



Department for
Business & Trade

Consultation on Competition and Consumer Protection Related Information Sharing

18 March 2024

Contents

1. Background	3
1.1 Why we are consulting?	3
1.2 Legal background	3
2. Proposals	5
2.1 Addition of enactments covering additional Bank of England functions to the list of legislation in Schedule 15	5
2.2 Addition of the Procurement Act 2023 to the list of legislation in Schedule 15	6
3. Further technical changes	9
4. How to respond	10
Confidentiality and data protection	10

1. Background

1.1 Why we are consulting?

The sharing of information among regulators and public bodies plays an important role in effective enforcement and regulation. There can therefore be significant benefits to ensuring that the Competition and Markets Authority (CMA) and other relevant public authorities are able to share information gathered in connection with the exercise of their functions. Nevertheless, such information sharing should be limited to where it is appropriate and effective safeguards need to apply to protect personal data and commercially sensitive information.

The legal framework for information sharing in relation to competition and consumer law enforcement matters is contained within Part 9 of the Enterprise Act 2002 (the Act). This includes important statutory obligations that apply to the disclosure of information relating to individuals and businesses that comes to the CMA or other relevant public authorities.

Under the Act, the CMA and other relevant competition and consumer regulatory and protection authorities are prohibited from disclosing specified information¹ which relates to the affairs of an individual or any business of an undertaking, except in certain circumstances. These are set out in so-called information sharing gateways.

The Government is now consulting on two proposals which would amend Part 9 of the Act to add a few enactments to Schedules 15 to the Act to ensure that the exchange of competition and consumer-protection related information between relevant UK public authorities is enabled to assist them in discharging their statutory functions.

1.2 Legal background

¹ As defined in sections 237 and 238 of the Act.

Information gathered by a public authority is deemed specified information if it comes to the public authority in connection with, among other things, the exercise of any of the functions that it has under or by virtue of Part 3 of the Act (mergers), Part 4 of the Act (market investigations), or the Competition Act 1998.² Additionally, Schedule 14 to the Act specifies a number of additional enactments under which any information obtained by a public authority in connection with the exercise of any statutory function will be specified information and is thus governed by Part 9 of the Act.

Section 241(3) of the Act allows public authorities, such as the CMA, which hold information to which the disclosure provisions in Part 9 of the Act apply, to disclose that information to another person for the purpose of facilitating the exercise by the recipient of functions that they have under the Act, any of the Acts specified in Schedule 15 to the Act or any secondary legislation specified by the Secretary of State by an order made for the purpose of subsection 241(3) of the Act.

Part 9 of the Act contains provisions which enable the Secretary of State by order to amend the list of enactments contained in Schedules 14 and 15 of the Act.

Where an enactment is added to Schedule 14 of the Act, any information obtained by a public authority in connection with the exercise of any statutory function under that enactment will be specified information for the purposes of Part 9 of the Act.

Where an enactment is added to Schedule 15 of the Act, this will permit the sharing of information with relevant UK public authorities to assist them in discharging their statutory functions under the enactment.

² Section 238 of the Act.

2. Proposals

2.1 Addition of enactments covering additional Bank of England functions to the list of legislation in Schedule 15

It is in the public interest for public authorities such as the CMA and the Bank of England to co-operate, as appropriate, in order to help facilitate their respective functions. As of December 2023, the CMA and the Bank of England have entered into a Memorandum of Understanding (MoU) which envisages closer cooperation on issues where they have shared interests. Among other things, the MoU sets out how the CMA and the Bank will share information (subject to the relevant legal constraints) to assist each other in carrying out their respective functions.

More generally, the CMA might hold specified information that could facilitate the Bank of England's various functions. For example, in producing the August 2023 Monetary Policy Report, the Bank of England reviewed CMA data, including aggregated data regarding actual and future expectations of groceries retailers' profits. Such information sharing can clearly be in the public interest.

Gateways under Part 9 of the Act allow the CMA and other public authorities which are bound by Part 9 to share specified information with the Bank of England, including for the purpose of facilitating the exercise of the Bank's statutory functions under relevant legislation specified in Schedule 15 to the Act. Notably, this includes the Financial Services and Markets Act 2000. However, other key operational statutes for the Bank are not covered by Schedule 15, creating potential barriers on effective information exchange between the CMA and the Bank.

The Government proposes to further facilitate useful information sharing between the CMA and the Bank of England in relation to some additional key functions of the Bank of England which are currently not captured in Schedule 15.

The enactments proposed to be added to Schedule 15 for this purpose are as follows:

- The Bank of England Act 1998: The Bank's monetary policy functions are enshrined in the Bank of England Act 1998. As such, its inclusion in Schedule 15 would enable the CMA to share information with the Bank to support the Bank in discharging its monetary policy functions.
- The Banking Act 2009: This Act provides for a special resolution regime which gives the Bank of England, the Prudential Regulation Authority, the Financial Conduct Authority and HM Treasury the tools to protect financial stability by resolving banks, building societies, investment firms, banking group companies and central counterparties (CCPs) that are failing, while protecting depositors, client assets, taxpayers and the wider economy. As such, its inclusion in Schedule 15 would enable the CMA to share information with the Bank to support the Bank in discharging its resolution functions.
- Schedule 11 (Central Counterparties) to the Financial Services and Markets Act 2000: This Schedule contains free-standing provision expanding the CCP resolution regime. The private sector purchaser stabilisation power broadly entails selling all or part of a CCP to a commercial purchaser, a potential consequence of its exercise being an increase in the concentration within relevant markets. It is likely that the CMA would hold relevant information which would be of significance to the public authorities with relevant statutory functions.

Do you agree or disagree with enabling the CMA and other relevant public authorities to share specified information with the Bank of England to support the Bank's functions under the legislation listed above?

2.2 Addition of the Procurement Act 2023 to the list of legislation in Schedule 15

The Procurement Act 2023's exclusion regime requires contracting authorities to exclude suppliers from relevant procurement procedures as a result of a range of undesirable activities, including some competition-related infringements. The Procurement Act sets out

a mandatory exclusion ground where the CMA³ has made a decision that a particular supplier has infringed Chapter I of the Competition Act 1998 within the last 5 years. In addition, the Procurement Act also sets out a mandatory exclusion ground where a supplier or a connected person has been convicted of the cartel offence under section 188 of the Enterprise Act 2002.

The Procurement Act also creates discretionary exclusion grounds to cover decisions by the CMA that the Chapter II prohibition (abuse of dominance) has been infringed and situations where an alleged competition infringement has not been investigated, or where a case is being investigated but has not yet concluded. The discretionary exclusion ground allows contracting authorities to consider whether a supplier's conduct, in the absence of a formal finding of breach of the law, would constitute an infringement or offence under competition law.

The Procurement Act creates a power for a Minister of the Crown to add excluded or excludable suppliers to a central, public Debarment List for a specified period of time. For the purpose of considering whether a supplier could be added to the Debarment List, a relevant authority may investigate whether the mandatory exclusion grounds or the discretionary exclusion applies to that supplier.

Currently, it can be difficult for contracting authorities to obtain relevant information to help them to determine whether a supplier's conduct, in the absence of a conviction, would constitute an infringement or offence under competition law. For example, it can be difficult for contracting authorities to know whether a CMA investigation is being or has been undertaken in relation to a specific supplier. Without an appropriate information gateway, the CMA is unable to share any information with contracting authorities (or the Procurement

³ Other regulators such as Ofgem and Ofcom have the power to enforce the competition rules in the Competition Act 1998 in their sectors and infringement decisions by those regulators are also the basis for an exclusion. For brevity this section of the consultation refers solely to the CMA, but such references should be taken as including a reference to other regulators with concurrent powers.

Review Unit charged with addressing systemic or institutional breaches of public procurement law) beyond what is in the public domain (i.e. non-confidential versions of competition infringement decisions with limited detail), due to the information-sharing restrictions in Part 9 of the Act.

The Government proposes making a consequential amendment which adds the Procurement Act 2023 to Schedule 15 to the Act in order to create an information sharing gateway which will enable the CMA to share relevant information with contracting authorities and the Procurement Review Unit for the purposes of facilitating their functions under the Procurement Act. This access will improve the information available to ensure that fully informed exclusion and debarment decisions can be made. This will ensure that public bodies are not contracting with suppliers that may pose a risk to the delivery of public contracts, the government's reputation or the achievement of value for money. Access to this information will also ensure a consistency of approach across the public sector (both among contracting authorities and with CMA decisions) and reduce the potential for unwarranted exclusions or legal challenges of decisions made by an individual contracting authority.

Do you agree or disagree with making this consequential amendment to enable the disclosure of information about certain competition infringements or potential infringements to contracting authorities and the Procurement Review Unit for the purposes of determining whether to exclude or debar suppliers from relevant procurement procedures?

3. Further technical changes

To note, the Government will also make an amendment which adds articles 13A to 13E of the Company Directors Disqualification (Northern Ireland) Order 2002 (the NI Order) to the list of legislation in Schedule 14 to the Act. This is not a policy change but merely corrects a drafting oversight and will bring the provisions concerning competition disqualification orders and undertakings in Northern Ireland in line with the provisions related to Great Britain.

The Company Directors Disqualification Act 1986 (CDDA 1986) includes provisions for the disqualification of directors of companies found to have infringed either the Chapter I or II prohibition in the Competition Act 1998, where it is considered that the director's conduct makes them unfit to be concerned in the management of a company. The CDDA 1986 applies to Great Britain, and the equivalent provision for Northern Ireland is made by the NI Order.

The Secretary of State has a duty to keep a register of all competition disqualification orders made and all competition disqualification undertakings accepted under the CDDA 1986 and the NI Order. In addition, where the competition disqualification order was made or the competition disqualification undertaking accepted under the NI Order, the Northern Ireland Department for the Economy is under a duty to enter information about the order or undertaking in a separate register which it maintains.

Information gathered by the CMA in connection with the exercise of functions under the CDDA 1986 can be disclosed via the Part 9 gateways. However, the NI Order is not in scope of Part 9 of the Act as it is neither covered by section 238(1)(a) of the Act nor it is included in Schedule 14 to the Act. The Government will correct this by adding the NI Order to Schedule 14. This will bring the NI Order in line with the CDDA 1986 which applies to Great Britain.

4. How to respond

Respond via email to: CompetitionPolicy@businessandtrade.gov.uk.

Write to:

Competition and Consumer Policy Directorate
Department for Business and Trade
Old Admiralty Building
Admiralty Place
London
SW1A 2DY

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

We will summarise all responses and publish this summary on [GOV.UK](#). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

Legal disclaimer

Whereas every effort has been made to ensure that the information in this document is accurate the Department for Business and Trade does not accept liability for any errors, omissions or misleading statements, and no warranty is given or responsibility accepted as to the standing of any individual, firm, company or other organisation mentioned.

Copyright

© Crown Copyright 2024

You may re-use this publication (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence visit:

www.nationalarchives.gov.uk/doc/open-government-licence or email: psi@nationalarchives.gov.uk.

Where we have identified any third-party copyright information in the material that you wish to use, you will need to obtain permission from the copyright holder(s) concerned.

This document is also available on our website at gov.uk/government/organisations/department-for-business-and-trade.

Any enquiries regarding this publication should be sent to us at

enquiries@trade.gov.uk.