

BIS CONSULTATION ON COMPETITION REGIME: DRAFT SECONDARY LEGISLATION – PART TWO

Response of Edwards Wildman Palmer LLP

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

Introduction

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 15 other locations across the United States, Europe and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting Government and the CMA Transition Team. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the BIS website.
- To the extent that terms have been defined in the Draft Secondary Legislation, this response adopts the same terms.

Questions

1. **What is your view on the proposed manner of publication of relevant information?**
 - 1.1. We do not consider the proposed manner of publication to be appropriate. In particular, the cost of publication in a Gazette is likely to be create concerns, and the delay between notification and publication may (i) discourage publication of agreements whose implementation is time critical, and (ii) at the same time, have a chilling effect on business by discouraging parties from engaging in legitimate business practices which they do not wish to notify (e.g. for confidentiality reasons) or time-critical agreements which they feel they cannot enter into prior to publication
 - 1.2. It is unclear why the Secretary of State has adopted such a prescriptive and limited method of satisfying the requirement of publication specified in s.188A(1)(c) EA02. We note that there are any number of other public forums for publication of relevant information, including companies' own websites which can easily be reviewed by parties interested in relevant agreements. Given that the use of such methods are deemed sufficient for various formal purposes, and will for example be sufficient to ensure that "facts are made public" under section 24(2)(b) EA02, it is not clear to us why such alternatives have not been considered in the Draft Secondary Legislation.

2. **Can you estimate the number of advertisements which might be placed in one of the *Gazettes*?**
 - 2.1. It is impossible to estimate this, as it remains unclear how businesses and their advisers will respond to the new legislation. On the one hand, the lack of clarity in the Draft Cartel Offence Prosecution Guidance may encourage the advertisement of large numbers of benign agreements which are not clearly outside the scope of s.188 EA02. On the other hand, various factors may discourage advertisements, in particular (i) the cost and administrative burden involved of notifying each individual agreement, particularly in industries where (legitimate) cooperation between competitors is commonplace and frequent, (ii) concerns regarding the commercial confidentiality of the information that must be published and (iii) risk that customers could misinterpret or misunderstand information so published.
3. **Do you have any other comments on the draft Order?**
 - 3.1. We have no further comments on the draft Order.

Edwards Wildman Palmer LLP
11 November 2013