

EXPLANATORY MEMORANDUM TO
THE ENTERPRISE ACT 2002 (PUBLISHING OF RELEVANT INFORMATION UNDER
SECTION 188A) ORDER 2014

2014 No. 535

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty

2. Purpose of the instrument

2.1 The Order sets out the manner in which ‘relevant information’ must be published where a person seeks to rely on the new publication exemption under section 188A of the Enterprise Act 2002 from the criminal cartel offence.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 47 of the Enterprise and Regulatory Reform Act 2013 amends the criminal cartel provisions in sections 188 to 202 in the Enterprise Act 2002. 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.

4.2 ‘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.

4.3 This Order provides that publication for the purposes of the exemption must be in either the London, Edinburgh or Belfast Gazettes.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The publication exemption recognises that, in the absence of a dishonesty test, there are some innocent business arrangements that – while they would not infringe the civil antitrust prohibitions on anti-competitive agreements – might nevertheless technically fall within the terms of the criminal cartel provisions.

7.2 The exemption 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.

8. Consultation outcome

8.1 Some respondents to the BIS consultation on the Order expressed concerns that the requirement to publish a notice in the Gazettes would impose costs on business. Publication on the company's own website; or direct notification to the CMA were suggested as alternatives.

8.2 While sensitive to arguments about potential burdens on business, the Government was not persuaded that these were sufficient to outweigh the greater benefits associated with publication of notices in the Gazettes. Nor does it believe that the option of formal notification direct to the CMA delivers as comprehensive an approach to notification solution as publication in the Gazettes; or that it would be consistent with the established principles of self-assessment in the wider competition regime.

9. Guidance

9.1 The CMA will publish guidance on 11th March 2014 on the 'relevant information' to be included in notices published in the Gazettes at:
<https://www.gov.uk/government/publications?departments%5B%5D=competition-and-markets-authority>

10. Impact

10.1 An Impact Assessment has been submitted for the purposes of 'one-in, two-out' calculations. This notes that publication is not compulsory. Businesses are free to exercise their own judgment as to whether they feel it appropriate to go down this route. Publication is also just one of three - equally valid - ways in which a business might choose to exercise the exclusion. The others - providing relevant information to customers or persons requesting bids – may be exercised in the course of normal business. The impact assessment will be published at:

<https://www.gov.uk/government/consultations/competition-regime-draft-secondary-legislation-part-2>

11. Regulating small business

11.1 The legislation applies to small business.

12. Monitoring & review

12.1 There is no statutory requirement to review this provision.

12.2 A review will be conducted of the Cartel offence within five years.

13. Contact

Stephen Childerstone at the Department for Business, Innovation and Skills; Telephone: 0207-215 0354; or email: stephen.childerstone@bis.gsi.gov.uk can answer any queries regarding the instrument.