

Competition Commission's Investigatory Powers

ENTERPRISE BILL -
CONSULTATION ON
MAXIMUM PENALTIES
FOR FAILURES TO
COMPLY WITH THE
COMPETITION
COMMISSION'S
REQUESTS FOR
INFORMATION

No: CCP 0004/02

SEPTEMBER 2002

ENTERPRISE BILL

CONSULTATION ON MAXIMUM PENALTIES FOR FAILURES TO COMPLY WITH THE COMPETITION COMMISSION'S REQUESTS FOR INFORMATION

INTRODUCTION

1. The Enterprise Bill, if enacted as presently drafted following committee stage in the House of Lords, would introduce a new power for the Competition Commission (CC) to impose monetary penalties on parties who, without reasonable excuse, fail to comply with notices requesting documents or information for the purposes of merger or market investigation references. Under the Bill as presently drafted, penalties could take the form of a fixed penalty, or a cumulating daily rate penalty or both. The Secretary of State would have a power to make an Order specifying the maximum penalties that the CC is to be able to impose up to a maximum of £30,000 for the fixed rate penalty, and a maximum of £15,000 per day for the daily rate penalty. Before setting the maximum penalties, the Secretary of State would be required to consult the CC and such other persons as she considers appropriate.

2. Although the Bill has not yet been enacted, it is thought desirable to begin the process of consultation on what any such penalties might be as early as possible to give consultees good time to comment on the proposals. The timescale for responding to this consultation assumes that the relevant provisions will have been enacted before the closing date. If any material amendments to the relevant provisions currently contained in the Bill are made before enactment, they will be notified to consultees¹.

3. This consultation document seeks views on the level at which the Order should fix the initial maximum penalties.

RESPONSES

4. How to respond to this consultation:

by e-mail to: competition.reform@dti.gsi.gov.uk

by post or fax to:

Ben Coates
Competition and Consumer Policy Directorate
Department of Trade and Industry
Room 645, 1 Victoria Street
London
SW1H 0ET

Fax: 020 7215 3876

¹ References to clause numbers in this document are to the clause numbers of the Bill as reported following committee proceedings in the House of Lords.

CLOSING DATE

5. Comments must be received by 16 December 2002.

OUTCOME

6. We aim to publish the outcome of this consultation by 31 January 2003.

7. Respondents should note that, subject to the Enterprise Bill securing Royal Assent before the end of the current Parliamentary session, and no substantive change being made to relevant clauses, this consultation shall be treated as statutory consultation for the purposes of the Act.

CONFIDENTIALITY

8. Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identify) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the Internet.

CONSULTEES

9. We are sending this document to the consultees listed in *Annex A*. Please tell us if you know of others who would be interested in receiving this consultation. It is also available from Ben Coates and on the DTI website at www.dti.gov.uk/ccp/topics2/ukcompref.htm.

HELP WITH QUERIES

10. If you would like help with queries or further information about this consultation, please contact Ben Coates (telephone: 020 7215 6979; e-mail ben.coates@dti.gsi.gov.uk).

SUMMARY

11. In the new mergers and market investigation regimes, the CC will be entrusted with responsibility for taking final decisions against statutory deadlines of 24 weeks for merger references; 2 years for market investigations. These are decisions which will often have a major impact on important sections of the economy. It is important that they are taken by the CC on a fully informed basis.

12. Government needs to pitch the maximum penalties available to the CC for information that is provided late at the right level. Too low, and there is a risk of the CC not securing access to the information it needs; too high and there is a risk of disproportionate penalties being imposed.

13. The consultation text below sets out a range of options for the initial maxima for the fixed and daily rate penalties on which we invite views. We suggested in the Explanatory Notes on the Bill that the maximum penalties

could be set at the level in Option 2 (below), but would welcome the views of respondents on what levels should in due course be set by Order.

MAIN CONSULTATION TEXT

14. Clauses 106 – 114 of the Enterprise Bill would give powers to the CC to obtain information, evidence and documents for the purposes of merger and market investigation references. There are similarities between these provisions and the investigatory powers that it currently has under section 85 of the Fair Trading Act 1973 (FTA). A key change, however, is the replacement of the CC's power to initiate contempt proceedings against persons who, without reasonable excuse, fail to comply with information requests with a power to impose monetary penalties. The use of the power would be subject to appropriate procedural safeguards including a full right of appeal to the Competition Appeal Tribunal. Clause 171 would apply these powers, with some very small variations, to the new market investigation regime².

15. Clause 108 (included at *Annex B* for ease of reference) would give the CC a power to impose a fixed rate penalty, or a daily rate penalty or a combination of the two up to a maximum to be determined by the Secretary of State by Order. (A draft Order, with figures omitted, is included at *Annex C* to this document to help set the consultation in context). The Bill provides that the maximum penalty that can be set by the Secretary of State cannot exceed £30,000 for the fixed rate penalty and £15,000 per day for the daily rate penalty. Before making an Order setting the maximum penalties, clause 108(8) requires the Secretary of State to consult the CC and such other persons as she considers appropriate.

16. A daily rate penalty, once set, will accumulate until the requested information is provided; or the latest date for the publication of the CC's report; or an earlier date at the CC's discretion. Once the CC has taken a decision about which type of penalty power or powers to use in relation to a particular case of non-compliance, it cannot change its mind subsequently.

17. The level of any monetary penalty will be the amount that the CC considers is appropriate in all the circumstances of the case within the upper limits set out in the Order. Clause 113 would help ensure certainty and consistency about how the powers will be applied in particular instances. It does this by requiring the CC to prepare and publish a statement of policy about the use of its investigation powers, including the considerations that will be relevant to determining the nature and amount of any penalty. The Bill

² A number of other statutes provide for references of certain matters to the CC (eg disputed licence modification proposals). In doing so they rely on procedural provisions in the FTA. Where those statutes currently adopt the powers relating to obtaining documents and information under section 85 FTA, our intention is to amend them to substitute the new monetary penalty power. Schedule 25 of the Bill already makes the necessary amendments to references under the Telecommunications Act 1984, the Competition Act 1980 and the Broadcasting Act 1990. It is proposed that comparable amendments will be made by or under the Enterprise Bill to the Airports Act 1986; the Gas Act 1986; the Electricity Act 1989; the Water Industry Act 1991; the Railways Act 1993; the Postal Services Act 2000; the Financial Services and Markets Act 2000; and the Transport Act 2000.

would require the CC to consult such persons as it considers appropriate when preparing its statement of policy. The CC is consulting on a draft statement of policy in this regard in parallel with this Government consultation. The draft statement of policy can be obtained from the Competition Commission's website: www.competition-commission.org.uk/.

Options for maximum penalties to be available to Competition Commission

18. The Secretary of State could set the level of the maximum permitted penalties at the maximum allowed under the Bill or any lower figure that she considered appropriate. In considering the figure to be included in the Order, it is important to recognise that the maximum permitted penalties will generally be an imperfect guide to any actual penalty imposed since - wherever they are pitched - the CC will not be obliged to impose this and will only be able to impose a penalty of such an amount as it considers appropriate in the circumstances of the case, having regard to its statement of policy. Nevertheless, the *table* below illustrates the maximum penalties that could be imposed by the CC in a range of practical situations that it may be faced with and may help respondents in offering views.

Option 1 – Penalties set at maximum permitted under the Enterprise Bill

19. It would be open to the Secretary of State to set the initial maximum level of penalty at the maximum permitted under the Bill: namely a fixed penalty of £30,000 and a daily rate penalty of £15,000. This would have advantages in avoiding the need for any subsequent review or revision through a further Statutory Instrument. It would also underline the importance that the Government attaches to the CC being able to obtain the information that it needs on a timely basis. This would be the CC's preference. Maximum penalties set at this level are precedented. They would be similar to the maximum levels currently permitted under an equivalent power in the European Community Merger Regulation (ECMR)³.

Option 2 - Maximum set at £10,000 (fixed rate) and £2,000 (daily rate)

20. The Explanatory Notes accompanying the Bill⁴ suggested that the initial maximum fines could be set at £10,000 for the fixed penalty, and £2,000 per day for the daily rate penalty. Given that the monetary penalty powers are a new and largely untested concept, there is a case for setting the initial maximum figures at a lower level than the permitted maximum, and then reviewing their effectiveness after a suitable period of time. There may be an argument, however, that penalties set within these parameters would not provide an effective sanction for the CC when dealing with cases of non-cooperation from very large companies.

³ See ECMR Articles 14 and 15 (Council Regulation 4064/89/EEC). Under these provisions, the European Commission may impose a fixed rate penalty of from 1,000 euros to 50,000 euros where, inter alia, a person fails to supply information within the period fixed by a decision. It may also impose a periodic penalty of up to 25,000 euros for each day of delay.

⁴ See paragraph 270 of Explanatory Notes accompanying the Enterprise Bill as brought from the House of Commons on 19 June 2002.

Option 3 – Other permutations

21. There are clearly a number of other permutations within the parameters set by the legislation. The final column of the table illustrates, for example, the effect of a maximum daily rate penalty set at £1,000 per day. However, with maximum penalties set at a lower rate than those in Option 2 there would be an exacerbated risk that, in the context of a multi-million pound merger, or when dealing with very large companies, the maximum penalties available to the CC would be ineffective. There is also an argument that the daily rate penalty maximises the incentives for a person to comply with a request for information, and that the figure should not be set too low. A fixed rate penalty is effective as a deterrent, but once imposed, has no further value as a lever for securing the required information.

Table: Illustration of effect of different maximum penalty rates on a range of different situations⁵

Examples of situations of non-compliance	Total penalty ⁶ £30k/£15k	Total penalty £10k/£2k	Total penalty £10k/£1k
Person 1 week late in complying with final information notice	£135,000	£24,000	£17,000
Person 2 weeks late in complying with information notice	£240,000	£38,000	£24,000
Person 3 weeks late in complying with information notice	£345,000	£52,000	£31,000
Person required to provide information by week 16 but refuses and incurs maximum penalty to end of week 24	£870,000	£122,000	£66,000

CONCLUSION

22. The level of the penalties is a detailed but important aspect of Bill implementation, on which the Bill contemplates the Secretary of State having to consult. If you have views on the maximum levels at which penalties should be set by Order from the outset of the new mergers and market investigation regimes, we would urge you to contribute them by the closing date.

⁵ Calculations assume that the CC imposes both the maximum fixed rate and the maximum daily rate penalty.

⁶ The first figure is the fixed penalty; the second figure is the daily rate figure.

LIST OF CONSULTEES

Allen & Overy
Ashurst Morris Crisp
Association of Lloyd's Members
Association of Newspaper & Magazine Wholesalers
Barclays plc
BBC
British Brands Group
British Retail Consortium
British Sky Broadcasting Ltd
Centrica plc
Chamber of Shipping
Clifford Chance
CMS Cameron McKenna
Colt Telecommunications (for the Operator's Group)
CompEcon Limited
Competition Commission
Competition Law Association
Confederation of British Industry
Consumers' Association
Council on Tribunals
EMI Recorded Music
Energywatch
European Commission (Emil Paulis)
Freshfields Bruckhaus Deringer
Herbert Smith
Independent Television Commission
Innogy
Institute Chartered Accountants in England & Wales
Institute of Directors
Joint Bar/Law Society Working Party on Competition Law
Linklaters & Alliance
Lord Borrie
Martin Howe
Merseytravel
Michael Hutchings
Mid-Yorkshire Chamber of Commerce and Industry
Morgan Cole Solicitors
National Association of Citizens Advice Bureaux
National Consumer Council
National Federation of Retail Newsagents
Newspaper Publishers Association
Newspaper Society
Northumbrian Water
Norton Rose
Office of Fair Trading
OFGEM
OFTEL
OFWAT
Ofwat National Customer Council
Olswang
Pricewaterhouse Coopers
Richards Butler
Simkins Partnership
Simmons & Simmons
Slaughter & May
Taylor Joynson Garrett
Tesco Plc
Trading Standards Institute
Transco
Travers Smith Braithwaite
TUC
UNIFI
Unilever
Vodafone plc
Water UK
Wragge & Co

ENTERPRISE BILL - Clause 108 Penalties⁷

- (1) A penalty imposed under section 107(1) or (3) shall be of such amount as the Commission considers appropriate.
- (2) The amount may, in the case of a penalty imposed under section 107(1), be a fixed amount, an amount calculated by reference to a daily rate or a combination of a fixed amount and an amount calculated by reference to a daily rate.
- (3) The amount shall, in the case of a penalty imposed under section 107(3), be a fixed amount.
- (4) No penalty imposed under section 107(1) shall –
 - (a) in the case of a fixed amount, exceed such amount as the Secretary of State may by order specify;
 - (b) in the case of an amount calculated by reference to a daily rate, exceed such amount per day as the Secretary of State may so specify; and
 - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day as the Secretary of State may so specify.
- (5) In imposing a penalty by reference to a daily rate –
 - (a) no account shall be taken of any days before the service of the notice under section 109 on the person concerned; and
 - (b) unless the Commission determines an earlier date (whether before or after the penalty is imposed), the amount payable shall cease to accumulate at the beginning of –
 - (i) the day on which the requirement of the notice concerned under section 106 is satisfied or (as the case may be) the obstruction or delay is removed; or
 - (ii) if earlier, the latest day on which the report of the Commission on the reference concerned is to be published in accordance with the provisions of this Part.

⁷ Clause as reported following committee proceedings in the House of Lords.

- (6) No penalty imposed under section 107(3) shall exceed such amount as the Secretary of State may by order specify.
- (7) An order under subsection (4) or (6) shall not specify –
 - (a) in the case of a fixed amount, an amount exceeding £30,000;
 - (b) in the case of an amount calculated by reference to a daily rate, an amount per day exceeding £15,000; and
 - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, a fixed amount exceeding £30,000 and an amount per day exceeding £15,000.
- (8) Before making an order under subsection (4) or (6) the Secretary of State shall consult the Commission and such other persons as he considers appropriate.

DRAFT STATUTORY INSTRUMENT

2003 No.

COMPETITION

The Competition Commission (Penalties) Order 2003

Made 2003

Laid before Parliament 2003

Coming into force [1st May 2003]

Whereas the Secretary of State, as required by section 108(8) of the Enterprise Act 2002⁽⁸⁾ (“the Act”), has consulted the Commission⁽⁹⁾ and such other persons as she considers appropriate;

And whereas the Secretary of State has considered the representations received;

Now, therefore, the Secretary of State in exercise of the powers conferred on her by section 108(4) and (6) of the Act[, including that section as applied by section 171(1), paragraphs 10(3), 13 and 24(9)(f) of schedule 25 of the Act and paragraph 1 of schedule 4ZA of the Water Industry Act 1991⁽¹⁰⁾], hereby makes the following Order:

Citation, commencement and interpretation

1. This Order may be cited as the Competition Commission (Penalties) Order 2003 and shall come into force on 1st May 2003.

The Specified Amounts

2.—(1) For the purposes of section 108(4)(a) of the Enterprise Act 2002 the fixed amount specified shall be £[].

(2) For the purposes of section 108(4)(b) of the Enterprise Act 2002 the amount per day specified shall be £[].

(3) For the purposes of section 108(4)(c) of the Enterprise Act 2002 the fixed amount specified shall be £[] and the amount per day specified shall be £[].

(4) For the purposes of section 108(6) of the Enterprise Act 2002 the amount specified shall be £[].

[Melanie Johnson
Parliamentary Under-Secretary of State for
Competition, Consumers and Markets
Department of Trade and Industry]

— January 2003

⁸ 2002 c. — .

⁹ Section 268 of the Act provides “the Commission” means the Competition Commission.

¹⁰ 1991 c.56.

EXPLANATORY NOTE

(This is not part of the Order)

This Order specifies the maximum amounts that the Commission may impose as a penalty under section 107(1) or (3) of the Enterprise Act 2002 ('the Act'). Section 107(1) permits the Competition Commission to impose a penalty where a person has failed, without reasonable excuse, to comply with a notice under section 106 of the Act. Section 107(3) of the Act permits the Commission to impose such a penalty where it considers that a person has intentionally obstructed or delayed another person in the exercise of his powers under section 106(6) of the Act.

A penalty imposed under section 107(1) may be a fixed amount, an amount calculated by reference to a daily rate, or a combination of the two. Where the penalty comprises or includes a fixed amount, the maximum fixed amount is £[]. Where the penalty comprises or includes an amount calculated by reference to a daily rate, the maximum rate at which the penalty may increase is £[] per day.

A penalty imposed under section 107(3) must be a fixed amount. The maximum amount of such a penalty is £[].

This Order applies for the purposes of penalties imposed in relation to merger investigations under Part 3 of the Act or Part II of the Water Industry Act 1991, market investigations under Part 4 of the Act (by virtue of section 171 of the Act), and investigations under section 11B(1) of the Competition Act 1980 (c.21), section 13B(1) of the Telecommunications Act 1984 (c.12) and paragraph 4A of schedule 4 to the Broadcasting Act 1990 (c.42) (by virtue of paragraphs 10(3), 13(4) and 24(9)(f) of schedule 25 to the Act).

THE CONSULTATION CRITERIA

- 1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.*
- 2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.*
- 3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.*
- 4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.*
- 5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation*
- 6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.*
- 7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.*

The complete code is available on the Cabinet Office's web site, address www.cabinet-office.gov.uk/servicefirst/index/consultation.htm.

COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to Mr P Martin, DTI Consultation Co-ordinator, Room 725, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6206 or email philip.martin@dti.gsi.gov.uk.

URN 02/1296