

# Cartel Offence Prosecution Guidance

Summary of responses to the consultation

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This publication is also available at [www.gov.uk/cma](http://www.gov.uk/cma).

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## 1 INTRODUCTION AND SUMMARY

### Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) establishes the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT) are transferred to the CMA and those bodies abolished. The CMA's primary duty is to seek to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets. These include the ability under section 188 of the Enterprise Act 2002 (EA02) (as amended by the ERRA13) to bring criminal proceedings against individuals who commit the cartel offence.
- 1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. Cartel Offence Prosecution Guidance (CMA9con) (the Draft Guidance) was one of a number of draft guidance documents published for public consultation on 17 September 2013.<sup>1</sup> The CMA's consultation (Consultation) on these documents closed on 11 November 2013.

### Summary of the key changes to the cartel offence

- 1.4 The ERRA13 made the following changes to the cartel offence:
  - the provision of a revised framework for combating behaviour by individuals leading to hardcore criminal cartels, removing the need to prove dishonesty
  - the creation of two new exclusions from the offence: (i) the notification exclusion,<sup>2</sup> and (ii) the publication exclusion<sup>3</sup>

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<sup>1</sup> These documents are available at [www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2](http://www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2)

<sup>2</sup> See subsection 188A(1)(a) of the EA02.

<sup>3</sup> See subsection 188A(1)(c) of the EA02.

- the retention of the exclusion relating to the notification of bid-rigging arrangements<sup>4</sup>
- the provision that an individual will not commit an offence if the agreement is made in order to comply with a legal requirement<sup>5</sup>
- the creation of three new defences to the cartel offence:<sup>6</sup> (i) where there is no intention to conceal the nature of the arrangements from customers; (ii) where there is no intention to conceal the nature of the arrangements from the CMA; and (iii) where the defendant, before the making of the agreement, took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining legal advice about them before their making or (as the case may be) their implementation.

1.5 Section 190A of the ERRA13 requires the CMA to prepare and publish guidance on the principles to be applied in determining, in any case, whether proceedings for an offence should be instituted. The Draft Guidance was prepared under this statutory requirement and published for consultation. It explains how the CMA will exercise its prosecutorial discretion in respect of the cartel offence.

### **Purpose of this document**

- 1.6 The consultation document accompanying the Draft Guidance (the Consultation Document) sets out a series of specific questions on which views of respondents were sought. This document sets out a summary of the responses received to each of those questions and the CMA's views on those responses.
- 1.7 In parallel with the Consultation, the Department for Business, Innovation and Skills (BIS) consulted on draft secondary legislation in relation to the prosecution of individuals for the cartel offence.<sup>7</sup> In particular, BIS sought views on a draft Order under section 188A of the EA02 specifying the manner in which relevant information about arrangements was to be published for the purposes of taking a person outside the criminal cartel

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<sup>4</sup> See subsection 188A(1)(b) of the EA02.

<sup>5</sup> See subsection 188A(3) of the EA02.

<sup>6</sup> See section 188B of the EA02.

<sup>7</sup> Available at [www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation](http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation).

offence. Although referred to in some responses, the proposed secondary legislation fell outside the scope of the Consultation Document. BIS will be publishing a separate response to its consultation.

## Responses to the Consultation

- 1.8 Sixteen written consultation responses relating to the Draft Guidance were received.<sup>8</sup> The Draft Guidance was also discussed at a launch event for the CMA draft guidance on 10 October 2013 attended by members of the legal, economic, academic and business communities. Additional comments on the Consultation were received during road shows held with certain external stakeholder groups in November 2013.<sup>9</sup> Of the 16 written consultation responses, 14 proposed amendments and additions to the Draft Guidance.

## Consultation questions

- 1.9 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised and the CMA's views on them set out.

Question		Chapter
1.	Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be instituted against an individual?	2
2.	Is the evidential stage of the test of the decision making process explained clearly enough?	3
3.	Do you have any comments on the factors that the CMA will take into account in considering the public interest in instituting a prosecution?	4
4.	Do you have any further comments on the Draft Guidance?	5

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<sup>8</sup> Annexe A lists the 16 organisations that provided responses relating to the Draft Guidance. The vast majority of these responses were from civil practice law firms and their professional associations.

<sup>9</sup> Roadshows were held with the City of London Law Society (CLLS) and the CBI Competition Panel.

- 1.10 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available at [www.gov.uk/cma](http://www.gov.uk/cma). Nor is this Summary of Responses a definitive statement of the principles the CMA will apply in determining whether to institute proceedings against an individual for the cartel offence. Parties seeking guidance should refer to the final published version of *Cartel Offence Prosecution Guidance* (CMA9) (the Guidance), also available at [www.gov.uk/cma](http://www.gov.uk/cma).

## 2 KEY ISSUES

- 2.1 In the Consultation Document, the CMA sought respondents' views on whether the Draft Guidance adequately sets out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be instituted against an individual.
- 2.2 This chapter focuses on the broad issues that were raised by the respondents in relation to this question. There was considerable overlap in the issues raised by respondents, both to this question and to the subsequent questions 2, 3 and 4. However, there were also two common and related themes: the interrelationship between the criminal regime and the civil competition rules, and the scope of the cartel offence and the CMA's focus on prosecuting hardcore cartels. The issues raised and the CMA's responses to these issues are addressed in this chapter.

**Question 1: Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be instituted against an individual?**

### General

#### *Summary of responses*

- 2.3 A few respondents felt that the Draft Guidance fulfilled its statutory purpose. These respondents appreciated the CMA's more limited role when acting as a criminal prosecutor compared with the CMA's role as a decision maker in civil antitrust cases, and acknowledged that criminal prosecution guidance was by its nature and status different to the more general guidance on which the CMA was also consulting.
- 2.4 Some respondents accepted that the CMA should not usurp the role of the courts by providing any interpretation of the cartel offence in the Guidance which might constitute an improper 'gloss' on the legislation.
- 2.5 However, the majority of respondents expressed concern that the Draft Guidance did not fulfil its statutory purpose. The respondents commented that the Draft Guidance fell short of adequately detailing how the CMA would exercise its prosecutorial discretion in determining whether or not to institute proceedings against an individual for the cartel offence. They felt that the Draft Guidance was not sufficiently clear or detailed in relation to the CMA's thinking on the types of activities or agreements which fell within or outside of the cartel offence.



- 2.6 The respondents also suggested the Guidance could include a statement of the CMA's enforcement priorities which would not create immunities from the risk of prosecution, but could offer meaningful guidance to individuals, business and advisers.

### ***The CMA's views***

- 2.7 The CMA has carefully considered the respondents' general suggestions for clarification or further guidance. It refers to the statements made in the Consultation Document about the limitations of prosecution guidance.
- 2.8 The CMA considers that it has adequately explained how it will exercise its prosecutorial discretion. In the public interest section of the Guidance it has highlighted a non-exhaustive list of factors to which the CMA will have regard in order to make an assessment of whether or not it is in the public interest to prosecute an individual for the cartel offence.
- 2.9 The statutory requirement under the ERA13 is for the CMA to publish prosecution guidance which covers the principles to be applied 'in any case'. In the CMA's view, this means that the Guidance should seek to be sufficiently general so as to be of assistance in any case of an alleged cartel offence; it does not require an exhaustive list of factors to be considered. Each case will be considered on its own individual facts and merits.
- 2.10 The CMA believes that the Guidance makes clear that the intention of the CMA is to focus criminal enforcement efforts on prosecuting individuals involved in hardcore cartels and the removal of dishonesty does not affect this.

### **Clarity – between civil/competition law enforcement and criminal prosecution**

#### ***Summary of responses***

- 2.11 Several respondents expressed the view that a clear statement should be inserted into the Guidance that the CMA would not normally seek to prosecute individuals involved in agreements which did not infringe UK or EU competition law, or agreements where there was a reasonable prima facie case for the application of the exceptions criteria pursuant to section 9 of the Competition Act 1998 (CA98).
- 2.12 Some respondents felt that it was a perverse outcome for business that agreements justifiable under EU competition law had to potentially rely on a defence or exclusion under the EA02 in order to fall outside of the scope of the cartel offence.

- 2.13 Respondents suggested that it would be useful for the Guidance to include examples of the types of agreements which may technically fall within the terms of the revised cartel offence, but which would not be considered unlawful because they did not infringe the civil antitrust prohibitions against anti-competitive agreements. Other comments made by respondents in this respect included:
- The Draft Guidance was unclear with regard to how the defences and exclusions would apply to arrangements which were exempt or potentially justifiable under the civil regime, but which fell within the scope of the amended offence. The respondents outlined a number of specific scenarios in their responses which they felt applied in this context .
  - If an offence was committed, it raised broader considerations than just the decision of whether or not to prosecute an individual. The respondents expressed concern about the application of the revised cartel offence to a range of widely understood business practices and agreements.
  - To the extent that those concerns were misplaced, the respondents believed that the effect would be to delay and frustrate legitimate business activity and raise costs for business. The respondents argued that this was not the result that parliament intended when it asked the CMA to issue prosecution guidance.
- 2.14 It was also suggested that the Draft Guidance's inherent uncertainty could lead to repeated notifications to the CMA or requests for advice.
- 2.15 A number of respondents required additional detail on the interrelationship between the civil and criminal competition enforcement regimes and, in particular, in what circumstances the CMA would consider a criminal prosecution for the cartel offence appropriate when no civil investigation was being pursued.

### ***The CMA's views***

- 2.16 The CMA's focus in relation to the public interest in favour of the prosecution of individuals for the cartel offence is on cases where the harmful nature of the individual's behaviour is obvious without the need for any detailed assessment. As a result, the potential for any conflict between the application of, on the one hand, the criminal offence and, on the other, the civil regime, is negligible.

- 2.17 In light of the respondents' comments, and in order to provide more clarity, the Guidance has therefore been amended to make this point clear by adding additional wording to paragraph 4.26.

## **Clarity – more examples, outer limits of the offence, definition of hardcore cartels**

### ***Summary of responses***

- 2.18 A number of respondents expressed the view that the Draft Guidance did not adequately reflect the intention of the revised cartel offence, which is to criminalise and deter the most serious and damaging forms of anti-competitive agreements, namely 'hardcore cartels'. The respondents suggested the Guidance include a clear statement that the CMA would focus its criminal enforcement powers on prosecuting individuals involved in hardcore cartels, mirroring what was stated in the Consultation Document, that the removal of the term 'dishonestly' from section 188(1) of the EA02 had not changed the CMA's prosecutorial focus.
- 2.19 Several respondents called for the Guidance to provide a higher level of clarification and detail, similar to that provided by other prosecution guidance (such as guidance issued in respect of the Bribery Act and Assisted Suicide). Comments made by respondents in this respect included:
- other prosecution guidance contained a set of principles and case studies which provided considerable detail and practical assistance to companies in terms of understanding how to comply with their legal obligations
  - other prosecution guidance clarified in greater detail the prosecutorial authorities' understanding of the limits of the offence and the types of actions which could trigger prosecution
  - like other prosecution guidance, it was possible – without undermining the relevant legislation – for the Guidance to provide some interpretation of the cartel offence as set out in the EA02 and some concrete examples of conduct which would not merit prosecution by the CMA for the cartel offence
- 2.20 Throughout the responses a considerable number of specific examples and scenarios were raised and further specific guidance requested. The CMA has not set them out here in the interests of brevity.

- 2.21 Some respondents referred to discussions which took place during the consultation period relating to legislative changes to the cartel offence, where a range of examples of agreements had been considered. The respondents expressed disappointment that those examples were not explicitly set out in the Draft Guidance.

### ***The CMA's views***

- 2.22 The CMA has carefully considered the respondents' specific suggestions for areas of possible clarification and as stated above, has amended the Guidance at paragraph 4.26 to make it clear that its focus is cases where the harmful nature of the individual's conduct is obvious. This is the effect of the application of the public interest factors set out in the Guidance, and in this regard particular attention is drawn to paragraphs 4.32, 4.33, 4.36 and 4.37 of the Guidance.
- 2.23 The CMA considers that the Guidance is comparable with the prosecution guidance issued by other prosecutors on other offences such as the DPP on assisted suicide and that issued jointly by the SFO and DPP in respect of the offence of bribery. In so far as these documents could be said to provide broader interpretations of the relevant offences, this arises through uncontroversial applications of the relevant statutes in much the same way that the CMA has done at paragraph 4.9 of the Guidance.
- 2.24 The CMA is aware that the Ministry of Justice guidance on the adequate procedures defence to bribery may have been confused by some respondents as constituting prosecution guidance. The Ministry of Justice has no prosecutorial function in respect of the bribery offence. This guidance was issued under a separate statutory requirement under section 9 of the Bribery Act 2010.
- 2.25 The Guidance does not set out examples of conduct which would fall within the definition of the cartel offence but which would not merit prosecution. To do so would in effect be to grant immunity from prosecution in advance of any consideration of the facts of the particular case, which the CMA has no power to do. The range of examples and scenarios raised by respondents demonstrates the requirement for flexibility in assessing each case according to its own facts and merits.

### 3 EVIDENTIAL STAGE

- 3.1 The CMA sought respondents' views on the evidential stage of the prosecutor's decision making process. At the evidential stage, the CMA must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the individual. This includes a consideration of the new statutory exclusions and defences introduced by the amendments to the cartel offence.
- 3.2 This question generated a variety of responses, a number of which duplicate issues dealt with in the previous or subsequent chapter of this document, in particular requests for clarity and examples. The CMA's views on those comments are also set out in those chapters and are not repeated here. The summary of responses in this chapter has been split into the main headings within the evidential section of the Guidance.

**Question 2: Is the evidential stage of the test of the decision making process explained clearly enough?**

#### General

##### *Summary of responses*

- 3.3 While a few respondents considered the evidential stage of the Draft Guidance to be helpful and clear, the majority of respondents felt that the evidential stage did not provide sufficient detail.
- 3.4 Some respondents submitted that the evidential stage of the Draft Guidance did not provide any significant clarity that could not already be obtained by reading the ERRA13.

##### *The CMA's views*

- 3.5 The CMA takes the view that it is the function of the courts to construe the meaning of the statute and that it should not seek to exclude from prosecution any conduct which falls or might reasonably be construed as falling within the statutory definition of the cartel offence; whether such conduct is the subject of prosecution will depend upon the decision as to the public interest. It is for this reason that the evidential stage of the Guidance does not go beyond the statutory definitions.

## Exclusions

### *Summary of responses*

- 3.6 Generally, respondents proposed that the exclusions section of the Draft Guidance could be expanded to provide further clarification of what constituted genuine steps in order to satisfy the statutory exclusions. A number of respondents felt that the Guidance needed to provide further clarity on what was sufficient to constitute 'relevant information' and suggested that the Guidance include a sample notification or publication extract.
- 3.7 Some respondents raised concerns about situations where not all relevant information was available to disclose at the relevant time, situations where there was an inadvertent failure to notify or publish all relevant information, or situations where existing agreements were amended after the enactment of the revised cartel offence.
- 3.8 Suggestions were made that uncertainty in the Draft Guidance regarding the types of agreements which may be prosecuted could lead to repeated notifications to the CMA or an unnecessarily large number of Gazette advertisements. One respondent commented that it was not in the best interests of the CMA to have to sift through repetitive notifications of legitimate commercial behaviour, rather than focusing on notifications that may give rise to a genuine question of compliance with competition law.
- 3.9 Several respondents required further guidance on what procedures the CMA would implement in order to handle notifications from individuals. One respondent sought more detail on the level of protection that the CMA would give to the information about arrangements brought to the CMA's attention. Other respondents noted that the obligation to disclose the terms of an agreement could result in confidential, competitively sensitive information being published which would give rise to a potential breach of competition law.

### *The CMA's views*

- 3.10 The CMA takes the view that the terms of the exclusions are clear and capable of ordinary interpretation.
- 3.11 The CMA explains at paragraph 4.16 of the Guidance that the exclusions are framed in terms of how it was intended that the arrangements would operate at the time the individual agreed to make or implement them. Further, paragraph 4.16 states that evidence of genuine steps being taken in relation

to one of the statutory exclusions will be relevant as to whether or not there was such an intention even if the individual failed to meet the requirements of section 118A of the EA02.

- 3.12 It is not a requirement of the legislation that individuals ‘notify’ the CMA of agreements in order to meet the statutory exclusions or in order to raise a defence should they be prosecuted.
- 3.13 The Guidance makes clear at paragraph 4.23 that, if an arrangement is notified to the CMA, this will not preclude the CMA from taking civil enforcement action in relation to the arrangement either at the time or at any later date.
- 3.14 The CMA does not rule out the possibility of further guidance on the operation of the exclusions once the scheme is up and running. However, any decision to issue further guidance or the scope of any such guidance will be informed by and will reflect the benefit of practical experience of the operation of the exclusions.

## **Defences: No Intention to Conceal**

### ***Summary of responses***

- 3.15 A number of respondents expressed the view that more information was required in the Guidance concerning the scope and application of the statutory defences. In particular, several respondents felt that the Guidance should include illustrative examples and further clarification of the factors which describe how the CMA would interpret an individual’s intention to conceal.
- 3.16 One respondent believed that it was important for the CMA to clarify its interpretation of the scope of the defences as it was now up to a defendant to prove one of the defences was met under the revised cartel offence, rather than up to the CMA to prove the defendant’s dishonesty. Additional concerns were raised about the evidential difficulties of proving a negative. It was suggested that, in order to raise a defence, an individual would need to produce positive evidence of an intention to notify customers or the CMA of the arrangements.
- 3.17 Another respondent felt that, in order to assess the credibility and impact of any defence, the CMA would have to consider how the defences would operate in practice. The respondent noted that this necessarily meant that the CMA would be required to interpret the meaning of the defences as set

out in the legislation and to apply that interpretation to the facts of each case under its consideration.

- 3.18 Two respondents commented that there were often legitimate reasons why details of agreements were not disclosed, such as confidentiality or consent considerations. While such circumstances could indicate an intention to conceal, one respondent submitted that it was important to note that such an intention would not be driven by a desire to hide anti-competitive conduct.

### ***The CMA's views***

- 3.19 The CMA takes the view that the defences are clearly set out in section 188B of the EA02. To provide examples which go beyond the restating of the words of the statute would risk replacing the statute with the Guidance. Where a defence is or may be invoked, the CMA should assess the evidence against the words of the statute and not by reference to examples given in the Guidance.
- 3.20 While it is the case that the burden of proof in respect of any defence is on the individual who raises it, the removal of dishonesty from the cartel offence does not mean that there is no requirement on the prosecution to prove their case. There is still a significant evidential burden on the CMA in any prosecution for the cartel offence.
- 3.21 The Guidance explains at paragraph 4.23 that it is not necessary for an individual to notify the CMA about agreements in order to establish a defence in the event that they are prosecuted.

### **Defences: Legal Advice Defence**

#### ***Summary of responses***

- 3.22 A number of respondents asked for further clarification in the Guidance about the circumstances in which an individual could prove that they had taken reasonable steps to disclose the nature of the arrangements to professional legal advisers. Comments included:
- the Guidance should clarify whether it could ever be reasonable for an individual to attempt and fail to disclose arrangements to a professional legal adviser or, alternatively, if it was reasonable for an individual to succeed in making disclosure, but fail to obtain legal advice
  - the Draft Guidance was unclear as to whether legal advice should be sought on whether the arrangement constituted an offence under



section 188 of the EA02, or whether the seeking of any kind of legal advice was sufficient to qualify for the defence

- the Guidance could confirm that the key factor for the CMA's consideration was that an individual had sought advice, irrespective of the content of the advice or whether the advice was followed
- there existed the potential for conflict over the legal advice defence in the Draft Guidance as between the company and the individual, as well as the potential conflict for in-house lawyers whose advice was sought
- it was unclear in the Draft Guidance whether, and if so how, the legal advice defence would affect the privileged status of communications between a client and its legal advisers and whether a waiver of legal professional privilege would be necessary in order to substantiate the defence
- there were a number of queries about what was meant by the term 'genuinely be an attempt to seek legal advice about the arrangement' as well as the scope of the term 'professional legal adviser'
- there were significant concerns about the potential for the legal advice defence to be open to abuse and to amount to a fatal flaw in the revised cartel offence.

### ***The CMA's views***

- 3.23 The CMA acknowledges the range of responses on this topic which it believes highlights the importance of ensuring that each case in which this issue may arise is considered on its facts.
- 3.24 The CMA recognises that issues are likely to arise with respect to legal professional privilege should this defence be raised by an individual. It is not for the CMA, however, to impose any conditions or limitations on how an individual may seek to establish the defence under subsection 188B(3); the CMA will consider any information which the suspect has put forward or on which he or she might rely, as indicated in paragraph 4.2 of the Guidance.
- 3.25 The CMA does not consider that it would be appropriate to provide any further guidance on this area at this stage beyond what is already stated in the Guidance at paragraph 4.24, that there must be a genuine attempt to seek legal advice about the arrangement.

## 4 PUBLIC INTEREST STAGE

- 4.1 The CMA sought respondents' views on the public interest factors which the CMA is required to consider in its determination of whether or not it is in the public interest to prosecute an individual for their involvement in hardcore cartel activity once the evidential threshold has been met.

**Question 3: Do you have any comments on the factors that the CMA will take into account in considering the public interest in instituting a prosecution?**

### Summary of responses

- 4.2 While a few respondents were satisfied with the public interest factors the CMA would take into account in order to determine whether or not to institute proceedings for the cartel offence, the majority of respondents felt that the public interest factors could be expanded further.
- 4.3 Some respondents pointed to the style of other prosecutors' guidance and suggested that the CMA follow a similar format. Respondents also suggested that it would be helpful to include additional paragraphs from the Code for Crown Prosecutors (the Code) in the Guidance.
- 4.4 Specific comments made by respondents on the public interest factors included:
- the Guidance needed to provide further guidance on the interrelationship between the civil and criminal competition enforcement regimes. In particular, the respondents felt that the Guidance should discuss whether it was in the public interest for the CMA to consider criminal prosecution for the cartel offence when no civil investigation was being pursued or where there were countervailing customer benefits which could have a positive impact on the community
  - a statement could be included in the public interest section of the Guidance, to the effect that the CMA was unlikely to prosecute an individual where there was no evidence that the individual had been involved in hardcore cartel activity. The respondents suggested that this statement include a summary of the term 'hardcore cartel'
  - an individual's state of mind was a factor relevant to prosecutorial discretion. Therefore, the CMA should consider whether a party's original intention when entering into the agreement ran counter to any

alleged effect of the agreement and whether the arrangement had the object of causing the resulting harm

- the relevant industry or market in which an entity operated should be considered at the public interest stage, as the context could diminish the culpability of the suspect
- the CMA should consider whether a criminal prosecution would be appropriate when there are other sanctions available to the CMA, such as director disqualification proceedings or parallel proceedings in other jurisdictions
- the duration of the cartel itself was not a relevant public interest factor. One respondent suggested that it was more appropriate for the CMA to have regard to the duration of an individual's involvement in cartel conduct and the proportion of the cartel's total duration represented by the period of the individual's involvement, rather than to the overall duration of the cartel
- one respondent was concerned that the Draft Guidance appeared to suggest that employees occupying positions of seniority could be considered to have a higher level of culpability than junior employees. The respondent felt that the Draft Guidance had departed from the Code with regard to its suggestion that seniority could be treated as a standalone factor in the assessment of culpability
- the description of the proportionality test in the Draft Guidance was regarded by several respondents as inadequate and as requiring further explanation. Respondents suggested the Guidance refer to paragraph 4.16(f) of the Code with reference to the issue of costs and reserving prosecution for the main participants in order to avoid excessively long and complex proceedings

### **The CMA's views**

- 4.5 The CMA has given careful consideration to all of the suggestions raised by respondents on the public interest factors. As has been explained in chapter 2, in order to provide further clarity, some additional wording has been inserted into paragraph 4.26 of the Guidance. Otherwise, the CMA is not persuaded of the need for further explanation within the public interest section.
- 4.6 The CMA's decision to prosecute an individual for the cartel offence is made by the application of the Full Code Test as set out in the Code. This is stated

explicitly in paragraph 3.1 of the Guidance. Therefore, it is not necessary for the Guidance to reproduce excerpts from the Code in order for them to apply; they will apply.

- 4.7 The Code was reissued in 2013. The previous Code that was issued in 2010 followed a different style to the current Code. This is one of the reasons why prosecution guidance which was issued by prosecuting authorities prior to January 2013 follows a different format to the CMA's Guidance.

## 5 OTHER COMMENTS

### Question 4: Do you have any further comments on the Draft Guidance?

- 5.1 The CMA sought respondents' views on any further issues not covered by the preceding three questions.

#### Summary of responses

- 5.2 Two respondents commented that the *Powers for investigating criminal cartels* (OFT515) document was important guidance. One of the respondents asked for an update on the document's workstream, whilst the other respondent urged the CMA to prioritise the workstream so that appropriate new guidance could be issued as soon as possible.
- 5.3 One respondent suggested the CMA engage in early case selection in order to alleviate some opposition to the revised cartel offence from within the business community.
- 5.4 One respondent felt that if the CMA did not provide additional clarity in the Draft Guidance, it could consider alternative ways of providing clarity, for example by publishing CMA decisions regularly in an anonymised format.

#### The CMA's views

- 5.5 The CMA is grateful for the other comments raised by the respondents.
- 5.6 The CMA will consider the requirement for guidance on powers for investigating criminal cartels in due course.

#### Conclusion

- 5.7 The CMA is grateful to all those who responded to the consultation and the time they have invested in doing so. The CMA has carefully considered all responses received.

## ANNEXE

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## A. List of respondents to the Consultation on the Draft Guidance

- Allen & Overy LLP
- Ashurst LLP
- Baker & McKenzie LLP
- Bar Council
- Berwin Leighton Paisner LLP
- Bird & Bird LLP
- City of London Law Society
- Clifford Chance LLP
- Dickson Minto W.S.
- Edwards Wildman Palmer LLP
- ESRC Centre for Competition Policy
- GC100
- Herbert Smith Freehills LLP
- Hogan Lovells International LLP
- Linklaters LLP
- Simmons & Simmons LLP