HM Government

Response Form: Competition Regime – Draft Secondary Legislation – Part 2

17 September 2013

Department
for Business
Innovation & Skills

Response Form: Competition Regime – Draft Secondary Legislation – Part 2

Issued: 17 September 2013
Respond by: 11 November 2013
Enquiries to:

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

Tel: 0207 215 1722
Email: competition.consultation@bis.gsi.gov.uk

This consultation is relevant to: Businesses of all size, economic regulatory bodies, consumer organisations, legal bodies and academics.

This information is also available on the GOV.UK website:
https://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation-part-two

How to Respond

This 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 page: www.gov.uk/government/consultations/competition-regime-draft-secondary-legislation-part-two (until 11 November 2013). The form can be submitted online/by email or by letter or fax to:

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

Tel: 0207 215 1722
Fax: 0207 215 0235
Email: competition.consultation@bis.gsi.gov.uk

A list of those organisations and individuals consulted is in Annex K. 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

Questions about the policy issues raised in the document can be addressed to Paul Griffiths at the above address.

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.

Comments or complaints

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

The consultation principles are in Annex J.

However if you wish to comment on the specific policy proposals you should contact the policy lead.

Response Form

Name:
Organisation (if applicable): Allen & Overy LLP
Address: One Bishops Square, London E1 6AO

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

☐	Business representative organisation/trade body
☐	Central government
☐	Charity or social enterprise
☐	Individual
☐	Large business (over 250 staff)
☒	Legal representative
☐	Local Government
☐	Medium business (50 to 250 staff)
☐	Micro business (up to 9 staff)
☐	Small business (10 to 49 staff)
☐	Trade union or staff association
☐	Other (please describe):

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:
The proposed manner of publication of relevant information, once in any one of the London Gazette, the Edinburgh Gazette and the Belfast Gazette is attractively simple and clear.

Publication in a Gazette, rather than on a firm's own website, will clearly assist the Competition and Markets Authority (CMA) undertake an efficient monitoring of publications.

And the choice of the Gazettes is obvious given their status as the official Newspapers of Record in the United Kingdom.

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

Comments:
We have no clear information on 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?

Comments:
The introductory section of the Government's "Consultation on draft secondary legislation – part two" (SI Consultation 2) contains, at chapter 2, useful information on the background and purpose of the exclusions. We have urged the CMA to include and expand on these points in its draft guidance document "CMA9con: Cartel Offence Prosecution Guidance" (the Draft Guidance).

For example, paragraph 2.6 of the SI Consultation 2 states "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". It would be useful if the Draft Guidance included wording to this effect, and gave examples of the types of agreements the Government/CMA is thinking of here. For example, would it include a joint venture between airlines involving the setting of common ticket prices? This is a horizontal agreement involving two or more undertakings engaging in price fixing. It therefore technically falls within the scope of the cartel offence. However, while such as arrangement would be caught by the civil prohibition in Chapter I of the Competition Act 1998 (CA98) or Article 101(1) of the Treaty on the Functioning of the EU (TFEU), it would likely benefit from an exemption under section 9 CA98 or Article 101(3) TFEU.

We understand that it will be difficult for the CMA to give too much detail in any such examples they include, over concerns that they would be setting a precedent that certain fact patterns will fall outside the civil antitrust prohibitions. However, some more general examples in the final version of the Draft Guidance would be very helpful.

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

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

Comments:
The draft Regulations are clear and appropriate.

The introductory section of SI Consultation 2 contains, at chapter 3, information on the circumstances where the CMA may exercise the power to take a case from a regulator additional to that set out in draft guidance document "CMA10con: Regulated Industries: Guidance on concurrent application of competition law to regulated industries" (the Draft CMA Concurrency Guidance). Examples provided are where the CMA can make a decision that sets the appropriate precedent, and where the regulator lacks the necessary resources or is unable to take a decision in a timely manner. We have urged the CMA to include these points in the Draft CMA Concurrency Guidance.

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

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

Comments: **We do not have any comments on the draft Rules.**

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