

Reform of EC competition regime

United Kingdom's response to the European Commission's White Paper on modernisation of the rules applying Articles 81 and 82 (October 1999)

Introduction

1. The UK agrees that the time is right to consider modernisation of the system of EC competition law enforcement. Effective and fair competition policy and its enforcement applied uniformly across the EU, is crucial to the goal of furthering European competitiveness and to ensuring that consumers in Europe receive a fair deal. In addition the prospect of enlargement underlines the need for a thorough review of the approach to competition law enforcement across the Community. The UK therefore welcomes the fact that the Commission has been prepared to consider fundamental changes to the existing competition regime, to present these publicly in a White Paper, and to have an open debate about the way forward.

2. The UK places a high priority on competition as a means of delivering genuine benefits to its own business and consumers. We are in the process of introducing new national competition legislation, the Competition Act 1998, which conforms closely with the EC system. If there are to be changes to the EC regime, we would want to consider whether changes to the UK regime would be desirable. We would want to ensure the two systems could work in harmony, so as to avoid increasing uncertainty or placing an unnecessary burden on business, or on the national competition authorities.

3. The White Paper sets out a number of ways in which the current system might be reformed. The UK has sought the preliminary views of a broad spectrum of interested parties on the Commission's proposals, and a wide range of views have been expressed. We will be interested to hear the outcome of the Commission's consultation process, and welcome the fact that there is to be further discussion of these proposals between the Commission and Member States following the consultation process. The UK will want to continue to consult interested parties.

Summary Of UK's Preliminary Views.

4. The UK fully supports the Commission's stated objective, which is to simplify the regime while providing for more effective enforcement of EC competition law. The UK also wants the Commission to ensure this reform is pursued in a way which does not significantly increase burdens on business or reduce the predictability of enforcement.

5. The Commission has said that it wants to establish a procedural framework that allows it to focus on the most serious threats to competition, and allows decentralised application of the rules while maintaining a consistent approach to competition policy across the Community. The White Paper also says that the Commission wants to ease the administrative burden on business while providing it with a sufficient degree of legal certainty.

6. The White Paper considers a number of options for reform, and indicates that the Commission's preferred approach has three elements: ending the system of notification and exemption; decentralisation, to give parallel competence to national competition authorities; and greater ex post control. The UK agrees that, in principle, these proposals have the potential to meet the Commission's objectives. However, the White Paper contains few details about how such a regime might work in practice. The proposals therefore need to be explored further.

7. The UK recognises the possible benefits of the Commission's preferred approach of ending the notification and exemption system, but recognises also the concerns business has about the possibility of reduced legal certainty. The UK believes that further work is needed to ensure that these concerns can be satisfactorily addressed. Until that has been carried out, it is not possible to be certain that the Commission's preferred option is the best way to deliver a more efficient and fair system of competition law enforcement while maintaining a sufficient degree of legal certainty for business.

8. The UK agrees that the proposal to decentralise the enforcement of EC competition law, in combination with a proposed end to the exemption system, has possible benefits - but there are a number of questions about how the system would work in practice that remain to be answered. The proposed reforms bring a risk of inconsistent decisions and the UK wants to work with the Commission and other Member States to identify mechanisms and procedures to effectively minimise that risk. It is essential that any reforms neither threaten the continued development of the single market, nor place unnecessary burdens on business.

9. The need for cooperation between NCAs and the Commission, and to ensure that confidential information can be adequately protected if it is to be exchanged between a number of different authorities, are important issues. The White Paper has some suggestions on how these could be achieved, but a lot of further work has to be done. The possible interactions between National Courts and NCAs and the Commission would also need to be considered carefully.

10. Clearly the Commission and NCAs need to have sufficient investigative powers to protect competition and enforce the law, but the rights of individuals and undertakings also need to be protected. The UK believes serious consideration should be given to the extension of legal professional privilege protection to advice provided by qualified in house lawyers who are bound by their professional code of conduct (as is the case in the UK regime).

11. The UK wants to work with the Commission and other Member States in developing proposals for reform. It will be important to continue to take into account the views of both business and consumers, as well as those who have to implement and apply the regulations. The UK believes the outstanding issues would need to be resolved satisfactorily before any reforms could be implemented.

12. Before proposing any new regulation to replace regulation 17/62 the Commission should ensure it carries out a 'fiche d'impact', its equivalent of the UK's regulatory impact assessment.

13. The UK's preliminary views on the details of the proposals, as set out in the White Paper, are as follows.

A. An End To Notifications And Individual Exemptions

14. The White Paper proposes an end to the notification and exemption system. This does not involve any amendment to the provisions in the EC Treaty relating to competition, but the Council regulation setting out the procedures applying those provisions would be fundamentally changed.

15. The proposal would result in a major shift from the current system, in which an agreement which appreciably restricts competition is prohibited, and automatically void unless authorised by the Commission under Article 81(3). Under the Commission's preferred directly applicable

'legal exception' approach, the validity of those agreements would not depend on an administrative act, but on whether or not the criteria set out in A81(3) were met. Undertakings would be responsible for reaching their own view on whether agreements to which they were party complied with competition law.

16. The Commission also propose to extend the scope of joint ventures (JVs) treated under the ECMR. Currently only full function JVs are handled this way, the Commission propose partial function production JVs with high investments should also be subject to prior approval under the ECMR. The concept of partial function joint ventures will need to be clarified. In principle the UK sees merit in extending the scope of joint ventures handled under the ECMR so that such JVs can be considered in advance but the details will need to be considered further.

Possible benefits of the proposed new system

17. The UK agrees with the Commission that there are a number of possible benefits attached to ending the system of notification and exemption.

18. The current system of notification, which gives the Commission some oversight of certain agreements, is a poor tool in competition law enforcement. The vast majority of agreements that are notified do not end in prohibition decisions, and seriously restrictive cartel agreements are never notified. The UK Competition Act 1998 was based upon, and was intended to operate in close harmony with, the EC competition rules. For that reason the notification and exemption system was adopted. However, certain steps were taken in the 1998 Competition Act (CA98) to minimise the number of notifications, including exclusions from the UK prohibition, eg certain land and vertical agreements. Exemptions for any kind of agreement may also be backdated, reducing the incentive to notify in advance of any challenge to an agreement. We will be considering what adjustments to UK regime might be desirable, as we see how the Commission's proposals for reform of the EC regime are developed.

19. The reduction in the Commission workload, which would result from complete abolition of the notification and exemption system together with the resulting obligation to respond to each notification, would enable it to prioritise and plan enforcement work better. Assuming finite resources, it would allow the Commission, and NCAs, to focus on the most serious threats to competition, as evidenced by the effects in the market, rather than being tied up with notified agreements which have, for the most part, proved to be innocuous.

20. The current notification system has a real cost for many businesses and for consumers, as the Commission is diverted from attacking damaging anti-competitive behaviour. The UK believes it is essential to see effective competition in Europe, as well as in the UK, so that companies face the real competitive pressures that deliver genuine benefits for both business and consumers.

21. It would free up resources to allow for a better service to complainants. The Commission proposals include the introduction of time limits for an initial response to complainants. The Commission should also look at introducing demanding internal administrative timetables for considering cases.

22. The proposed reforms would also allow more effective private actions in the courts by undertakings suffering from the anti-competitive behaviour of others; currently proceedings can be stalled because of the need for a Commission decision on A 81(3). This would provide a mechanism by which people could seek to accelerate action rather than relying on the Commission or NCA to decide whether their particular complaint is of sufficient general interest to be given priority. Courts are also the only place where damages for losses can be sought.

23. It would remove a burden from business. Currently undertakings which want to enter into an agreement caught by A81(1) but which they consider meets the criteria of A81 (3) (and does not fall within a block exemption) either have to seek an exemption from the

Commission, a time consuming and costly process, or live with the legal uncertainty arising because the agreement has not been approved by the Commission.

24. Many large companies operate internationally and there are a number of regimes outside Europe (eg the US and Australia) which do not have a notification and exemption system. With growing globalisation, there could be benefits from working towards convergence in international regulatory regimes.

Concerns

25. While we recognise the potential benefits of the Commission's proposal to move away from the current centralised system of notification and exemption, it is also apparent to the UK that there are a number of possible difficulties attached to this, particularly with respect to business's ability to plan ahead and to operate on a level playing field.

26. While ending the notification and exemption system removes a burden from businesses entering into agreements (see paragraph 23 above), some in the UK point out that removing the option of seeking an individual exemption, would mean a loss of legal certainty in certain cases, particularly for those undertakings with a large market share.

27. Business is concerned that, in the absence of the notification and exemption system, its agreements could be open to challenge by parties to the agreement who want to break a contract, or by competitors, or by competition authorities, at any time. Furthermore, in a decentralised system, undertakings could choose between lodging a complaint with a national competition authority or with the Commission. Undertakings would also have the option of challenging whether the terms of A81 (3) were met in a particular case in one or more national courts (subject to the application of the Brussels convention). The UK recognises concerns that this might result in increased uncertainty.

28. Undertakings do not have the option of seeking legal certainty through notification and exemptions in other competition regimes, such as in the US, and business innovation in those countries does not appear to have suffered. However, as the US regime has been in place for many years, there is clearly much more jurisprudence on which business can rely than would initially be the case in the EC.

29. Some commentators have expressed doubts about the ability of national courts to take decisions on whether A 81(3) applies, because of the complex economic evidence that would need to be considered.

30. All national courts in the Community are already empowered to take decisions on A 81(1) and A 82, and courts in the UK will soon be applying the equivalent provisions of the CA98. Judges already have to weigh technical evidence, including that relating to economic effects, presented by experts in a variety of cases. Economic evidence related to consideration of A81 (3) could be handled in the same way. The UK, therefore, sees no problem in principle with courts in the UK applying A81 as a whole (although the practicalities, such as the need for further training or the possibility of specialist courts, would **need further consideration**).

Legal certainty in the current system

31. In assessing the issue of loss of legal certainty it is helpful to consider the level available to business under the current system.

32. For the reasons set out in para 23, many companies opt not to notify and live with the legal uncertainty that brings. When undertakings do seek legal certainty through notifications, they more commonly opt to receive a comfort letter rather than a formal exemption decision. A comfort letter provides a good indication of Commission thinking, can usually be issued more quickly than an exemption, and may involve fewer resources for the firm and the Commission. However, it does not provide the same degree of legal certainty as an exemption; third parties are not barred from challenging the agreement (though the court

would be influenced by the Commission's views) and the Commission may easily reopen the case if new facts emerge or circumstances change.

33. The action of notification provides provisional immunity from Commission fines but not provisional validity. It can take several years for the Commission to arrive at a decision as to whether A 81 (3) applies. During that period, even those undertakings who are seeking formal exemptions are in practice relying on their own judgement; they are still at risk of voidness and/or third party actions for damages should their agreements be found not to be exemptable.

34. While the UK recognises the limitations to legal certainty in the current EC system, it also agrees that the need to minimise legal uncertainty in any reformed regime is a legitimate concern of business, and for those seeking to ensure European competitiveness. This need should, in the opinion of the UK, be given careful consideration.

Measures to maximise legal certainty in the new system

35. The White Paper indicates that the Commission would intend to issue new guidelines and notices which would set out in more detail how various agreements and practices would be viewed under A 81 and A 82. Although these would be helpful, they would not eliminate legal uncertainty in cases which raise complex issues of legal interpretation and economic analysis.

36. The White Paper also suggests block exemptions for certain types of agreements would be retained, providing legal certainty for companies in many cases, particularly where they have a relatively low market share. The UK agrees these could be helpful in improving legal certainty for business. The UK encourages the Commission to bring forward its proposals for reform of the block exemptions covering horizontal agreements, so that this can be completed before the modernisation reforms come into effect. It may also be necessary to review how other block exemptions are working in practice, especially those of long standing, eg that covering rail, road and inland waterways. It may also be helpful to review the existing Commission notices, such as those covering relevant de minimis levels for vertical and horizontal agreements.

37. The White Paper suggests there would be some new types of decisions. The paper says that although there would no longer be any individual exemptions awarded, the Commission, alone, would be able to take positive decisions in exceptional cases, where a transaction raises new questions. These would be 'declaratory' rather than 'constitutive', in that they would not alter the legal status of the agreement under A81. So while these would be of some benefit to the undertakings concerned, and others who were party to similar agreements or activities, they would not rule out challenges in national courts (as an exemption does). National courts could, however, be expected to be influenced by the Commission's views.

38. The White Paper indicates that decisions not to investigate or not to prohibit could be taken by either the Commission or NCAs. It is not clear how much reasoning might be attached to such decisions, and whether that reasoning would be made public. Again these would be no formal barrier to others seeking to challenge that same agreement or activity in a national court.

39. There are a number of questions that have yet to be answered about the assistance, short of a formal decision, which might be available to undertakings who were unsure about how the rules apply to a particular agreement, and what timescales would apply. It would be helpful if the Commission could provide advice within timescales which met the needs of business.. Under the existing framework, the Commission is prepared to give advice to undertakings on the application of A82, resulting in a negative clearance decision. It seems it would be possible for the Commission to adopt a similar procedure in respect of A81 as a whole, under its proposed new system. It is, however, not clear what assistance NCAs, rather than the Commission, would be able to give to undertakings in those circumstances, and to what extent undertakings could rely on such advice.

40. The proposed types of decisions under the new arrangements will need to be looked at in more detail in further discussions, as will any suggestions regarding measures to provide informal assistance for undertakings. The UK believes there is a need to consider whether additional arrangements might be needed to provide a sufficient degree of legal certainty for business.

B. Decentralisation

41. The White Paper proposes decentralisation of the application of A81 as a whole, with Member States having parallel powers to the Commission. The UK has not empowered its competition authorities to apply A81 and A82 directly (other than for those sectors which fall to member States under A84). Arguably this would have served little purpose while the Commission retained exclusive competence to decide on whether the terms of A81(3) were met.

42. The UK believes that awarding the power to apply A 81(3) to NCAs and simply decentralising the current notification system would, in practice, merely shift the burden of work from the Commission to Member States, and would do little to improve the effectiveness of competition law enforcement across the Community. It would also raise issues about the impact of exemption decisions taken by individual member states on business and consumers elsewhere in the Community. The Commission's suggestion of a network of NCAs applying a directly applicable legal exception approach has appeal, but it too raises possible difficulties.

Possible benefits of the proposed new system

43. In many cases it would be easier, and possibly quicker, for undertakings and complainants to deal with their national competition authority rather than the Commission in Brussels. NCAs should be better placed to investigate and obtain relevant information about infringements in their locality. NCAs, while all applying exactly the same principles of law, would have some leeway to adopt procedures most appropriate in their local markets.

44. Decentralisation could strengthen the enforcement of EC competition law, as a network of NCAs, in addition to the Commission, would be able to investigate and take action in cases affecting trade between Member States. With the prospect of enlargement of the Community in 2003, the current centralised system could become increasingly inefficient.

45. Decentralisation of EC law should help encourage harmonisation of national competition laws across the Community, removing some compliance burdens on business.

Concerns

46. The main concern, expressed by business and others, is that it would be difficult to ensure consistency of the application of EC competition law by the Commission, NCAs and courts - particularly as many NCAs and courts may have relatively little experience of applying A81 and A82, and none of applying A81(3). This would reduce legal certainty for business, and the impact of liberalisation initiatives if the effect was to re-erect national market barriers in sectors such as, for example, agriculture. The result could be detrimental to European competitiveness in the long run. This is a concern that the UK takes seriously.

47. Some critics have said that although the Commission system is far from perfect, at least it is one body with one set of procedures. Business sees some advantages in having a one stop shop for seeking approvals. Business has also expressed understandable concern about the scope for 'double jeopardy', with the possibility of complaints being made against the same activity in a number of countries, which could result in numerous parallel or sequential investigations.

48. It has been suggested that procedural variations might encourage forum shopping between Member States, for example, if rules of evidence make it significantly more difficult to bring a case in courts of one Member State than another, or if there is the possibility of a reasoned opinion from an NCA in one Member State but not another. This is an important

point, although under the Commission's preferred approach there would be no possibility of binding exemption decisions in the new system, which would mitigate the effect of possible forum shopping.

49. Business is also concerned about safeguards for protecting any confidential business information exchanged between NCAs. The legal position needs to be investigated fully before deciding how information might be exchanged between the Commission and NCAs. It will be essential to be satisfied that confidential information is subject to an acceptable level of safeguards across the network.

Allocation of work

50. The UK accepts that within a system of parallel powers NCAs and the Commission can have different roles, ie that while both would handle cases, the Commission could be responsible for general policy, including issuing notices and guidelines - which would be helpful in ensuring consistency of approach by different competition authorities.

51. Clearly, it would not be the best use of resources if Commission officials were duplicating work done by those in NCAs, or vice versa. The UK recognises there is a risk that this might happen, unless it is clear where responsibilities lie within the network. There may be some categories of cases, such as where A86 may be in point or cases covering wide geographical areas, eg transport, which should generally be handled by the Commission. However, in other areas it may not be desirable to set out bright line divisions of responsibility. The system needs to be flexible enough to allow the best approach to handling each case to be fully considered.

Measures to ensure consistency

52. In practice, domestic law and EC law often overlap so NCAs in many Member States may already be taking a view on whether, on balance, restrictive agreements are acceptable in cases which could fall under EC law too.

53. The UK wants to work with the Commission and other Member States to establish mechanisms and procedures which would ensure decisions taken under the new regime by the network of NCAs and the Commission were consistent. At present Member States/NCAs and the Commission discuss the latter's cases through Advisory Committee meetings, and consideration needs to be given to whether that system could be extended to cover all EC cases being considered across the Community. Commission Guidelines and Notices on the interpretation of the law and Block Exemption Regulations will also contribute to consistency.

54. So far as national courts are concerned, Member States may already have domestic arrangements for cooperation between national courts and competition authorities where competition issues arise in cases, and these ideas could be built on in establishing arrangements across the Community. Such mechanisms for cooperation will need to be discussed further. National courts and tribunals can also refer questions of law to the ECJ, under A 234.

55. The aim should be to establish mechanisms which ensure consistency in advance of decisions being taken. Of course, under the Commission proposals NCAs would not be simply taking on a share of what was the Commission's monopoly power, ie awarding exemptions, or comfort letters, to undertakings in respect of notified agreements. Instead, the focus of work would be on own initiative investigations and considering complaints. The only 'constitutive' decisions (using the terminology of the White Paper) would therefore be prohibition decisions, which are normally subject to review by a higher authority or court on appeal.

56. The White Paper suggests that the Commission would have the possibility of taking a case out of the jurisdiction of an NCA, by means of a mechanism equivalent to Article 9(3) of the current regulation 17/62. Under A 9(3), NCAs remain competent to apply Articles 81(1) and 82 unless and until the Commission initiates its own procedure. In practice this permits

the Commission to take over a case from an NCA where an exemption is merited, because only the Commission has the power to apply Article 81(3). A 9(3) could also be used by the Commission to remove a case from the jurisdiction of an NCA where it disagreed with the way in which the NCA was dealing with the case. However, the UK is not aware of any instance to date where this power has actually been used because of a conflict of views.

57. Under the proposed new arrangements NCAs would have parallel powers to apply A81 in full and A82. The Commission would no longer have any monopoly over Article 81(3). The White Paper indicates that the Commission envisages using a replacement to A9(3) as a tool by which cases can be taken away from NCAs, within a new system of parallel competence, because of a conflict of view. This warrants further careful consideration.

58. It is not clear to what extent NCAs would be bound in their jurisdiction by any earlier 'declaratory' decisions taken by other NCAs, or by the Commission. The uncertainties about the way the proposed decentralised system would work need to be addressed, to reduce the risk of 'double jeopardy' for business. The UK considers that the situation where different competition authorities, or courts, are able to issue conflicting decisions on the same set of facts should be avoided.

59. If, in spite of mechanisms discussed above to avoid conflicts **before** any formal decision is reached, the Commission (or another NCA) disagreed with a decision by another, it may be that appropriate appeals mechanisms should be used rather than the NCA (or indeed the Commission) simply issuing its own conflicting decision. There are existing EC Treaty provisions for challenging decisions by the Commission (A 230) or Member States (A226 and 227).

60. Ultimately, the final arbiter of all EC competition law decisions remains the ECJ (but an ECJ judgment typically arrives many years after an agreement or activity is first considered).

C Ex Post Control And Investigative Powers

61. The White Paper argues that the Commission needs to refocus efforts from advance control of notified agreements to ex post enforcement of competition law. As part of this the Commission is seeking increased investigative powers. These include clarification of the extent of the Commission's powers to take oral evidence in the course of its investigations, and introduction of the power to use this in the Commission's procedures, and to subject it to penalties for the provision of incorrect information. It is also suggested that the Commission should have the power to summon parties to give evidence at Commission premises. Clearly the Commission and NCAs need to have sufficient investigative powers to protect competition and enforce the law, but the rights of individuals and undertakings also need to be protected.

62. The White Paper suggests that there may be a need for new measures to ensure unannounced investigations can be co-ordinated across the Community, either by centralising the system of authorisation for such investigations with the CFI empowered to deal with this; or by harmonising national rules. The UK is doubtful about the need for, and merit of, such a reform.

63. The White Paper suggests the Commission would issue a new notice setting out procedures for complaints, the introduction of a four month time limit for the Commission to notify complainants of the action it proposes to take in response to their complaints, and a simplified procedure for the rejection of complaints. The UK welcomes the proposals for an enhanced role and improved service for complainants.

64. The Commission wants to clarify and formalise the procedures for the adoption of interim measures, which should enable it to respond more quickly to protect companies suffering from the anti-competitive behaviour of others. The UK believes that the possibility of interim measures is a key element of effective competition law enforcement and welcomes the Commission proposal.

65. The UK will want to consider all of these proposals in more detail, in consultation with other interested parties, over the coming months. The UK believes serious consideration should be given to the extension of legal professional privilege protection to advice provided by qualified in house lawyers who are bound by their professional code of conduct (as is the case in the UK regime).

Harmonisation of procedures across different sectors

66. The White Paper also proposes that, for the most part, the coal and steel, transport and agricultural sectors should be subject to the same procedures as others, bringing an end to the separate procedural rules that currently apply for those sectors. The UK understands that the special procedures allowed in certain cases relating to agricultural products under regulation 26/62 will continue unchanged. The UK welcomes, in principle, the suggestion that procedures should be harmonised, so simplifying the EC competition regime. In doing so, however, full account will need to be taken of any special characteristics of these industries.

End