

COMPETITION POLICY.Introductory paper by Mrs. Oppenheim.

Competition policy and the laws and institutions through which it is enforced are complex, and familiar only to specialists. The proposals of our working party are, therefore, being put before the Shadow Cabinet in several parts. This paper sets out the philosophy which underlines our recommendations, highlights the political problems they are designed to tackle and the solutions proposed. The report of the working party, which follows, sets out the principles on which the recommendations are based and summarises those recommendations, details the changes needed in institutions and procedures and identifies the legislative changes needed to give effect to them.

2. Since this is an area where any Government would have to undertake careful consultation before acting, it would be wrong at this stage to seek unqualified approval for every feature, let alone detail of what is proposed. What we need now is agreement on the essentials which will permit us to explain our intentions clearly and persuasively in an election campaign and to move into action without delay when in Government.

PHILOSOPHY.

3. Vigorous and effective competition is fundamental to the health of the market economy whose revival is one of our main purposes. As Adam Smith pointed out, competitive conditions do not persist in an economy unless the Government takes steps to enforce them. "People of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public in some contrivance to raise prices."* At present competition policy is somewhat arbitrary, is not always pursued with a sense of urgency, suffers from a lack of clarity and is open to political intervention. We need, therefore, to eliminate these weaknesses, to reassert the principle of "effective competition" and to ensure that it is the overriding rationale of the office of Fair Trading, the Monopolies Commission and the Restrictive Practices court.

4. There are two major dilemmas which the policy must resolve and necessarily can only do so imperfectly. First, how far can one rely on the rule of law and comprehensive statutes, and how far should the system be discretionary? Experience suggests that both extremes are to be avoided. A highly discretionary system invites massive political intervention and creates great uncertainty in industry. A full-blooded legal approach such as is found in the USA is cumbersome, inflexible, imposes great expense on both Government and industry, and ironically also creates uncertainty. The second dilemma is whether the policing apparatus should be politically controlled, or

* Source: "The Wealth of Nations" p128 of the modern library edition.

whether it should be a genuinely independent QUANGO. The right compromise in the UK today is clearly to reduce political control as far as possible and to move towards more "rule of law" (without going all the way). A more clearly defined legal framework with proper right of legal redress, would provide industry with the further safeguards it needs in its dealings with institutions enjoying more independence than today.

POLITICAL CONSIDERATIONS.

5. A policy which lays great stress on effective competition should be popular. Corporate strategy surveys have indicated that it is rated highly by the public, not least as a means of moderating inflation. The proposals should permit us to abolish the Price Commission and price controls at an early date without being exposed to serious accusations from the Labour Party and Unions.

6. By bringing the Nationalised Industries within the ambit of competition policy, the way is opened to achieving a number of our major objectives for state firms. The proposals provide for independent examination of the competitive practices of the corporations and the elimination of abuses in a non-partisan way through a legal framework. Once such a mechanism is in operation, it should be difficult for a future Labour Government to tamper with it. This, too, promises to be electorally attractive.

THE POLICY.

1. RATIONALISATION OF PUBLIC BODIES RESPONSIBLE FOR COMPETITION POLICY.

- (a) The Monopolies Commission to be streamlined and strengthened by more full-time members paving the way for its integration with the Restrictive Practices Court, should that be desired in due course.
- (b) Abolition of the Price Commission.
- (c) The OFT to have proper investigatory powers. No departmental officials no longer to be members of the Mergers panel.

7. These proposals will result in significant saving in public expenditure and staff. They will permit speedier Monopolies and Mergers investigations, where this is feasible and appropriate (and it often is); and provide for quicker, more responsive and flexible examination of monopoly or oligopoly pricing practices. They will allow the monitoring of trends, and early warning of undesirable effects of uncompetitive practices, without which the policy machinery is "blind". When under the present system a monopoly or near-monopoly situation arises, it is often too late to avert it, since large scale divestiture can so easily become impossible or absurd by the time the investigation is complete. British Leyland is, perhaps, a good example of a state of affairs which the new machinery might have prevented.

2. NEW STRUCTURE AND PROCEDURES.

- (a) The OFT will initiate all preliminary investigations which will last a maximum of three months. Then mergers cases will be handled by its own Mergers Panel, while monopoly and oligopoly cases will go to the Monopolies Commission.
- (b) Before a reference is made to the Monopolies Commission, the Director General (DG) will in some cases enter into a legally enforceable but voluntary agreement with a firm or firms. If the agreement is observed no further reference would be made or action taken.

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8. These new provisions should be welcomed by industry. The voluntary agreement procedure will avoid the time, formality and expense of a full investigation. The short "preliminary investigation" will eliminate long periods of damaging uncertainty. Both investigations and agreements should, as a rule, be somewhat narrower in scope than is currently the case. Consumers should be pleased by swifter and simpler ways of correcting undesirable practices. It will, of course, be necessary to ensure that the legislation is drafted in a way which minimises the scope for behind-the-scenes "arm-twisting" which such powers inevitably confer on the OFT.

(c) When a reference is made the DG of the OFT would direct the Monopolies Commission whether to embark on a short or longer term investigation. In all cases a time limit would be set. Shorter investigations would be more common.

9. This proposal meets much of the criticism of present procedures.

(d) The discretion of the Secretary of State and scope for interference to be very strictly limited.

10. Politically motivated interference, mostly by Labour Ministers, has had a highly undesirable effect in the past. This has significantly diluted the effectiveness of Monopoly and Mergers Policy. Equally if not more important, it provides dangerous precedents and opportunities for a future Labour Government, perhaps more malicious than this one. It is important to ensure that future Labour Ministers are unable to exercise these powers to dilute competition policy, in particular in the Public Sector. However, Departments would still be permitted to submit relevant evidence for consideration by the CFT or LMC. This will leave them and Ministers reasonable scope for political initiatives.

11. There is obviously a very delicate balance to be struck here, and room for debate about how far the privileged position of Ministers should be reduced. However, the advantages of possessing the notional ideal degree of Ministerial discretion in periods of Tory Government have to be weighed very carefully against the scope for the misuse of such powers by other Governments.

3. SIGNIFICANCE OF MAIN POLICY CHANGES. SEVEN KEY POINTS.

(a) Criteria for adjudication on Monopolies and Mergers to be clearer, more consistent and more narrowly defined, with maintenance of competition and the consumer interest taking precedence over all other considerations, and proper allowance being made for the effect of foreign competition.

12. In the past employment considerations, industrial strategy, regional policy and balance of payments have all been included in the criteria as ends in themselves by which mergers are judged either to be in the public interest or not. This has provided the loopholes Labour Governments have exploited for political purposes to the detriment of the preservation of competition and other aspects of the national interest. It is, therefore, highly desirable that these considerations should be subordinated to that of effective competition and the consumer interest and deemed relevant only as means rather than ends.

13. Naturally, the presence and nature of foreign competition must be taken into account, and its nature will have to be carefully examined in particular cases. For instance, in some industries where a monopoly exists in this country, foreign competition can be sufficiently keen to regulate the situation. In others, where no actual monopoly exists, notably the car industry, the comparatively uncompetitive pricing practices in the British car industry could well have the effect of allowing foreign imports to be sold in this country at considerably higher prices than elsewhere. The definitions of oligopoly and monopoly proposed will permit these issues to be given proper weight.

14. Such a proposal for the application of a tighter range of criteria in relation to mergers does not appear in the Government's own Green Paper* for obvious reasons, although it has been commended by consumer organisations. It has great political advantages for us particularly as they would be applied by an independent body. It is proposed that the burden of proof in mergers should be partly reversed, though not dramatically so. The first test a merger must pass is "whether competition will be adversely affected. If it is not, then the firms are free to go ahead. If it is, the second test is whether there are other benefits to the public interest which compensation for the damage to competition". This change could be controversial with the CBI and others, although it is also recommended in the Green Paper. But it is a much surer way of preserving competition than leaving the onus of proof where it is at present.

(b) Nationalised Industries to be brought within the scope of Competition Policy and be liable to investigation in the same way as the private sector.

15. This will permit us to enforce our basic goal of greater competitiveness in the public corporations in an apolitical way, at arms length from Government. Such a process could achieve sufficient momentum to be unchallengeable under a future Labour administration. But we need not stop there. If, as I should recommend, our study group can undertake a further phase of work for us in the near future, we should ask them to consider bringing any future Government proposal for nationalisation within the scope of competition policy; and to recommend ways in which the statutory basis of the monopoly enjoyed by each established nationalised industry might be examined to establish whether it is in the public interest. If they cannot, these would be important questions to consider in Government.

(c) Oligopoly to be statutorily defined.

(d) Clear, if non-exhaustive, statutory definition of uncompetitive practices by monopolies and oligopolies which may be the basis of a recommendations by the OFI for an MTC investigation. This is to be welcomed for the same reasons.

16. This is quite essential in principle, and urgently needed in practice. The provisions of the Fair Trade Act are loose enough to cover cases of evident oligopoly in which uncompetitive practices prevail; and in particular where formal price-fixing agreements exist. With the growing concentration of many parts of British industry, oligopolies have become more and more important. And they are probably responsible for a large part of the uncompetitive pricing practices from which this country suffers. It should be stressed that in both cases there are very clear conditions which must be satisfied before there can be an investigation, and the powers given are permissive. The power and duty to monitor trends in industrial structure and competitive conditions are vital if these responsibilities are to be properly discharged. Without them the policy machinery would be as ham-strung as armed forces without a source of intelligence or the ability to reconnoitre.

(e) Where competition is insufficient, divestiture can be recommended in the public as well as private sector.

* "A review of Monopolies and Mergers Policy" Cmnd. 7198. published 1978.

17. Extension of this power to the public sector would be an innovation in this country although it has long been a feature of competition policy elsewhere. It would naturally be of principal interest for the nationalised industries. It must be stressed that this power is valuable above all as a deterrent, and is not often exercised in other countries or (in the private sector) here.

(f) If the Secretary of State vetoes MMC or OFT recommendations, as has been the recent experience, Parliament must be given an opportunity to debate and vote where appropriate.

18. This would be a valuable provision to have in force under a future Labour Government.

(g) The DG of the OFT should have the power to order investigations and report on price increases in politically sensitive areas, thus fulfilling an educative role and meeting urgent political needs.

19. Until the introduction of the Price Commission Act, the I were all in favour of such proposals as a replacement for the Price Code. Subsequently they have become understandably nervous of any such proposals, however benignly framed. However, given public irrationality and sensitivity on the issue of prices, it is prudent and realistic to provide for the OFT to carry out such investigative reports. What has been proposed is not a system of price controls, nor does it imply one. It should be possible to ensure that business and industry see the proposal as the harmless and constructive idea it is.

CONCLUSION.

20. The recommendations of the Working Party are not comprehensive. But they provide a well-worked out core for a proper policy for competition, something this country has never had before, either on paper or in practice. They promise both to be politically advantageous and of great economic value. They open up valuable possibilities for our policy towards the nationalised industries. They would find favour with the public, the press and consumer groups. They do not involve such legislation.

21. They may well be viewed with some anxiety by parts of the business community. That in itself could be a political bonus for us, not a defect. Since, it is crucial that such anxieties should be dispelled where they are reasonable we should make it clear that we intend proper consultation before we act.

22. With the Government making noises about the production of its own, albeit inadequate, monopolies and mergers proposals, it is important that once our policy is approved it should be spelt out as a key-note speech before the Government proposals are published.

23. The postponement of the election provides an ideal opportunity for this which I believe it would be a mistake to miss.

24. Last but not least, I would propose in the near future to invite the Group to extend its work to cover the most important omissions identified in its report, and any other issues which it might be appropriate to refer to it.