



Department  
for Business  
Innovation & Skills

**COMPETITION REGIME:  
DRAFT SECONDARY  
LEGISLATION – PART TWO**

17 SEPTEMBER 2013

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## Foreword from the Minister for Employment Relations and Consumer Affairs

We launched a consultation on the Ministerial statement of strategic priorities for the new Competition and Markets Authority and secondary legislation in July. I wrote then that the UK competition regime enjoys a world-class reputation and that it creates an environment that encourages business to invest and innovate, delivering better and cheaper products and services for consumers and driving growth. The Coalition Government believes that we should strive to make the regime even more effective and so brought forward the Enterprise and Regulatory Reform Act 2013 which will reform the regime.



We are creating the CMA and introducing reforms to give it stronger powers and speed up its cases. As a single competition authority, the CMA will be more flexible and responsive in its use of competition tools and resources to tackle competition problems. It will help to create the right conditions for business to thrive and enter new markets and deliver better outcomes for consumers. We have taken significant steps in the transition to the new CMA including the appointment of a high calibre board.

This consultation document sets out further secondary legislation required to provide detailed provisions on the revised competition regime. Alongside this consultation, there is a separate consultation on the CMA's draft Guidance, which will explain the revised legislative framework and set out how the CMA will exercise its functions in practice. You may find it useful to consider this document and the draft Guidance together, and to offer your views on the draft Guidance in parallel.

Taken together, these consultations will clarify the framework set out in primary legislation and how the regime will work in future. I again encourage you to get involved in the important work to establish this reformed and stronger competition regime.

A handwritten signature in blue ink that reads "Jo Swinson".

Jo Swinson MP  
Minister for Employment Relations and Consumer Affairs

## Executive Summary

Competitive markets drive improvements in productivity, innovation and economic growth, as well as providing price, choice and other benefits for consumers. The Enterprise and Regulatory Reform Act 2013 (ERRA13) will create the Competition and Markets Authority (CMA) as a new single competition authority, succeeding the Office of Fair Trading (OFT) and Competition Commission (CC). It also introduces a number of reforms to further strengthen the competition regime.

Much of the important detail of how the CMA will carry out their functions will be in the secondary legislation made under the reformed statutory framework, and the new CMA Guidance. Over the summer, we consulted and sought your views on the ministerial statement of strategic priorities for the CMA and a first set of draft secondary legislation.

This document forms the second tranche of the consultation and invites your comments on the following pieces of secondary legislation:

- **Cartels – Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014**, made under s.188A of the Enterprise Act 2002 (EA02) specifying the manner in which relevant information about arrangements is to be published for the purposes of taking a person outside the criminal cartel offence.
- **Concurrency – Competition Act 1998 (Concurrency) Regulations 2014**, made under s.54 of the Competition Act 1998 (CA98) on the coordination of concurrent powers under Part 1 of CA98.
- **Antitrust – The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014** – these are Rules for the Competition Appeal Tribunal (CAT) on obtaining a warrant from the CAT to enter premises made under s.15 of the EA02.

Detailed information on these instruments is set out in the document below, and drafts of each are attached at Annexes 1 – 3.

### Next steps

The purpose of this consultation is to seek views on the draft texts of the statutory instruments. This document contains the second tranche of draft statutory instruments, following the first tranche consultation which closed on 6 September. We invite you to consider these drafts alongside the parallel consultation on the CMA's new Guidance, which will explain how the CMA will apply and give effect to the statutory framework. The BIS consultation can be found at <https://www.gov.uk/government/consultations/competition-regime-draft-secondary-legislation-part-two> and the Consultation on the CMA's Guidance can be found at <https://www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2>.

We will consider responses in making amendments to the draft texts before the statutory instruments are laid in Parliament next year for commencement in April 2014.

We welcome views on these drafts from all interested parties. There is a full list of consultation questions on page 20. Written responses should be sent by 11 November 2013.

## How to respond

This stage of the consultation will begin on 17 September 2013 and will run for 8 weeks, closing on 11 November 2013.

When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

The consultation response form is available electronically on the consultation web page: <https://www.gov.uk/government/consultations/competition-regime-draft-secondary-legislation-part-two>

The form can be submitted online/by email or by letter or fax to:

competition.consultation@bis.gsi.gov.uk  
Paul Griffiths  
Consumer and Competition Policy Directorate  
Department of Business, Innovation and Skills  
1 Victoria Street  
SW1H 0ET

Tel: 020 7215 1722  
Fax: 020 7215 0235

A list of those organisations and individuals consulted is in Annex 5. We would welcome suggestions of others who may wish to be involved in this consultation process.

You may make printed copies of this document without seeking permission.

Other versions of the document in Braille, other languages or audio-cassette are available on request.

## Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries about the policy issues raised in the document can be addressed to:

Paul Griffiths  
Consumer and Competition Policy Directorate  
Department of Business, Innovation and Skills  
1 Victoria Street  
SW1H 0ET

Tel: 020 7215 1722

Fax: 020 7215 0235

Email: [competition.consultation@bis.gsi.gov.uk](mailto:competition.consultation@bis.gsi.gov.uk)

The consultation principles are in Annex 4.

## **What Happens Next**

Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

The response to the consultation will take the form of decisions made in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

## 1. Introduction

- 1.1 This document sets out a second tranche of draft statutory instruments that will provide the detail on the reformed competition regime. (See paragraph 1.6 for details of the first tranche.) Competitive markets drive improvements in productivity, innovation and economic growth, as well as providing price, choice and other benefits for consumers. To strengthen the competition regime, the Coalition Government brought forward the Enterprise and Regulatory Reform Act 2013 (ERRA13) to create a new single Competition and Markets Authority (CMA) and gives it enhanced powers. The CMA, which will bring together the functions of the Competition Commission (CC) and the competition and certain other functions of the Office of Fair Trading (OFT), will be legally established in October 2013 and will take on its full functions in April 2014.
- 1.2 As set out in the consultation document on the detail of the new regime published in July, the CMA will be the UK's single competition authority with a duty under s.25 of ERRA13 to promote competition for the benefit of consumers. It will be a powerful advocate for competition across the UK economy, Europe and globally. Institutional change will streamline handover processes and increase flexibility in resource allocation, making competition enforcement more effective. ERRA13 also introduces a number of reforms to further strengthen the UK's competition regime and improve speed and predictability for business such as:
- making it easier to prosecute the criminal cartel offence by removing the 'dishonesty' element while introducing new circumstances in which the cartel offence is not committed;
  - strengthening the concurrency regime by giving economic regulators an explicit duty to consider Competition Act 1998 (CA98) enforcement before taking enforcement action under their regulatory powers and strengthening the CMA's powers to coordinate CA98 enforcement;
  - giving the CMA discretion to suspend all integration steps in a proposed merger; and clarifies that the CMA will be able to reverse integration steps that have already taken place;
  - introducing, harmonising or shortening statutory time limits for mergers and markets cases;
  - extending information gathering powers throughout a market study and a Phase 1 merger investigation; and
  - providing strengthened powers and more robust decision-making in the enforcement of the antitrust prohibitions in CA98.
- 1.3 The framework for these reforms is set out in the primary legislation, but much of the important detail of how that framework will be implemented will be contained in secondary legislation and the CMA's own Guidance, which is being consulted on in



parallel to the preparation of the secondary legislation. The new Guidance will explain the legal framework and set out how the CMA will carry out its responsibilities under it. The consultation exercise forms part of a complex transition programme and therefore the secondary legislation and Guidance consultations are being held in two tranches (with the BIS and CMA guidance consultation tranches running in parallel).

1.4 In this document, which forms the second tranche of the BIS consultation, we invite your views on three key statutory instruments. Explanations of these instruments are set out in the Chapters below, with drafts of each attached at **Annexes 1 – 3**. The instruments are to be made under the following provisions:

- **Chapter 2: Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014**, made under s.188A of the Enterprise Act 2002 (EA02) specifying the manner in which relevant information about arrangements is to be published for the purposes of taking a person outside the criminal cartel offence.
- **Chapter 3: Competition Act 1998 (Concurrency) Regulations 2014**, made under s.54 of CA98 on the coordination of concurrent powers under Part 1 of CA98.
- **Chapter 4: The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014** – these are Rules for the Competition Appeal Tribunal (CAT) on obtaining a warrant from the CAT to enter premises made under s.15 of EA02.

1.5 The CMA Transition team<sup>1</sup> are also seeking views on the second tranche of draft guidance documents by 11 November 2013. These will cover:

- Consumer Protection: Guidance on the CMA's approach.
- Competition Act 1998: Guidance on the CMA's investigation procedures, including the CMA's Competition Act 1998 Rules.
- Cartel Offence: Prosecution Guidance.
- Regulated Industries: Guidance on concurrent application of competition law to regulated industries.
- CMA Guidance on the variation and termination of merger, monopoly and markets undertakings and orders.
- Proposed approach to the treatment of existing OFT and CC Guidance.

1.6 The first tranche of the BIS consultation and CMA Guidance consultation, which ran over the summer, can be found at:

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<sup>1</sup> The Transition Team, which has been appointed by the CMA Chair Designate and Chief Executive Designate, consists of individuals from the OFT, the CC and elsewhere. Pending formal creation of the CMA on 1st October 2013, the OFT and CC act on behalf of the CMA through the Transition Team.

<http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation> and

<https://www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-1> respectively. Responses to both consultations will be considered in making amendments to the draft text before the statutory instruments are laid in Parliament next year for commencement in April 2014, and the CMA's Guidance is published in the New Year.

1.7 The first tranche of the BIS consultation asked for views on the following draft instruments:

- **Competition and Markets Authority (Penalties) Order 2014**, made under s.40A of CA98, as amended, and s.174D of the Enterprise Act 2002 (EA02). The Order raises the maximum fixed penalty to £20,000 and daily penalty of £5,000 on businesses.
- **Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**, made under s.94A of the EA02, as amended, establishing legal rules to determine when an enterprise is to be treated as controlled by a person and the turnover of an enterprise for the administrative penalty for failure to comply with interim measures.
- **Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**, made under s.68 of EA02 to replace references to OFT and CC with references to the CMA and provide for the transfer of their functions in respect of 'European relevant merger situations' to the CMA.
- **Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**, under s.28 and s.121 of EA02 to alter the timing of merger fee payments so that in all cases they will be payable once the CMA has made a decision following a Phase 1 investigation.

1.8 The first tranche of CMA Guidance documents covered:

- Mergers: Guidance on the CMA's jurisdiction and procedure.
- Markets Studies and Market Investigations: Supplemental guidance on the CMA's approach.
- Administrative Penalties: Statement of Policy on the CMA's approach.
- Telecoms price control references: Statement of the CMA's policy and approach.
- Transparency and disclosure: Statement of the CMA's policy and approach.

1.9 The transitional arrangements dealing with the commencement of provisions within ERRA13 on 1 April 2014, when the CMA will take on its full functions, will be published as part of the CMA Guidance consultations. As a general principle, the

government intends that all powers and procedures should be capable of coming into effect as of 1 April 2014 and should be applied prospectively, and not retroactively. Detailed transitional arrangements for ERRA13 provisions will be included in a Commencement Order and transitional arrangements for statutory instruments made under ERRA13 will be made in those instruments.

- 1.10 A regulatory triage assessment has been produced to analyse the impact of the statutory instrument, specifying the manner in which relevant information about arrangements is to be published for the purposes of taking a person outside the criminal cartel offence (see Chapter 2). We concluded that the CMA's new power in relation to this requirement changes the regulatory environment for businesses in the regulated sectors. It is, however, voluntary, of a low one-off cost, and is intended to give business the option of greater certainty by providing a route to declare unproblematic agreements from inadvertently being caught by the offence. The remaining measures contained in this document do not impose regulatory burdens on business beyond what was outlined in the impact assessment for the Enterprise and Regulatory Reform Bill.

## 2. Cartels: Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014

- 2.1 Section 188A of the Enterprise Act 2002 (EA02) (inserted by s.47 of the Enterprise and Regulatory Reform Act 2013 (ERRA13)) sets out the circumstances in which the cartel offence contained in s.188 of the EA02 is not committed. It provides that a person does not commit the cartel offence if, in any case, 'relevant information' about the arrangements would be disclosed to customers or published before the arrangements were implemented in a manner specified in an order made by the Secretary of State. This draft Order specifies that relevant information is published if it is advertised once in any of the *London Gazette*, the *Edinburgh Gazette* and the *Belfast Gazette*.

**Question 1: What is your view on the proposed manner of publication of relevant information?**

**Question 2: Can you estimate the number of advertisements which might be placed in one of the *Gazettes*?**

**Question 3: Do you have any other comments on the draft Order?**

### Background

- 2.2 Sections 188 to 202 of the EA02 provide for a criminal offence for individuals who dishonestly agree to engage in cartel arrangements. The offence is defined in sections 188 and 189 and occurs when an individual dishonestly agrees with one or more others that two or more undertakings will engage in one or more of the prohibited cartel activities. These activities are listed in s.188(2) and comprise price-fixing, limiting production or supply, market-sharing and bid-rigging.
- 2.3 Section 47 of the ERRA13 amends s.188 of the EA02 by removing the requirement that an individual must be acting dishonestly and providing instead new disclosure provisions for all of the four categories of prohibited cartel activity compliance with which will take a person outside the criminal offence.
- 2.4 A new s.188A EA02 sets out the circumstances in which the cartel offence is not committed. It provides that a person does not commit the cartel offence if, in the case of arrangements affecting the supply of a product or service, the customers would be given 'relevant information' before supply is agreed; or, in the case of bid-rigging, the person requesting bids would be given 'relevant information' before the time when a bid was made; or, in any case, 'relevant information' about the arrangements would be published before the arrangements were implemented in a manner specified in an order made by the Secretary of State.
- 2.5 Subsection (2) of the new s.188A EA02 defines 'relevant information' as the names of the undertakings to which the arrangements relate, a description of the

nature of the arrangements and the products or services to which they relate, and such other information as may be specified in an order made by the Secretary of State (the draft Order on which we are consulting does not take up this option of specifying any other information as 'relevant information').

- 2.6 The reason for allowing this protection from committing the offence is that there are a limited number of agreements which may technically fall within the terms of s.188 in the absence of a requirement to prove dishonesty but which would not be unlawful in that they do not infringe the civil antitrust prohibitions against anti-competitive agreements. Notification or publication provides a mechanism for compliance with the law. Provision was made for public disclosure as it may not always be desirable, sensible or practicable for the arrangements to be disclosed to customers – for example, in the case of some consumer goods.
- 2.7 Publication in a *Gazette* was the manner proposed in the Government's response to the consultation on competition reform and during the passage of the Enterprise and Regulatory Reform Bill. The *Gazettes* are the official Newspapers of Record in the United Kingdom. They exist in order to disseminate a wide range of State, Legal and Public notices.
- 2.8 The publication provisions are intended to give businesses a mechanism to prevent unproblematic agreements from inadvertently being caught by the cartel office, and to allow material information about the agreements to be disclosed to the public and competition authorities in an informative and accessible but not overly burdensome way. The reason for specifying in the draft Order that publication must be in a *Gazette* rather than, for example, on a firm's own website, is to ensure that the information is readily accessible and cannot be hidden, and that the CMA is able to monitor the information easily; it would be very difficult for the CMA to keep a check on all business websites, especially as it might not be obvious where such information was to be found and its location might require successive web pages to be accessed. Although publication will take the arrangements outside the criminal offence, the CMA could take action under the civil antitrust regime against arrangements which were genuinely damaging to competition. In practice, it is unlikely that 'hard core' cartels of the kind which the cartel offence is directed against will be publicised because that would invite antitrust action against them. It is important, therefore, that the CMA is able, and is known to be able, readily to have access to information on the disclosed arrangements.

#### Cost per publication

- 2.9 We understand that the price of placing a notice varies from £165 and £225, based on the format of the advert and in which *Gazette* it is placed. A reasonable estimate of the cost might therefore be £190 per advertisement.

#### Number of publications

- 2.10 It is very difficult to estimate the number of agreements between businesses which might be notified in the *Gazettes*, because these are commercial arrangements and it will be for businesses to decide whether or not to publish information and in

particular to decide whether to inform customers directly or to publish the information. During the consultation period and the passage of the legislation, no clear information was provided on the number of arrangements which would likely be published each year.

### 3. Concurrency: Competition Act 1998 (Concurrency) Regulations 2014

- 3.1 The Government wants to encourage the sector regulators and CMA to be more proactive in promoting competition in the regulated sectors and dealing with anticompetitive practices. The new Competition Act 1998 (Concurrency) Regulation 2014 will therefore help to encourage cooperation between the competition authorities and give the CMA a leading role in the concurrency arrangements. This regulation is made under s.54 of CA98, as amended by s.51 of the ERA13.
- 3.2 While the Government expects the competition authorities to usually agree on which body is best placed to lead on a case, Regulation 5 will give the CMA the power to decide that it or another authority that wants to undertake a case will exercise CA98 functions in that particular case. Unlike other economic regulators, Monitor does not have a duty to promote competition; it must exercise its functions with a view to preventing anti-competitive behaviour in the provision of health care services for the purposes of the NHS which is against the interests of people who use such services. The power of the CMA to allocate cases will therefore not apply where a case is principally concerned with matters within the scope of Monitor's concurrent powers.
- 3.3 After the initial allocation of a CA98 case the CMA will also have the legal authority under Regulation 8 to take over a case, following consultation with the relevant regulator, and until a Statement of Objections has been issued. The power will not, however, be applicable to cases that Monitor is undertaking. After a statement of Objections has been issued, the CMA will only be able to exercise its power to take a case with the agreement of the regulator.
- 3.4 The CMA will be able to exercise the power to take a case in circumstances where it considers it appropriate to do so to promote competition in the interests of consumers. The power will be exercisable where (consistent with the EU Commission's powers to take cases from National Competition Authorities) for example the CMA considers itself best placed to: make a decision that sets the appropriate precedent, in particular when similar issues arise across different sectors or parts of the United Kingdom; or enforce the CA98 prohibitions more effectively, for example because the regulator lacks the necessary resources or is unable to take a decision in a timely manner.
- 3.5 The Secretary of State's role under the existing Concurrency Regulations in determining disputes between the CMA and a regulator (or between regulators) on which body leads on a case is being removed. Instead, the CMA would carry out this function as part of its leadership role as set out above.

#### Information Sharing

- 3.6 The CMA and regulators will also be required under Regulation 9 to put in place arrangements for the CMA and regulators to inform other competition authorities

with a potential interest of any concurrent case where there are reasonable grounds for suspecting an infringement. This obligation will apply regardless of whether the authority holding the information proposes to launch such an investigation.

- 3.7 Regulation 9 will also require sector regulators and the CMA to agree arrangements for sharing information with each other about ongoing concurrent cases. The CMA's Guidance will set out which Notices and further information are required, or permitted, to be shared where there are sufficient grounds for suspecting an infringement.
- 3.8 The competition authorities will also be permitted, but not required, under the current information sharing gateways to share information about a broader range of complaints than those where there are sufficient grounds for suspecting an infringement. The information gateways themselves, however, are not being substantively amended under ERRA13 or the Competition Act 1998 (Concurrency) Regulations 2014.

### Secondments

- 3.9 The wording of Regulation 8 of the current Concurrency Regulations is being modified to clarify that secondment can be for any of the purposes under Part 1 of CA98 and not just for the purposes of s. 27-29. This would allow deeper engagement and cooperation between regulators, in particular, allowing a secondee to play a role in decision-making.

### Further Consequential Amendments on Concurrency (not set out in this document)

- 3.10 Consequential amendments will need to be made under the s.99 order-making power in ERRA13 to amend sectoral legislation to provide that the regulators have powers under CA98 concurrently with the CMA when it replaces the OFT.
- 3.11 The Government also proposes to make consequential amendments to ensure the relevant regulators have concurrent EA02 Part 4 powers and duties. (Under the amended EA02, Part 4 covers both market studies and market investigations. The concurrent powers will be those powers of the CMA that are exercised by its Board, i.e. the amended market study regime and market investigation referral powers). These amendments are necessary to ensure that when the CMA takes over from the OFT there is a seamless transition and the regulators continue to have concurrent markets powers and that the reforms introduced by ERRA13 also apply to them.

**Question 4: Do you have any comments on the draft Regulations?**



## Background

- 3.12 The consultation on competition reform identified a number of weaknesses in the current concurrency regime. The Competition Act 1998 (Concurrency) Regulations 2004<sup>1</sup> currently require regulators to agree amongst themselves which authority shall exercise the functions in Part 1 of the CA98. If they cannot agree within a reasonable time, the OFT must inform the Secretary of State who must then determine this question.
- 3.13 At present, the Concurrency Regulations include provisions enabling (but not requiring) the competition authorities to send to each other information they receive that an antitrust behaviour may have taken place<sup>2</sup> and requiring a competent person to inform another competent person who has or may have concurrent jurisdiction at the point when he proposes to exercise concurrent functions<sup>3</sup>. If a regulator is not minded to launch an investigation under the CA98 it is not required to inform the OFT or other regulators of its intentions.
- 3.14 As (per paragraph 3.13 of OFT Guidance 405), a sector regulator is normally expected under the current arrangements to deal with anti-competitive behaviour in that sector, it is currently possible for such behaviour to be addressed using sectoral powers without the OFT being involved in the decision or even informed of it. This means that cases which could be of interest to the OFT, for example because of their implications for general competition enforcement policy, may not be brought to its attention before a sector regulator decides not to launch an investigation under CA98. Similarly, it means that the OFT might not be given the opportunity to provide support to the sector regulator in respect of the matter.
- 3.15 Furthermore, the Concurrency Regulations currently do not make provision to require the sharing of information between sector regulators and the OFT once an investigation under CA98 is under way.

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<sup>1</sup> S.I. 2004/1077.

<sup>2</sup> Regulation 3.

<sup>3</sup> Regulation 4.

## 4. Antitrust: The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014

- 4.1 The draft Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014 will amend the CAT's rules to make provision for the procedure on an application by the CMA (or one of the sector regulators with concurrent CA98 powers) for a warrant to enter premises under various provisions of the CA98 and the EA02.
- 4.2 Currently, applications for a warrant have to be made to the High Court or the Court of Session. There are Practice Directions which accompany the Civil Procedure Rules 1998<sup>5</sup> dealing with warrant applications to the High Court under the relevant sections of the CA98 and EA02. The draft CAT rules draw on these but are adapted to the particular procedures of the CAT and will be adapted for application outside England and Wales.
- 4.3 The draft rules in particular cover how an application is to be made, including the evidence which must accompany it; how a warrant is to be issued and executed; and applications to vary and discharge a warrant.

### Question 5: Do you have any comments on the draft Rules?

#### Background:

- 4.4 Section 41 of and Schedule 13 to the ERA13 amend sections 28, 28A, 62, 62A, 63, 65G and 65H of the CA98 to extend to the CAT the powers contained in these sections to issue warrants to enter premises. The effect is to allow the CAT (as well as the High Court or the Court of Session) to issue warrants allowing an investigation officer to enter premises to obtain access to documents as part of an investigation. The amendments maintain the requirement for applications for a warrant to be made in accordance with rules of court if they are made to a court. Applications to the CAT are to be made in accordance with CAT rules (the Secretary of State has powers to make these rules under section 15 of and Part 2 of Schedule 4 to the EA02). Section 48 of the ERA13 enables the CAT to issue warrants allowing an investigation officer to enter premises when investigating suspected infringement of the cartel offence under s.188 of the EA02. Again, the procedure is to be set out in the CAT rules.
- 4.5 The Government considers that allowing warrant applications to the CAT as well as the Court in relation to both civil proceedings for suspected breach of Article 101/Chapter I prohibition under the CA98 and criminal proceedings under the EA02 will help to streamline both enforcement routes for cartel cases: the CAT as a specialist tribunal can be expected to need less information about the legislative

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<sup>5</sup> 1998/3132.

background for any warrant application. We anticipate that the CAT will be able to deal with applications quickly.

## 5. Consultation Questions

### **Chapter 2. Cartels: Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014**

*Question 1: What is your view on the proposed manner of publication of relevant information?*

*Question 2: Can you estimate the number of advertisements which might be placed in one of the Gazettes?*

*Question 3: Do you have any other comments on the draft Order?*

### **Chapter 3. Concurrency: Competition Act 1998 (Concurrency) Regulations 2014**

*Question 4: Do you have any comments on the draft Regulations?*

### **Chapter 4. Antitrust: The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014**

*Question 5: Do you have any comments on the draft Rules?*

# Annex 1: Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014

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STATUTORY INSTRUMENTS

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**2014 No. XXXX**

**CRIMINAL LAW**

Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State in exercise of the powers conferred on him by section 188A(1)(c) Enterprise Act 2002(a) makes the following Order:

**Citation and commencement**

1.—(1) This Order may be cited as the Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 and comes into force on 1 April 2014.

**Publishing of Relevant Information**

2. For the purposes of section 188A(1)(c) of the Enterprise Act 2002 relevant information about an arrangement is published if it is advertised once in either the London Gazette, the Edinburgh Gazette or the Belfast Gazette.

Date		<i>Name</i> Title
	Department for Business, Innovation and Skills	

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(a) 2002 c. 40.

### **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order specifies the manner in which the arrangements as defined in section 188 of the Enterprise Act 2002 (“the Act”) are to be published is advertising them once in any of the *London Gazette*, the *Edinburgh Gazette* and the *Belfast Gazette*.

Section 188A of the Act sets out the circumstances in which the cartel offence is not committed. It provides that a person does not commit the cartel offence if, in any case, ‘relevant information’ about the arrangements would be published before the arrangements were implemented in a manner specified in an order made by the Secretary of State.

## Annex 2: Competition Act 1998 (Concurrency) Regulations 2014

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STATUTORY INSTRUMENTS

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2014 No.

### COMPETITION

#### Competition Act 1998 (Concurrency) Regulations 2014

<i>Made</i>	- - - -	2014
<i>Laid before Parliament</i>		2014
<i>Coming into force</i>	- -	[1 <sup>st</sup> April] 2014

The Secretary of State, in exercise of the powers conferred by sections 54(4), (5) to (6B) and 71 of the Competition Act 1998(a), makes the following Regulations:

#### Citation and commencement

1. These Regulations may be cited as the Competition Act 1998 (Concurrency) Regulations 2014 and will come into force on 1<sup>st</sup> April 2014.

#### Interpretation

2.-(1) In these Regulations—

“the Act” means the Competition Act 1998;

“notify” means to notify in writing (including electronically) and “notice” shall be construed accordingly;

“Part 1 functions” means any functions under Part 1 of the Act which are, or (but for provision under these Regulations) would be, exercisable concurrently by two or more competent persons;

“prescribed functions” means—

- (i) any of the functions of the CMA under the sections 25 to 29, sections 31A to 31C, section 31D(8) or section 31E of the Act or Schedule 6A to the Act;
- (ii) the function of making a decision, as defined in section 46(3) of the Act;
- (iii) any of the functions of the CMA under paragraph 4 of Schedule 1 to the Act or under an order made under section 50 of the Act;

“relevant competent persons” has the meaning given in regulation 4(2); and

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(a) 1998 c. 41. Section 54 was amended by the Enterprise Act 2002, Schedule 25, paragraphs 38(1), (41)(a) and (b), the Communications Act 2003, s 371(5)(a), the Water Act 2003, Schedule 7, paragraph 32(1) and (2), the Railways and Transport Safety Act 2003, Schedule 2, paragraph 19(p), the Health and Social Care Act 2012, s 74(5)(a) and (b), the Enterprise and Regulatory Reform Act 2013, section 51, Schedule 5, paragraph 33 and Schedule 15, paragraph 11 and SI 2004/1261, Schedule 1, paragraph 33(1) to (3).

“the Rules Order” means the [Competition Act 1998 (Competition and Market Authority’s Rules) Order 2014](a).

(2) References in these Regulations to “health care”, “the NHS” and the provision of health care services for the purposes of the NHS each have the meaning given in section 64 of the Health and Social Care Act 2012(b)

### Information regarding potential cases

3. For the purpose of determining which competent persons have jurisdiction to exercise Part 1 functions in respect of a case or for the purpose of facilitating the performance by another competent person of its Part 1 functions, a competent person may send to any other competent person details of any information in its possession that an infringement of—

- (a) the Chapter I prohibition,
- (b) the Chapter II prohibition,
- (c) the prohibition in Article 101(1), or
- (d) the prohibition in Article 102,

may have taken place.

### Determination of the exercise of Part 1 functions

4.—(1) If a competent person proposes to exercise any of the prescribed functions in respect of a case and it considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in respect of that case, it must inform that other competent person in writing of its intention to exercise prescribed functions in respect of that case.

(2) Where a competent person has informed another competent person of its intention to exercise prescribed functions in accordance with paragraph (1) in respect of a case, all such competent persons (“the relevant competent persons”) must agree who is to exercise Part 1 functions in respect of that case.

(3) When agreement has been reached in accordance with paragraph (2), the CMA must as soon as practicable inform in writing the relevant competent persons which competent person is to exercise Part 1 functions in respect of the case.

### Dispute

5.—(1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the CMA must notify the other relevant competent persons that it intends to determine which relevant competent person is to exercise Part 1 functions in respect of the case.

(2) Any relevant competent person may make representations in writing to the CMA no later than 5 working days after the date upon which the CMA notifies its intention to make a determination in accordance with paragraph (1).

(3) The CMA must within 10 working days of notifying its intention in accordance with paragraph (1)—

- (a) determine which competent person is to exercise Part 1 functions in respect of the case; and
- (b) inform in writing all other relevant competent persons—
  - (i) which competent person is to exercise jurisdiction in respect of the case,
  - (ii) the date of the determination, and
  - (iii) the reasons for the determination.

(4) In making a determination in accordance with paragraph (3)(a) the CMA—

- (a) must take into consideration any representations made in accordance with paragraph (2); and

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(a) tbc.

(b) 2012 c. 7.



- (b) (subject to paragraph (5)) may decide that it is to exercise Part 1 functions in respect of the case rather than another relevant competent person, where the CMA is satisfied that its doing so would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers.

(5) Where Monitor is one of the relevant competent persons, the CMA may not make a determination in accordance with paragraph (1) and (3)(a) that a competent person other than Monitor is to exercise Part 1 functions in relation to the case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

### **Avoidance of double jeopardy**

6.—(1) Where two or more competent persons may have concurrent jurisdiction to exercise Part 1 functions in respect of a case, no competent person shall exercise any prescribed functions in respect of that case before agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise Part 1 functions in respect of that case.

(2) Subject to regulations 7 and 8, once agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise Part 1 functions in respect of a case, no other competent person shall exercise any Part 1 functions in respect of that case.

### **Transfer**

7.—(1) A competent person who has exercised any Part 1 functions in respect of a case (“the transferor”) may agree with another competent person who has, or (but for regulation 6) would have, concurrent jurisdiction to exercise Part 1 functions in respect of that case (“the transferee”) to transfer the case to the transferee.

(2) If the transferor and the transferee propose to agree a transfer in accordance with paragraph (1), the transferor must first—

- (a) notify the undertaking which is the subject of the exercise of Part 1 functions in that case (the undertaking concerned) and any other person likely to be materially affected by the transfer, of the proposed transfer, and
- (b) give such recipients of the notice the opportunity to make written representations upon the proposal within no less than 10 working days of the date of that notice.

(3) The transferor and transferee must take into account any written representations made in accordance with paragraph (2)(b) before agreeing the transfer.

(4) Once the transferor and transferee have reached a decision about the proposed transfer, the transferor must—

- (a) inform the recipients of the notice under paragraph (2) in writing of their decision and the reasons for it, and
- (b) if the transfer has been agreed, that the transferee is to exercise jurisdiction in respect of the case from the date of the transfer.

(5) The transferor is not under any obligation to notify any person in accordance with paragraph (2) or to inform any person in accordance with paragraph (4) if the transferor has not informed that person that it has exercised Part 1 functions in respect of the case.

(6) At any time before agreement has been reached in accordance with regulation 4(2) or a determination has been made in accordance with regulation 5(3)(a) as to which competent person is to exercise Part 1 functions in respect of a case, a competent person (A) who considers that it may have concurrent jurisdiction to exercise Part 1 functions in respect of the case, may agree with another such competent person (B) to transfer the case to B.

### **Circumstances in which the CMA may decide that it is to exercise Part 1 functions**

**8.—**(1) The CMA may direct a regulator to transfer a case in respect of which the regulator is exercising Part 1 functions to the CMA where the CMA is satisfied that—

- (a) it exercising the Part 1 functions rather than the regulator would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers; and
- (b) where the regulator is Monitor, the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

(2) If the CMA proposes to exercise the power in paragraph (1) the CMA must first consult the regulator who is exercising Part 1 functions in respect of the case, explaining the reasons why the CMA considers it appropriate to exercise that power.

(3) If, following the consultation referred to in paragraph (2), the CMA still proposes to exercise the power in paragraph (1), the CMA must—

- (a) notify—
  - (i) the regulator who is exercising Part 1 functions in respect of the case,
  - (ii) the undertaking which is the subject of the exercise of Part 1 functions in the case (the undertaking concerned), and
  - (iii) any other persons likely to be materially affected by the transfer, of what it proposes,
- (b) give such recipients of the notice the opportunity to make written representations upon the proposal within no less than 10 working days of the date of that notice, and
- (c) take into account any representations made in accordance with paragraph (3)(b).

(4) Once the CMA has reached a decision whether to exercise the power in paragraph (1), the CMA must—

- (a) inform the recipients of the notice under paragraph (3)(a) in writing of its decision and the reasons for it; and
- (b) if the CMA has decided to exercise the power in paragraph (1), inform such recipients in writing that the CMA is to exercise jurisdiction in respect of the case from the date of the transfer.

(5) The CMA is not under any obligation to notify or inform any person referred to in paragraph (3)(a)(ii) or (iii) in accordance with this regulation if the regulator has not informed that person that it has exercised Part 1 functions in respect of the case.

(6) The CMA may not exercise the power in paragraph (1) in respect of a case where a regulator has given notice under section 31(1) of the Act that it proposes to make a decision (within the meaning given by section 31(2) of the Act) in that case.

### **Information sharing**

**9.—**(1) Each competent person must put in place arrangements for sharing with other competent persons the following information in connection with concurrent cases—

- (a) details of any information in the possession of the competent person that an infringement of—
  - (i) the Chapter I prohibition,
  - (ii) the Chapter II prohibition,
  - (iii) the prohibition in Article 101(1), or
  - (iv) the prohibition in Article 102,
 may have taken place, whether or not the competent person proposes to exercise any of the prescribed functions in respect of the case;
- (b) a draft of any notice which the competent person proposes to give under section 31 of the Act (decisions following an investigation) or paragraph [5] of the Schedule to the Rules Order (statement of objections), before the notice is given;
- (c) a draft of any commitments which the competent person proposes to accept under section 31A of the Act (commitments) before those commitments are accepted;

- (d) a draft of any notice which the competent person proposes to give under section 35(3) (notice of interim measures), before the notice is given;
  - (e) a draft of any notice which the competent person proposes to give under paragraph [10(1)] of the Schedule to Rules Order (notice of infringement decision), before the notice is given;
  - (f) a draft of any notice which the competent person proposes to give under paragraph [10(3)] of the Schedule to Rules Order (notice of no grounds for action decision), before the notice is given;
  - (g) a draft of any notice which the competent person proposes to give under paragraph [15(3) or (6)] of the Schedule to Rules Order (notice of proposed cancellation of parallel exemption and notice of decision), before the notice is given;
  - (h) a draft of any notice of a decision by the competent person not to proceed with a case, before the notice is given;
  - (i) a draft of any notice which the competent person proposes to give under section 112 of the Enterprise Act 2002(a) as applied by section 40A(9) of the Act (notice of administrative penalty), before the notice is given;
  - (j) such other information in the possession of the competent person as any other competent person may reasonably require to facilitate the performance of its functions under the Act.
- (2) This regulation does not affect any power or duty to disclose information which exists apart from this regulation.

### Use of staff

**10.—**(1) A competent person who wishes to exercise Part 1 functions in respect of a case (“the appointor”) may appoint an officer of another competent person (“the appointee”) to act as his officer in relation to that case provided that the competent person of which the appointee is an officer gives his written consent to the appointment on or before the date upon which the appointment commences.

(2) An appointee is an officer of the appointor for the purposes of sections 27 to 29 inclusive of the Act and may exercise such other functions in relation to the case as may be agreed.

(3) Where the appointor is the Water Services Regulation Authority, the appointee is to be treated as an employee of the appointor for the purposes of paragraph 10 of Schedule 1A to the Water Industry Act 1991(b).

(4) Any act or omission of the appointee within the terms of the appointment is to be deemed to be an act or omission of the appointor.

### Service of Notices

**11.—**(1) Any notice to be served on any person under regulations 7 and 8 may be served by post or by sending it by electronic means to an electronic address notified by the person for the purpose. .

(2) A letter containing that notice is to be deemed to be properly addressed if it is addressed to that person at its registered office or last known residence or last known place of business in the United Kingdom.

### Revocation and transitional provision

**12.—**(1) The Competition Act 1998 (Concurrency) Regulations 2004(c) (the 2004 Regulations) are revoked.

(2) Where a competent person is entitled to exercise prescribed functions within the meaning of and in accordance with the 2004 Regulations in respect of a case before the date these Regulations come into force that competent person is to be treated as having jurisdiction to exercise Part 1 functions in respect of that case for the purposes of these Regulations as though an agreement to that effect had been reached in accordance with regulation 4(2) of these Regulations.

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(a) 2002 c. 40.

(b) 1991 c. 56. Schedule 1A was inserted by Schedule 1 to the Water Act 2003 (c. 37).

(c) S.I. 2004/1077.

Date

*Jo Swinson*  
Parliamentary Under-Secretary of State  
for Employment Relations and Consumer Affairs  
Department for Business, Innovation and Skills

### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations make provision for the Competition and Markets Authority (“CMA”) and the regulators who can exercise functions of the CMA under Part 1 of the Competition Act 1998 (c 41) (the Act) concurrently with it to co-ordinate the performance of those functions.

Terms used in these Regulations are defined in Part 1 of the Act, and have the same meaning in these Regulations as they do there. In particular, Article 101(3) and Article 102 are defined in section 59 of the Act; “the Chapter I prohibition” has the meaning given in section 2(8) of the Act; “the Chapter II prohibition” has the meaning given in section 18(4) of the Act; “competent person” means the CMA or any of the regulators; “a concurrent case” has the meaning given in section 54(6C) of the Act and “regulator” means the Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Northern Ireland Authority for Utility Regulation, the Civil Aviation Authority and Monitor.

Regulation 3 provides for a competent person to circulate information for the purposes of determining which of their number may exercise Part 1 functions (as defined in regulation 2) in relation to a case or for the purpose of facilitating the performance by another competent person of its Part 1 functions.

Regulation 4 sets out the steps that must be taken before a competent person exercises prescribed functions (as defined in regulation 2) in relation to a case.

Regulation 5 provides the procedure for determining which competent person is to exercise Part 1 functions in a particular case when agreement has not been reached on this issue in accordance with regulation 4 and provides that the CMA may not determine that a competent person other than Monitor is to exercise Part 1 functions in relation to the case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

Regulation 6 makes provision for the circumstances in which the exercise of prescribed functions by a competent person in relation to a case precludes the exercise of Part 1 functions by another competent person.

Regulation 7 makes provision for a competent person who has exercised Part 1 functions in relation to a case to transfer that case to another competent person.

Regulation 8 makes provision for the CMA to determine that it rather than a competent person who has exercised Part 1 functions in relation to a case is to exercise Part 1 functions in relation to that case and provides that the CMA cannot determine that it rather than Monitor should exercise Part 1 functions in respect of a case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

Regulation 9 provides for arrangements to be established by competent persons for sharing information in relation to concurrent cases.

Regulation 10 makes provision for the appointment of an officer of one competent person to act as the officer of another competent person in relation to a case.

Regulation 11 makes provision for the service of notices.

Regulation 12 revokes the Competition Act 1998 (Concurrency) Regulations 2004 (SI 2004/1077) and makes transitional provision in relation to cases where a competent person is already exercising Part 1 functions.

The impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, includes an assessment of the effect that the changes to the concurrency arrangements will have on the costs of business and the public and voluntary sector and can be found at the website: <https://www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority> .

## Annex 3: The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014

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STATUTORY INSTRUMENTS

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**2014 No. XXXX**

**COMPETITION**

**TRIBUNAL RULES**

### The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State, after consultation with the President of the Competition Appeal Tribunal and such other persons as he considers appropriate in accordance with section 15(1) of the Enterprise Act 2002(a) and after consultation with the Administrative Justice and Tribunals Council in accordance with section 44 and paragraph 24 of Schedule 7 to the Tribunal Courts and Enforcement Act 2007(b) in exercise of the powers conferred by section 15 and Part 2 of Schedule 4 to the Enterprise Act 2002, makes the following Rules:

#### Citation and commencement

1.—(1) These Rules may be cited as the Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014 and shall come into force on [ ].

(2) In these rules, “the Principal Rules” means the Competition Appeal Tribunal Rules 2003(c).

#### Amendment of the Principal Rules

2. The Principal Rules shall be amended as provided in the Schedule to these Rules.

Date

*Name*  
Parliamentary Under Secretary of State  
Department for Business Innovation and Skills

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(a) 2002 c.40.  
(b) 2007 c.15; S.I. 2007/2951.  
(c) S.I. 2003/1372, as amended by S.I. 2004/2068.

## SCHEDULE

## Rule 2

## Amendments to the Competition Appeal Tribunal Rules 2003

## 1. In rule 2—

## (a) After the definition of “the chairman” insert—

““CMA” means the Competition and Markets Authority;

“the Commission” has the same meaning as in section 59 of the 1998 Act;

“Commission official” means a person authorised by the European Commission for any of the purposes set out in section 62(10), 62A(12) or 63(10) of the 1998 Act;”;

## (b) After the definition of “damages” insert—

““infringement” means an infringement of section 2 or 18 of the 1998 Act or Article 101 or 102 of the Treaty on the Functioning of the European Union;

“named officer” means the person identified in a warrant as the principal officer in charge of executing that warrant, and includes an officer authorised under section 63 of the 1998 Act or any person authorised under section 195(1) of the 2002 Act;

“offence” means an offence under section 188 of the 2002 Act;

“officer” means an officer of the CMA;”;

## (c) After the definition of “the 2002 Act” insert—

““warrant” means a warrant under:

(i) section 28, 28A, 62, 62A, 63, 65G or 65H of the 1998 Act; or

(ii) section 194 of the 2002 Act.”.

## 2. In rule 3 (Application of rules)—

## (a) in paragraph (a), after “Tribunal” insert “save as otherwise provided in Part IVA (warrants)”;

## (b) in paragraph (b), after “(proceedings under the 2002 Act)” for “or” substitute a comma, and after “(claims for damages)” insert “or Part IVA (warrants)”;

## (c) in paragraph (d)—

(i) for the full stop substitute a semi-colon; and

(ii) after the semicolon insert—

“(e) Part IVA of these rules applies to warrants.”

## 3. After Part IV of the rules insert—

## “PART IVA

## WARRANTS

**Application of the rules to warrants**

**49A.**—(1) The rules applicable to proceedings under section 28, 28A, 62, 62A, 63, 65G or 65H of the 1998 Act and section 194 of the 2002 Act are those set out in this Part and in Part I, Part II (except for rules 8, 9(2), 10, 12, 13(b), 14 to 16, 18(4), 20(2), and (21) and Part V (except for rules 50, 52, 54, 56 and 57) of these rules.

(2) In this Part—

“explanatory note” means a document to be served on the occupier or the person appearing to be in charge of the premises to which the warrant relates at the same time as the warrant is served which explains —

(a) the powers to search the premises under which the warrant is issued;

- (b) the rights of occupiers to access to legal advice and the rules which apply to legally privileged communications, rights against self-incrimination and rights to have any confidential information treated as confidential by the regulator;
- (c) the procedure which will be followed if the named officer removes any property from the premises to which the warrant relates;

“regulator” has the meaning set out in section 54 of the 1998 Act; and

“warrant application” means an application for a warrant made under rule 49B.

(3) Where a warrant application has been made by a regulator exercising the functions of the CMA under Part I of the 1998 Act, references in this Part to the CMA shall be read as referring to that regulator.

[Insert any amendments necessary for Scotland/Northern Ireland].

### **Manner of making a warrant application**

**49B.**—(1) An application by the CMA for a warrant must be made by sending a written notice of application to the Registrar in accordance with the provisions of this rule.

(2) The warrant application may be made without notice to any person and without naming a defendant. It shall not be served on any person, unless otherwise directed by the Tribunal. No such direction shall be given without the CMA first having had the opportunity to make observations on the proposed direction. In determining whether to make the proposed direction, the Tribunal will take any such observations into account.

(3) The notice of application filed under paragraph (1) of this rule must state—

- (a) the section of the Act pursuant to which the warrant application is made;
- b) the address or other identification of the premises to be subject to the warrant; and
- (c) the anticipated date or dates for the execution of the warrant.

(4) The notice of application must be accompanied by affidavit evidence. The affidavit shall—

- (a) state and, where appropriate, exhibit supporting evidence concerning:
  - (i) the subject matter (namely, the nature of the suspected infringement or offence) and purpose of the investigation to which the warrant application relates;
  - (ii) the identity of the undertaking or undertakings suspected to have committed the infringement, or the person or persons suspected to have committed the offence;
  - (iii) the grounds for applying for the issue of the warrant and the facts relied upon in support;
  - (iv) details of the premises to be subject to the warrant and of the possible occupier or occupiers of those premises;
  - (v) the connection between the premises and the undertaking or undertakings suspected to have committed the infringement or the person or persons suspected to have committed the offence;
  - (vi) the name and position of the officer who it is intended will be the named officer;
  - (vii) in the case of a warrant application under the 2002 Act, if the named officer is to be a person who is not an officer but is a competent person authorised by the CMA, pursuant to section 195(1) of the 2002 Act, to exercise on its behalf all or any of the powers conferred by section 194 of the 2002 Act, the name and job title of such person, and the reason why it is intended that he may act as the named officer and exercise the relevant powers conferred by section 194 of the 2002 Act;
  - (viii) if it is intended that the warrant may, pursuant to a relevant provision of the 1998 Act or 2002 Act, authorise any person (other than an officer or a Commission official) to accompany the named officer in executing the warrant, the name and job title of such person, and the reason why it is intended that he should be permitted to accompany the named officer;

(b) exhibit the following:



- (i) the written authorisation of the CMA containing the name of the named officer and the name of any other persons who it is intended may accompany the named officer in executing the warrant;
  - (ii) in the case of a warrant application under section 62, 62A or 63 of the 1998 Act, if it is intended that Commission officials will accompany the named officer in executing the warrant, the written authorisations of the Commission containing the names of such Commission officials; and
  - (iii) in the case of a warrant application under the 2002 Act, the written authorisation of any person authorised pursuant to section 195(1) of the 2002 Act.
- (5) There must also be filed with the notice of application—
- (a) drafts of:
    - (i) the warrant, which must comply with the requirements of rule 49C;
    - (ii) the explanatory note; and
  - (b) a written undertaking, signed by the person who it is intended will be the named officer, to execute the warrant in accordance with rule 49F.
- (6) In making the warrant application, it shall be the duty of the CMA to set out fully and fairly all matters that are relevant to the warrant application.

### **Requirements for warrant**

**49C.** The warrant must—

- (a) in the case of a warrant under the 1998 Act, contain the information required by section 29(1), 64(1) or 65I(1) of the 1998 Act;
- (b) state the address or other identification of the premises to be subject to the warrant;
- (c) state the names of:
  - (i) the named officer; and
  - (ii) any other officers, Commission officials or other persons who may accompany the named officer in executing the warrant;
- (d) set out the action that the warrant authorises the persons executing it to take under the relevant section of the 1998 Act or under section 194 of the 2002 Act;
- (e) include a statement that the warrant continues in force until the end of the period of one month beginning with the day on which it issued; and
- (f) state that the named officer has given the undertaking required by paragraph (8) of this rule.

### **Determination of the warrant application**

**49D.** Having received and considered a warrant application, the Tribunal shall—

- (a) determine the warrant application (unless circumstances make it unnecessary to do so); or
- (b) prior to determining the warrant application, give any directions that it considers to be appropriate or necessary for that purpose, including directing that further evidence be filed or that an oral hearing be listed.

### **Issue of warrant**

**49E.—(1)** The Registrar shall provide to the CMA a copy of the document recording the Tribunal's decision on the warrant application.

(2) In the event that the Tribunal grants the warrant application, the Registrar shall also provide to the CMA—

- (a) the sealed warrant, which shall state the date on which it was issued;
- (b) the explanatory note; and

- (c) certified copies of the sealed warrant and explanatory note for service on the occupier or person in charge of the premises subject to the warrant.

### **Execution of warrant**

**49F.**—(1) A named officer attending premises to execute a warrant must, if the premises are occupied—

- (a) produce the sealed warrant and explanatory note on arrival at the premises to the occupier or any other person appearing to him to be entitled to grant access to the premises explaining the authority under which entry is sought; and
- (b) as soon as possible thereafter personally serve a copy of the sealed warrant and explanatory note on the occupier or person appearing to him to be in charge of the premises.

(2) The named officer must also comply with any order which the Tribunal may make for service of any other documents relating to the application for the warrant.

(3) In the case of a warrant under the 2002 Act—

- (a) the named officer is not required to serve copies of the warrant and explanatory note personally if he reasonably believes this would frustrate the object of the search or endanger officers or other people; and
- (b) if the occupier is not present, the named officer shall leave copies of the warrant and explanatory note in a prominent place on the premises or appropriate part of the premises, recording the name of the named officer in charge of the search and the date and time of the search, unless the named officer reasonably believes that recording or disclosing his name might put him in danger.

(4) Unless the Tribunal otherwise orders—

- (a) the initial production of a warrant and entry to premises under the authority of the warrant must take place at a reasonable hour unless this might frustrate the purpose of the search; but
- (b) once persons named in the warrant have entered premises under the authority of a warrant, they may, at any time while the warrant remains in force:
  - (i) remain on the premises; or
  - (ii) re-enter the premises,for the purpose of completing the execution of the warrant.

(5) If the persons executing a warrant propose to remove any items from the premises pursuant to the warrant they must, unless it is impracticable to do so—

- (a) make a list of all the items to be removed;
- (b) supply a copy of the list to the occupier or person appearing to be in charge of the premises; and
- (c) give that person a reasonable opportunity to check the list before removing any of the items.

### **Application to vary or discharge a warrant**

**49G.**—(1) The occupier or person in charge of premises in relation to which a warrant has been issued may apply to the Tribunal to vary or discharge the warrant.

(2) An application under paragraph (1) of this rule must be made immediately upon the warrant being served or brought to the attention of the person applying to vary or discharge it.

(3) An application under this rule shall be made—

- (a) by sending a written notice of application to the Registrar by hand, by facsimile or by e-mail. In the event that the notice of application is sent by e-mail, the applicant must request a 'read receipt' and the application shall not be deemed to have been sent until such receipt is received; or

- (b) orally, either by attending the Tribunal in person or by telephone. The Registrar must be notified as soon as reasonably practicable if an applicant or his representatives propose to attend the Tribunal in person.

(4) In the event that a person makes an application under this rule, he must immediately inform the named officer of that application.

(5) An application under this rule shall state the basis on which the applicant claims that the warrant should be varied or discharged and shall be supported by such evidence as the applicant relies on in support of the application. Where time does not permit a person to file the supporting evidence at the same time as an application under this rule, the applicant shall instead indicate in that application the nature of the evidence that he intends to rely on and file that evidence as soon as reasonably practicable thereafter.

#### **Execution of the warrant where an application to vary or discharge has been made**

**49H.**—(1) Where the named officer has been informed that an application has been made under rule 49G(1), he must delay starting or continuing to execute the warrant for a reasonable period (not exceeding two hours, unless the Tribunal directs otherwise), provided that the person who has made that application complies with the conditions set out in paragraph (2) below.

(2) The conditions are that the applicant—

- (a) permits the named officer and those accompanying him to enter and remain on the premises subject to the warrant;
- (b) keeps the named officer informed of the steps being taken to seek the variation or discharge of the warrant; and
- (c) complies with any other conditions which the named officer considers reasonably necessary to preserve the purpose for which the warrant was issued, including conditions that require the applicant to take all necessary steps to ensure that: no one on the premises disturbs, moves or otherwise interferes with any document or information that is the subject of the warrant; and that no one other than the applicant's legal adviser is informed about the warrant, its execution or the investigation.

#### **Determination of an application to vary or discharge a warrant**

**49I.** The power of the Tribunal to give directions under rule 19(1) includes the power, if the Tribunal considers it appropriate, to give a direction suspending the operation of the warrant until the application to vary or discharge the warrant is determined. However, such a direction shall not affect the duty of the applicant to comply with the conditions set out in, or imposed pursuant to, rule 49H(2), unless the Tribunal orders otherwise.

#### **Hearing of applications**

**49J.**—(1) The hearing of any application under this Part will be in private and no public notice of such hearing shall be given unless the Tribunal is satisfied that none of the information which it will be considering is, in its opinion, information of the kind referred to in paragraph 1(2) of Schedule 4 to the 2002 Act.

(2) Applications under this Part may be heard by any means, including in writing (which includes e-mail), by telephone or by video-conference.

#### **Supplementary**

**49K.** No notice of application for a warrant (nor any supporting materials) received by the Registrar shall be disclosed nor made available for inspection to or by any person (other than the CMA), whether before or after the application is determined by the Tribunal, unless the Tribunal:

- (a) is satisfied that the notice of application (and supporting materials) do not contain any information of the kind referred to in paragraph 1(2) of Schedule 4 to the 2002 Act; or
- (b) orders otherwise.”

4. In rule 62 (Power of President, Chairman and Registrar to exercise powers of Tribunal), after paragraph (2) insert—

“(2A) Any application under Part IVA of these rules may be determined by the President or a Chairman alone and, where the President or Chairman considers appropriate, without an oral hearing.”.

**EXPLANATORY NOTE**

*(This note is not part of the Rules)*

Rule 2 and the Schedule introduce amendments into the Competition Appeal Tribunal Rules 2003 which allow the Tribunal to issue warrants to named officials of the Competition and Markets Authority and of regulators who are entitled, pursuant to section 54 of the Competition Act 1998, to exercise the functions of the Competition and Markets Authority under that Act.

## **Annex 4: Consultation Principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

### **Comments or complaints on the conduct of this consultation**

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:

John Conway,  
BIS Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone John on 020 7215 6402  
or e-mail to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

However if you wish to comment on the specific policy proposals you should contact the policy lead (see p.7).

## Annex 5: List of individuals/organisations consulted

39 Essex Street Chambers	BSkyB
Addleshaw Goddard LLP	Burges Salmon LLP
Administrative Justice & Tribunals Council	Cabinet Office
Advertising Standards Association	Centrica/British Gas
Allen & Overy LLP	Charles River Associates International
Arnold & Porter	Charles Russell
Amazon	Citizens Advice
Asda	Citizens Advice Scotland
Ashurst	City of London Corporation
Association of Convenience Stores	City of London Law Society
Association of General Counsel & Company Secretaries	Civil Aviation Authority
Attorney General's Office	Cleary Gottlieb Steen & Hamilton LLP
Australian Competition & Consumer Commission	Clifford Chance LLP
Baker & McKenzie LLP	CMS Cameron McKenna LLP
Bar Council	Compass Lexecon
Boots	Competition Appeal Tribunal
Barclays Bank Plc	Competition Commission
Berwin Leighton Paisner LLP	Competition Law Association
Bingham McCutcheon	Confederation of British Industry
Bird & Bird LLP	Consumer and Competition Commission New Zealand
Black Stone Chambers	Consumer Council for Northern Ireland
Brick Court Chambers	Consumer Futures
Bristows	Credit Suisse
British Airways	Crown Office and Procurator Fiscal Service
British Bankers Association	Deloitte
British Chambers of Commerce	Denton Wilde Sapte LLP
British Council of Shopping Centres	Department for Culture, Media & Sport
British Institute of International and Comparative Law	Department for Environment, Food and Rural Affairs
British Petroleum	Department for Energy & Climate Change
British Retail Consortium	

Department of Enterprise, Trade and Investment NI	Herbert Smith Freehills LLP
Department of Regional Development NI	Hill Dickinson LLP
Department for Transport	HM Treasury
Department of Health	Hogan Lovells
DLA Piper	HSBC
Dundas & Wilson LLP	Information Commissioner's Office
Edwards Angell Palmer & Dodge	In-house Competition Lawyers Association
Ernst & Young	Institute of Directors
ESRC Centre for Competition Policy	International Airline Group
European Property Finance Limited	International Bar Association
European Commission	International Chambers of Commerce
European Policy Forum	Irish Competition Authority
Eversheds	Joint Working Party of the Bars and the Law Societies of the United Kingdom
Everything Everywhere	Kings College London
Faculty of Advocates	Kirkland & Ellis LLP
Federal Ministry of Food, Agriculture and Consumer Protection (DE)	KPMG
Federal Trade Commission (USA)	Land and Property Services
Federation of Small Businesses	Land Registry
Field Fisher Waterhouse LLP	LEGG Ltd
Financial Conduct Authority	LEK Consulting LLP
Financial Ombudsman Service	Linklaters LLP
FIPRA	Lloyds Banking Group
Forum for Private Business	Local Better Regulation Office
Freshfields Bruckhaus Deringer LLP	Local Government Association
Frontier Economics Limited	London School of Economics
French Ministry for Competition, Consumer Affairs and Anti-Corruption (DGCCRF)	Lord Chief Justice of England and Wales
FTI Consulting	The Lord Chief Justice of Northern Ireland
GlaxoSmithKline	Lord President and Lord Justice General
Goldman Sachs	Macfarlanes LLP
Google	Maclay Murray and Spens LLP
Hausfeld LLP	Matrix Chambers
	Mayer Brown International LLP
	McGrigors LLP
	McGuire Woods LLP



Monckton Chambers  
Monitor  
Nabarro Nathanson LLP  
National Audit Office  
National Economic Research Associates  
National Federation of Property Professionals  
Northern Ireland Assembly  
Northern Ireland Executive  
Northern Ireland Utility Regulator  
Norton Rose Fulbright LLP  
O2/Telefonica  
Ofcom  
Office of Fair Trading  
Office of Fair Trading Scottish Representative  
Office of Rail Regulation  
Ofgem  
Ofwat  
Olswang  
One Essex Court  
Orrick, Herrington & Sutcliffe LLP  
Osborne Clarke  
Oxera  
Oxford University (St John's College)  
Oxford University (All Souls)  
Oxford University (Oriel College)  
Oxford Law  
PhonePayPlus  
Pinsent Masons  
Postal Services Commission  
Postwatch  
PPL  
Microsoft  
Ministry of Justice  
Reed Smith LLP  
Registers of Scotland  
Regulatory Policy Institute  
ResPublica  
Rothschild  
Royal Institute of Chartered Surveyors  
Rio Tinto  
Sainsbury's  
Salans LLP  
Scottish Assembly  
Scottish Competition Law Forum  
Serious Fraud Office  
Shearman & Sterling LLP  
Shell  
Shepherd and Wedderburn LLP  
Simmons & Simmons  
SJ Berwin LLP  
Slaughter and May  
Speechly Bircham LLP  
Squire Saunders Dempsey LLP  
Symantec  
TalkTalk  
Taylor Wessing LLP  
Tesco  
Three  
The City of London Law Society  
The Law Society of England and Wales  
The Law Society of Northern Ireland  
The Law Society of Scotland  
The Work Foundation  
Unilever  
Trading Standards Institute

Provident Financial

RBB Economics

University of Exeter

Virgin Media

Visa Europe

Vodafone

Water Industry Commission for Scotland

Watson, Farley & Williams

Welsh Assembly

Which?

White & Case LLP

Wilmer Cutler Pickering Hale and Dorr LLP

Wragge & Co.

Travers Smith LLP

University of East Anglia

## Annex 6: Response Form

Name:  
 Organisation (if applicable):  
 Address:

Please return completed forms to:  
**Paul Griffiths**  
**Consumer and Competition Policy Directorate**  
**Department for Business, Innovation and Skills**  
**1 Victoria Street**  
**SW1H 0ET**

Telephone: 020 7215 2078  
 Fax: 020 7215 0235  
 email: competition.consultation@bis.gsi.gov.uk

The closing date for this consultation is **11 November 2013**.

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

**Please tick a box from the list of options below that best describes you as a respondent.**

<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

**When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.**

**Chapter 2. Cartels – Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014**

*Question 1: What is your view on the proposed manner of publication of relevant information?*

Comments:

*Question 2: Can you estimate the number of advertisements which might be placed in one of the Gazettes?*

Comments:

*Question 3: Do you have any other comments on the draft Order?*

Comments:

### **Chapter 3. Concurrency: Competition Act 1998 (Concurrency) Regulations 2014**

*Question 4: Do you have any comments on the draft Regulations?*

Comments:

### **Chapter 4. Antitrust: The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014**

*Question 5: Do you have any comments on the draft Rules?*

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No

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1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 5000

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