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RESPONSE OF ASHURST LLP TO BIS CONSULTATION ON

DRAFT SECONDARY LEGISLATION – PART TWO

1. INTRODUCTION

1.1 Ashurst LLP welcomes the opportunity to respond to the consultation published by the Department for Business, Innovation and Skills (**"BIS"**) on 17 September 2013 on the second tranche of draft secondary legislation related to the reforms to the UK competition regime due to take effect from 1 April 2014 (the **"BIS Consultation"**). We confirm that nothing in this response is confidential.

1.2 This response is made on our own behalf, drawing on our professional experience. We are not responding on behalf of any particular clients.

2. GENERAL OBSERVATIONS

2.1 We note that the BIS Consultation is being undertaken in parallel with a consultation on the second tranche of draft CMA guidance documents (the **"CMA Consultation"**). We have responded to the CMA Consultation separately as requested, but we note that some of the points arise in relation to both consultations. We have therefore repeated certain points in our responses where appropriate for ease of reference.

3. ENTERPRISE ACT 2002 (PUBLISHING OF RELEVANT INFORMATION UNDER SECTION 188A) ORDER 2014

Q1. What is your view on the proposed manner of publication of relevant information?

3.1 Whilst the London Gazette, Edinburgh Gazette and Belfast Gazette have a limited readership base, we consider that the proposed manner of publication of relevant information is likely to be sufficient to achieve the stated objective set out in the consultation document i.e. "*to allow material information about the agreements to be disclosed … in an informative and accessible but not overly burdensome way*."[1]

3.2 We do have some concerns about how practicable it will be to expect businesses/individuals to publish "relevant information" about an arrangement in one of the Gazette publications if they wish to benefit from the exception under section 188(1)(c) EA02 given that neither the Enterprise and Regulatory Reform Act 2013 (**"ERRA13"**) nor the CMA's draft guidance provide any guidance on how much information will be required to satisfy section 188A(2)(b) of the Enterprise Act 2002 (**"EA02"**).[2]

3.3 However, we note in this regard that the publication exception is just one of three possible exceptions on which individuals can rely in relation to the revised criminal cartel offence, and that there is no obligation to publish "relevant information" in this way. We also note that the intended audience of advertisements placed in a Gazette in this context is not

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[1] Paragraph 2.8 of the BIS Consultation.

[2] Section 188A(2)(b) provides that "relevant information" must include "*a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies*."

limited to potential customers but also includes the CMA who, we presume, will monitor the Gazette publications as an additional potential source of information relating to anti-competitive agreements.

Q2. Can you estimate the number of advertisements which might be placed in one of the Gazettes?

3.4 We have no basis on which to make an assessment of the number of advertisements which might be placed in one of the Gazettes. Given the lack of clarity currently provided regarding the scope of the offence and the likelihood of prosecution, we would anticipate that the number of advertisements placed in one of the Gazettes could be quite considerable. However, we would also anticipate that given the practical difficulties associated with relying on the publication exception in its current form (as discussed above), businesses may take the view that it is simpler to rely on one of the other exceptions or defences instead. We are not currently in a position to comment on which of these alternatives is most likely.

4. COMPETITION ACT 1998 (CONCURRENCY) REGULATIONS 2014

Q4. Do you have any comments on the draft Regulations?

4.1 Our views on the Draft Competition Act 1998 (Concurrency) Regulations 2014 (**"Draft Concurrency Regulations"**) are set out below. Where appropriate we have also referred to the CMA Consultation on the Draft Concurrency Guidance (**"Draft Concurrency Guidance"**). Please note that references to **"Regulators"** in this section are to the various sectoral regulators with concurrent competition powers.

Deciding whether to use competition or sectoral powers

4.2 It appears that the Draft Concurrency Regulations make no provision for the potential conflict between Regulators and the CMA in circumstances where a Regulator has decided to use its sectoral powers instead of its competition powers (and another Regulator or the CMA wishes to use its competition powers in relation to the same agreement/practice). It would be helpful if the Draft Concurrency Regulations could be amended to address the potential for such parallel investigations.

Regulation 4

4.3 We note that in relation to case transfers pursuant to Regulations 7 and 8, the CMA/Regulators (as appropriate) must, *inter alia*: (i) notify undertakings which are the subject of the exercise of Part 1 powers and any other persons likely to be materially affected; and (ii) take into account any representations from such persons. The Draft Concurrency Regulation should be amended so that the CMA and Regulators are obliged to take into account the views of affected parties when taking an initial case allocation decision pursuant to Regulation 4.

Regulation 5

4.4 Regulation 5(1) provides that if a case allocation decision under Regulation 4(2) is not made within a reasonable time, the CMA can then start the process pursuant to which it will allocate the case. This gives rise to two issues:

(a) first, it is not clear what is a "reasonable time". In the Draft Concurrency Guidance, the CMA expects that agreement should be reached within two months. It strikes us that two months is a considerable period of time and the vast majority of cases should be allocated much more quickly (especially, for example, in cases giving rise to issues that require urgent investigation). We suggest that the Draft Concurrency Regulations are amended in order to ensure that case allocation

decisions are made more quickly, and in any event within no more than 30 working days; and

(b) secondly, it is unclear whether, after receiving notification from the CMA pursuant to Regulation 5(2), the relevant Regulators are able to agree on case allocation prior to the CMA determining to which Regulator the case should be allocated. It may be appropriate to suspend the power of Regulators to agree case allocation between themselves once a notice pursuant to Regulation 5(2) has been issued by the CMA.

Regulation 9

4.5 Regulation 9 of the Draft Concurrency Regulations provides for the sharing of information between the CMA and Regulators "*in connection with concurrent cases*" (i.e. cases using competition powers). It should be made clear that information shared pursuant to Regulation 9 should only be used for competition cases and should not be used in relation to the exercise of sectoral powers, especially where Regulators would not otherwise have the power to collect the relevant information. This may require the Draft Concurrency Regulations to be further amended so that Regulators are obliged to set up information barriers (i.e. "Chinese walls") to ensure that such information is not used inappropriately.

5. THE COMPETITION APPEAL TRIBUNAL (WARRANTS) (AMENDMENT) RULES 2014

Q5. Do you have any comments on the draft Rules?

5.1 As a preliminary point, we note that draft Rule 49C(f) provides that a warrant must "*state that the named officer has given the undertaking required by paragraph 8 of this rule.*" There is no paragraph 8 in draft Rule 49C, and it is unclear what undertaking this is intended to refer to. We would request that this drafting is reviewed and clarified in the final version of the CAT (Warrants) (Amendment) Rules 2014 (**"CAT Rules"**).

5.2 With regard to the procedure set out in the draft CAT Rules, we note that the draft CAT Rules clearly reflect the Practice Directions for applications to the High Court for a warrant under CA98 (the **"CA98 Practice Direction"** and also under the **EA02**. We support this approach, whilst noting the need to adapt the rules to the particular procedures of the CAT.

Rule 49F(4)(a): Timeframe within which initial production of warrant and entry to premises must take place

5.3 Draft Rule 49F(4)(a) provides that "[u]*nless* [the CAT] *otherwise orders – 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*". Given that any challenge to a warrant must be made immediately upon the warrant being served (draft Rule 49G(2)), we would suggest that the appropriate timeframe within which initial production of the warrant and entry to the premises must take place should be expressly limited to normal CAT working hours (stated on the CAT website to be 9.30am – 5.00pm, Monday to Friday). This would ensure that the right to challenge can be exercised effectively and the Registrar's staff are available to receive the application.

5.4 We note in this regard that the CA98 Practice Direction states that the initial production of a warrant issued by the High Court in relation to a CA98 investigation and entry to the premises under that warrant must take place between 9.30am and 5.30pm, Monday to Friday, unless the court orders otherwise (paragraph 8.3(1) of the CA98 Practice Direction). We would suggest that the same approach would be appropriate for inclusion in the CAT rules. The possibility for the CAT to order otherwise ensures adequate flexibility for situations where this timeframe for first exercise of the warrant would not be appropriate.

Rule 49G(3): Application to vary or discharge a warrant

5.5 We note that draft Rule 49G(3)(a) provides that in the event that an application to vary or discharge a warrant is made by email, the applicant must request a "read receipt" and the application shall not be deemed to have been sent until such receipt is received. We are concerned that the read receipt tool depends on the technical compatibility of the e-mail set-up used by the applicant and the CAT, and may not work in all instances. It may not be possible to establish in advance whether the read receipt tool will function correctly in a given case, leading to undesirable uncertainty. This could operate to make e-mail applications unworkable.

5.6 It is highly desirable to have the option of making an application to vary or discharge a warrant by e-mail. We would therefore suggest that parties applying to vary or discharge a warrant might also be able to seek verbal confirmation of receipt from the CAT Registrar (by telephone), which could be, for example, recorded in a file note by the applicant/its advisers, rather than relying on the "read receipt" tool.

Template warrants and explanatory notes annexed to warrants

5.7 We note that draft Rule 49F(1) provides that an explanatory note must be served alongside the warrant, which includes the information specified in draft Rule 49A(2). We assume that this is intended to be a similar document to the Notice of powers to search the premises and rights of occupiers which is issued alongside warrants issued by the High Court. We consider that it would be helpful if, once the draft CAT Rules have been finalised, example templates of warrants to be issued by the CAT under these rules and the accompanying explanatory notes were to be published, as they have been for warrants issued by the High Court.

Ashurst LLP

15 November 2013