

## By email

The CMA Transition Team on behalf of the  
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11 November 2013

Dear Sirs

## **RESPONSE TO CMA TRANSITION TEAM CONSULTATION: CARTEL OFFENCE PROSECUTION GUIDANCE**

We are providing brief comments below in response to the CMA Transition Team's consultation document of September 2013 on Cartel Offence Prosecution Guidance.

The comments in this letter do not necessarily reflect the views of any clients of Bird & Bird LLP.

The draft Guidance in our view fulfils its purpose only to a limited extent. The statutory cartel offence is wide in scope following the removal of the word "dishonestly" from section 188 of the Enterprise Act 2002 by the Enterprise and Regulatory Reform Act 2013. As a result, many types of agreements will technically fulfil the criteria of section 188(2) and be criminalised and potentially be subject to prosecution. One can envisage that some such agreements would not fall within the defences or exclusions provided for in the 2013 Act, for example because it is not practical to disclose the details to customers, the details are too confidential to be published in the prescribed manner and/or legal advice is not obtained on the agreement. The guidance which the CMA is required to publish (under section 190A of the 2002 Act) could in our view give more clarity on the circumstances or principles in which prosecution for certain types of agreement would not be considered appropriate.

For example, the Guidance could state, without fettering the discretion of the CMA in relation to specific future cases, that the CMA would not normally consider it appropriate to prosecute relevant individuals where the agreement is a bona fide implementation of normal commercial practice in the relevant industry, where such practice has not previously been found by the CMA or the European Commission to involve infringements of UK or EU competition law. Further, the draft Guidance could state that the CMA would not normally consider it appropriate to prosecute individuals concerning agreements where there is a reasonable prima facie case for the application of the exceptions criteria pursuant to section 9 of the Competition Act 1998. This would nonetheless leave open the possibility for the CMA to bring prosecutions where the specific circumstances and/or special considerations support prosecution in an individual case.

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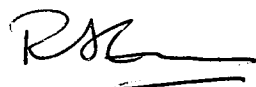
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The substance of the draft Guidance is mainly contained in chapter 4. However, much of this chapter does not provide substantive guidance as such, as opposed to reiterating the content of the legislation. No guidance is provided on the principles on which the CMA would exercise its prosecutorial discretion in relation to particular types of agreement, except for some guidance provided on the interpretation of the exclusions and defences (in particular, paragraphs 4.16 and 4.24) and except for the statements that hardcore cartels are generally serious and that the more serious and harmful cartels are likely to be prosecuted (paragraphs 4.32 and 4.33). In our view, in an area of this importance and where the potential consequences are so serious, industry is entitled to expect more useful guidance on which other types of agreement, if any, may as a general principle normally give rise to prosecution, and which types of agreements would not normally give rise to prosecution.

The section on the culpability of an individual suspect (paragraphs 4.35 to 4.40) is helpful on the issues that would be considered in this respect. However, more guidance is in our view appropriate on the types of agreement that would or would not give rise to considerations of prosecution of relevant individuals.

Therefore, in answer to the consultation questions, our views are as follows. As regards question A.1, we consider that the draft guidance does not adequately achieve the statutory purpose of explaining the principles to be applied in determining what types of agreements described in section 188(2) of the 2002 Act will or will not normally result in prosecution. As regards question A.2, the explanation given concerning the evidential stage of the test to be applied by the CMA is clear but does not give any significant clarity that cannot be obtained from reading the statute. As regards question A.3, we consider that, as explained above, more guidance can be given on the factors that the CMA will take into account when considering the types of agreements for which prosecution will normally be considered appropriate in the public interest.

Yours faithfully



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**Partner**

**For and on behalf of Bird & Bird LLP**

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