major divestment remedies" following market enquiries.

- ☐ Yes
- ☐ No

Other comments:

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3 The criminal offence - illegal agreements (paragraph 7.23)

The new regime proposes a new criminal offence for hard-core cartels.

Although the Government states a firm intention to introduce this offence and is not asking for views on whether it should or should not be introduced, it seems to us that this is a major issue of principle on which views should be expressed. The arguments in favour of criminalisation of certain "hard core" (i.e. especially serious) breaches of competition law, are that this acts as a deterrent by putting the individuals responsible for such breaches at personal risk of loss of liberty. The US experience may suggest that there is no other sanction the possibility of which so effectively deters potential wrong doers. On the other hand, criminalisation may also make cartels even harder to detect by making the conspirators more careful at hiding their tracks. Introducing a criminal element also means having to distinguish between the most serious breaches of competition law and others where the infringement is of a technical nature and carries no real moral culpability. Lastly, where individuals are concerned, it is often extremely difficult to determine fairly which of a number of possible business executives should be the subject of criminal proceedings and which should not. It is also possible that the higher standards of proof required for criminal proceedings may impede the speedy conclusion of the non criminal infringement proceedings and possible civil proceedings based on them. The question therefore arises whether a criminal offence should be introduced at all.

- ☐ Serious breaches of competition law should be made criminal
- ☐ No breaches of competition law should amount to criminal offences

The Government is considering whether the proposed criminal offence should only catch involvement in horizontal agreements between competitors (i.e cartels) or whether certain types of vertical agreement, especially those which are already outside the existing EC exemptions and involve abuse of market power, should also be caught. The Government asks whether to adopt a broader offence which will catch involvement in illegal vertical agreements or to confine the offence to horizontal agreements between competitors.

- ☐ Catch horizontals only
- ☐ Catch verticals as well
- ☐ Catch verticals only where they involve abuses of market power

4 The criminal offence - corporate bodies (paragraph 7.47)

The Government believes there are some procedural efficiencies to be gained by making hard core anti trust infringements crimes on the part of corporate bodies as well as the responsible individual(s). Further, under general principles of criminal law, corporate liability would normally arise alongside culpability on the part of those in key corporate positions. The Government sets against this the divergence with EC law which would occur if the OFT took criminal proceedings with higher standards of proof and evidence in a case where the European Commission or the OFT was taking civil infringement proceedings.

Should the new criminal offence extend to corporate bodies as well as individuals?

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Yes

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No

5 Actions on behalf of consumers (paragraph 8.22)

The Government is seeking to extend the ways in which damages can be awarded for breaches of competition law. In particular the Government wishes to allow representative bodies such as consumer groups to bring actions. Where actions are brought by bodies such as the Consumers Association, the Government believes it might be possible to make a claim for damages on behalf of a group or class of consumers. A question arising out of this approach is how damages should be awarded and the Government seeks views on the uses to which recovered damages should be put. Options currently being considered are:

A. Put the damages awarded in trust for a limited period so that claimants may come forward

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Yes

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No

Or

B. Once the cost of action is covered, residual money could be put to purposes which benefit consumers of the product in question or those in a related market, such as better provision of consumer information, or specific community facilities?

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Yes

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No

Other - please specify:

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6 Protecting the public - disqualification of directors (paragraph 8.27)

The Government intends to include in the legislation provisions enabling the OFT to seek a Court Order disqualifying a director where serious breaches of competition law have taken place. The power would be so worded that it could be exercised whether or not a criminal prosecution has taken place and whether or not the director was aware that competition law had been infringed. The maximum period of disqualification would be 15 years.

The Government proposes the OFT should extend its leniency policy so as not to disqualify those directors who have come forward to assist the OFT by providing evidence of breaches of competition law. In other words the Government does not want to frighten off individuals who might be prepared to "whistleblow" and enable the authorities to act against enterprises in breach of competition law. The Government invites views on whether it is right that the OFT should not move to disqualify directors who would otherwise have been the target for disqualification proceedings but have assisted the OFT to detect the competition law infringement.

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Yes

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No

Thank you for completing this survey