Department for Business Innovation & Skills

COMPETITION REGIME

Response to Consultation on Draft Secondary Legislation – Part Two

MARCH 2014

Contents

Introduction

This is a supplementary response to the Government Response of 1st October 2013 to the Consultation on the Statement of Strategic Priorities for the CMA published on 15th July 2013. It covers the Government's consultation on the second tranche of draft secondary legislation implementing the reformed statutory competition framework introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA).

The draft statutory instruments on which the Government has consulted can be found at Annexes 1 to 3 of the 17th September consultation document by following:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245994/Competition-regime-draft-secondary-legislation-part-two.pdf

The Government received 11 formal responses to the consultation.

Type of Organisation	**Responses**
Large Business	1
Legal Representative Group	1
Legal Advisors	6
UK Government Body	3
Total	11

A full list of respondents to the consultation is published in Annex A. The consultation responses are published in full at:

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

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

Section 47 of the ERRA amends the criminal cartel provisions in sections 188 to 202 in the Enterprise Act 2002 (EA). It removes the section 188 requirement to demonstrate dishonesty to establish one of the four categories of prohibited cartel activity; but inserts a new section 188A that provides that the cartel offence will not be committed if 'relevant information' about the business arrangements concerned is either disclosed to customers or published – in a manner specified in secondary legislation – before those arrangements are implemented.

'Relevant information' is defined in section 188A as the names of the undertakings to which the arrangements relate; and a description of the nature of the arrangements and the goods or services to which they relate. We have not taken up the Section 188A option for the Secretary of State to specify other information at this stage. The draft Order provides for publication in either the London, Edinburgh or Belfast Gazettes.

The Consultation explained that there are a limited number of agreements that – in the absence of the dishonesty test – might technically fall within the terms of the criminal cartel provisions; but would not infringe the civil antitrust prohibitions on anti-competitive agreements. The disclosure provision is therefore designed to allow material information about these agreements to be disclosed to customers and the competition authorities in an accessible way; and to avoid them from inadvertently being caught by the cartel offence.

It stated that publication in the Gazettes – the official newspapers of record for such public notices – is favoured over publication on the businesses' own websites for reasons of accessibility; and to give the CMA certainty over where such disclosure notices are to be found. Publication in the Gazettes was proposed in both the Government's response to its consultation on competition reform and during the passage of the Enterprise and Regulatory Reform Bill.

The Consultation acknowledged that there would be an administrative cost associated with publication in the Gazettes (estimated at an average of £190 per advertisement); and that it would be difficult to assess the precise number of advertisements.

The Consultation therefore sought views on the proposed manner of publication and estimates of its likely use:

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?

Consultation Responses

There were seven substantive responses on this element of the consultation.

All seven respondents expressed a view on the proposed manner of publication. Two respondents gave unqualified support – suggesting that publication in the Gazettes was simple and clear, and consistent with the policy objective of enabling efficient monitoring by the CMA without over-burdening business. The support of a further two respondents was more nuanced – stating that the proposed approach was acceptable, but expressing concerns about its practicality in the absence of clear guidance from the CMA on the extent of the information required; questioning whether the costs might encourage businesses to rely on the alternative disclosure options instead; and suggesting that the costs should more reasonably be borne by Government.

The remaining three respondents were not convinced of the appropriateness of the publication proposal. Concerns were expressed about confidentiality; the costs of publication; and that potential delays between notification and publication could discourage its use where a deal is time-critical. One respondent stated that it would burden legitimate business without reducing criminal cartel activity. The CMA's or companies' own websites were suggested as more appropriate media for publication.

Three respondents commented on the potential volume of advertisements in the Gazettes. Although none were able to suggest even a range of figures, all agreed that targeted use of the publication exemption would depend on clear guidance from the CMA.

Government's Decisions

While sensitive to arguments about potential burdens on business, we are not persuaded that these are sufficient to outweigh the greater benefits associated with publication of notices in the Gazettes.

We are also not persuaded that the option of formal notification direct to the CMA suggested by a number of respondents delivers as comprehensive an approach to notification solution as publication in the Gazettes. We also believe that it would be inconsistent with the established principles of self-assessment in the wider competition regime.

Specifically, an option of direct notification to the CMA would suggest that this was a preferred or more reliable method for companies to invoke the exemption - in the process undermining the alternative and equally valid methods set out in the legislation. This would tend to discourage the freedom that the legislation gives to companies to choose the method that best and most efficiently meets their needs and circumstances.

Direct notification would also fail to deliver the range of qualitative benefits associated with publication in the Gazettes - which provides not only an accredited route to the CMA, but also (via these official newspapers of record) delivers the wider policy objectives of providing public notice to customers that a system of 'closed' communication with the CMA would not.

The Government has therefore decided that the publication exemption should continue to be met through the placing of a notice in one of the Gazettes.

Concurrency – Competition Act 1998 (Concurrency) Regulations 2014

The Government wants the sectoral regulators and the CMA to take a more proactive approach to promoting competition and tackling anti-competitive practices in the regulated sectors.

To that end, these Regulations provide for greater co-operation and sharing of information between competition authorities; and give the CMA the leading role in determining arrangements where authorities have concurrent powers. The latter replaces the Secretary of State's same power under the existing Concurrency Regulations.

While the Government expects the competition authorities to generally agree on the leadership of individual cases, Regulation 5 gives the CMA the power to exercise the Competition Act powers itself; or to allocate a case to another willing regulator .

Under Regulation 8, the CMA will have the power to take over a case that had initially been allocated to another regulator - following consultation with the relevant regulator; and up until the point when a Statement of Objections has been issued (after which the agreement of the regulator must be obtained) .

The CMA is empowered to take over a case under Regulation 8 or allocate a case to itself under Regulation 5 only where it considers this would help to promote competition in the interests of consumers.

Regulation 9 requires the CMA and the regulators to put information sharing arrangements in place to cover, amongst other things, informing other competition authorities with a potential interest of any concurrent case where there are reasonable grounds for suspecting an infringement; and for sharing information about ongoing concurrent cases.

Regulation 10 clarifies that secondments to a regulator can be for any of the purposes under Part 1 of the Competition Act 1998.

The Consultation asked the following question:

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

Consultation Responses

Seven respondents commented on the draft Rules. One respondent commented that the Regulations were clear and appropriate; a second that they were broadly appropriate. The remaining comments focused on specific substantive and technical aspects of the Rules.

Two respondents suggested that, where a case is being allocated under Regulations 4 or 5, there should be an explicit requirement (as in Regulations 7 and 8) to take the views of materially affected parties into account; and to have regard to representations from them on which concurrent competition authority is best placed to lead on the case.

A further respondent stated that, when a case is allocated by consent under Regulation 4 or by CMA direction under Regulation 5, the undertaking concerned should be informed when the decision is made (as is already the requirement in Regulation 7), and not when the transfer subsequently takes place.

Some respondents suggested that there should be additional fixed time limits built into the co-ordination processes. One argued that the obligation to agree on which authority should lead on a case within a 'reasonable time' in Regulation 5(1) should be replaced by a maximum two month period. Two others suggested that the period for consultations between the CMA and the regulators under Regulation 8(2) should be subject to a specific time limit; with one stating that this should be limited to 10 days.

One respondent suggested that the inclusion in Regulation 2 of separate definitions for 'Part 1 functions' and 'prescribed functions' would lead to unnecessary complexity.

The Government's Decisions

The Government has decided that it is not appropriate to make amendments to Regulations 4 and 5 to mirror the provisions in Regulations 7 and 8 on notifying undertakings and other materially interested parties and taking their views into account.

This is because these Regulations deal with separate and distinct elements of the administrative and investigatory processes. Regulations 7 and 8 are concerned with cases where an investigation has already been commenced but where jurisdiction is subsequently either being voluntarily transferred or formally taken over by the CMA.

Regulations 4 and 5 in contrast are concerned with the preceding part of the process, where regulatory bodies are co-operating on the decision of whether an investigation should or should not be commenced and if so, by which of them. It is possible that no investigation will result and in many cases the interested parties will not be aware that an investigation is being contemplated. Allowing interested parties to make representations at this early stage might therefore risk prolonging the case allocation process.

For similar reasons, the Government has also decided not to introduce additional time limits into the co-ordination process. While it is appropriate to impose such timescales on the formal investigation process; it would not be practicable to introduce the same constraints into the preceding jurisdictional negotiations between regulators.

The Government has decided that it is more appropriate to retain both the term "Part 1 functions" and the term "prescribed functions" in the Regulations for consistency with the drafting of the power under which the Regulations are made. Section 54 of the Competition Act 1998 gives the Secretary of State power to make regulations prescribing which of the Part 1 functions may not be exercised by competent persons in certain circumstances. The Regulations need to be able to refer both to this subset of the Part 1 functions and the Part 1 functions as a whole. For example, the CMA may take over a case from a regulator where “it exercising the Part 1 functions rather than the regulator would further the promotion of competition etc”. In this case it is necessary to refer to the whole range of the Part 1 functions not just the subset. The existing Concurrency Regulations already use both terms so this is not adding any additional complexity.

The Government has, however, amended Regulation 10 to clarify that individuals who have been seconded to one of the concurrent regulators have full legal capacity to exercise Competition Act powers on behalf of that regulator.

Antitrust – The Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014

The Government will publish a separate response to the consultation on this legislation before the amendments to the Rules are made.

Annex A

LIST OF RESPONDENTS

- Allen & Overy LLP
- Ashurst LLP
- Baker & MacKenzie LLP
- Berwin Leighton Paisner LLP
- Clifford Chance LLP
- EDF Energy
- Edwards Wildman Palmer LLP
- The Law Society of Northern Ireland
- Monitor
- Ofgem
- OFWAT

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BIS/14/659