MODERNISATION - A CONSULTATION
ON THE GOVERNMENT'S PROPOSALS
FOR EXCLUSIONS AND EXEMPTIONS
FROM THE COMPETITION ACT 1998
IN LIGHT OF REGULATION 1/2003 EC

SUBMISSION OF THE
CLA'S WORKING PARTY ON COMPETITION LAW

1. Introduction

1.1 These comments have been prepared by the Working Party on Competition Law of the Competition Law Association (CLA). The membership of the CLA includes barristers, solicitors and in-house lawyers, academics and other professionals including economists, patent and trade mark agents. The CLA's main object is to promote freedom of competition and combat unfair competition. Membership of the Working Party on Competition Law is open to all members of the CLA.

1.2 The CLA broadly welcomes the current proposals as it considers that close alignment of UK competition law with EC competition law is likely to improve legal certainty and to decrease the costs of compliance for business. In addition the CLA considers that it is important that enforcement of EC competition law at a national level should be carried out in a consistent manner to ensure not only that the United Kingdom complies with its member state obligations but also that United Kingdom business is treated on an equal footing with other businesses when trading both in the UK and in Europe.

1.3 The CLA notes that the Government and/or the OFT do not presently propose to amend the *de minimis* guidance,

whereby agreements entered into by parties with a market share of less than 25 per cent. are unlikely to be held to infringe the Chapter I Prohibition. This submission is made on the assumption that this *de minimis* guidance remains in force.

2. **Consequent to its proposal to remove the domestic notification system and to create a legal exception regime in the UK, the Government also proposes to remove the power in section 7 of the Competition Act to introduce opposition procedures into Block Exemption Orders. The Government seeks views on its proposal.**

2.1 The CLA broadly welcomes the Government's proposal to remove the power to introduce opposition procedures into BEOs. It is consistent with the creation of a legal exception regime in the UK that undertakings will make their own assessments of the legality or otherwise of their agreements and, in particular, whether or not their agreements fall within the terms of a BEO.

2.2 The Government's proposal is also consistent with the Commission's recent approach to BERs, and the Commission's stated intention to remove opposition procedures generally from BERs. It has been the experience of the CLA that the opposition procedures have been little used at EC level.

2.3 The CLA notes that the only BEO currently in operation under the Competition Act does not contain an opposition procedure. The CLA agrees with the observation made in the consultation paper that the likely impact of removing section 7 will be minimal.

3. **The Government proposes to remove the Exclusion Order for vertical agreements under the Competition Act and seeks views on the likely impact of this proposal.**

3.1 The CLA agrees with the view stated in the consultation paper that it is preferable to reduce as far as possible any substantive and procedural differences between the Competition Act and EC competition law. It also agrees that the proposal to remove the BEO for vertical agreements would be consistent with that aim.

3.2 However, the CLA supports the original aim of the BEO to reduce the burden on business of making precautionary notifications under the Competition Act of large numbers of essentially benign agreements, and to allow the competition authorities to concentrate their resources on matters of significant competition concern, rather than on the detailed scrutiny of such agreements.

3.3 The membership of the CLA working party is split between those who support the removal of the BEO and those who do not. A majority are in favour of the removal of the BEO.

3.4 For those who do not favour the removal of the BEO, a major concern is that of the preservation of legal certainty and the burden that its removal will place on smaller companies (see section 4 below). There is no perceived need for change since the BEO was introduced in 1998. Moreover, they are of the view that the way of dealing with the perceived shortcomings in the BEO (i.e. the view that it has been perceived as providing a blanket protection from competition scrutiny for vertical agreements) is to make the "clawback" in the existing BEO more useable and to educate the public about the potential problems with vertical agreements.

3.5 By contrast, the majority of the CLA working party favours the removal of the BEO for the reasons set out in paragraph 3.1 above. They are of the view that the burdens that the removal of the BEO will place on smaller companies will be minimised if the *de minimis* guidance remains in force (see paragraph 1.3 above).

3.6 They are also of the view that the removal of the BEO and the application to vertical agreements of one single regime will simplify the application of competition law and make it more accessible.

3.7 However, in the interests of legal certainty they are of the view that the BEO should not be removed immediately. Some notice should be given to business of its removal and time given to enable business to prepare for that. It would be useful for the Government to accompany the removal of the BEO with roadshows, etc. for local business, chambers of commerce and trade associations to ensure that smaller companies in particular are made aware of the potential application to them of the EU BER.

3.8 They are also of the view that the EU BER should be applied in its entirety in the United Kingdom by way of parallel application. It would complicate matters and detract from the advantages set out in paragraphs 3.1 and 3.6 were the Government to pick and choose provisions from the EU BER rather than applying it in its entirety in the United Kingdom.

4. **The Government seeks information on the number and types of UK vertical agreements, which will now be open to competition scrutiny as a result of removing the Exclusion Order (whilst retaining the Block Exemption Regulation applicable under section 10 of the Competition Act) and which are not already subject to the Chapter II prohibition. The Government also seeks**

information on the likely costs of further legal consideration of these agreements. This information will help to inform the Regulatory Impact Assessment at Annex D.

4.1 The CLA's view is that the removal of the BEO is likely to affect a large number of vertical agreements (subject to the point made at paragraph 3.5 above). For example, it is likely to affect a large number of distribution agreements entered into by undertakings providing local services.

4.2 A significant number of these vertical agreements are unlikely to have been reviewed for competition law compliance. Of these, a large proportion is likely to be agreements entered into by smaller companies. The removal of the BEO is therefore likely to impose a burden on small businesses.

5. **The Government proposes to repeal the separate competition scrutiny regime for statutory audit services and consequential exclusion from the Competition Act. We would welcome your views on this proposal.**

5.1 The CLA broadly welcomes the Government's proposal to repeal the separate competition scrutiny regime for statutory audit services and consequential exclusion from the Competition Act.

5.2 The CLA supports the Government's aim to align the domestic regime with the EC system so that, as far as practicable, the competition authorities are operating consistently irrespective of whether they are applying the Chapter I and II prohibitions or Articles 81 and 82. The CLA shares the Government's belief that it is generally not desirable to create new competition scrutiny regimes, as these increase the potential for inconsistent approaches.

5.3 Whether statutory audit services should be subject to Competition Act scrutiny or to a market investigation regime should be considered with regard to the policy issues arising from this particular market.

6. **The Government proposes to repeal the provisions of the Environment Act that allow for the creation of a separate competition scrutiny regime for Producer Responsibility Schemes and for the exclusion of such schemes from the Competition Act. We welcome your views on this proposal.**

6.1 The CLA understands that the original purpose of the establishment of a competition scrutiny regime for Producer Responsibility Schemes under the Environment Act was to mirror the provisions of Articles 81 and 82 EC (while the RTPA was still in force in domestic law).

6.2 The CLA supports the Government's aim to align the domestic regime with the EC system so that, as far as practicable, the competition authorities are operating consistently irrespective of whether they are applying the Chapter I and II prohibitions or Articles 81 and 82. The CLA shares the Government's belief that it is generally not desirable to create new competition scrutiny regimes, as these increase the potential for inconsistent approaches.

6.3 The CLA therefore supports the Government's repeal of the provisions of the Environment Act that allow for the creation of a separate competition scrutiny regime for Producer Responsibility Schemes, which will have the effect of including such schemes within the Competition Act.

7. **The Government seeks your views on whether to remove the exclusion from the Competition Act for agreements given clearance under section 21(2) of the Restrictive Trade Practices**

Act 1976, and on the number of agreements that might be affected if the exclusion were to be removed.

7.1 The CLA supports a consistent approach to all agreements under the domestic and EC regimes, and so supports in principle the proposal that agreements that benefited from clearance under section 21(2) should now be considered under the Chapter I prohibition and Article 81. However, the CLA also supports the aim to reduce regulatory burdens and to decrease the costs of compliance for business.

7.2 The CLA understands that there are a large number of agreements still in existence that benefited from clearance under section 21(2). It is also understood that efforts have been made by the parties to those agreements to ensure that no material variations have been made to them and that the agreements continue to benefit from the permanent exclusion from the Chapter I prohibition granted by Schedule 3 paragraph 2 to the Act. However, it is the CLA's view that these agreements are likely to become less numerous as time progresses and as businesses can no longer operate them without material variation.

7.3 It is understood that the Government is currently carrying out further research into the number and nature of these agreements. It is particularly important to consider whether or not, as suggested in the consultation paper, many of these agreements will fall outside the scope of the Chapter I prohibition because they are likely to have no appreciable effect on competition.

7.4 The CLA therefore proposes that, subject to the outcome of the aforementioned research, the Government should remove the exclusion for section 21(2) agreements but only after a period of, say, 5 years.

8. **Land agreements**

8.1 The CLA notes that the Government's consultation and proposals explicitly fail to address the question of land agreements.

8.2 The CLA is of the view that the issue of land agreements is worth revisiting. The continued exclusion of land agreements from the Competition Act 1998 is contrary to the aim of aligning the domestic regime with the EC system insofar as practicable. The CLA is also of the view that the current guidance on land agreements lacks clarity and that it would be sensible to review the practical operation of the exclusion of such agreements from the Competition Act.

Competition Law Association

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