RESPONSE TO CMA CONSULTATION: CARTEL OFFENCE PROSECUTION GUIDANCE

Baker & McKenzie LLP welcomes the opportunity to comment on the CMA Consultation: Cartel Offence Prosecution Guidance ("the Draft Guidance"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and EU competition law.

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 Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether the proceedings for the cartel offence should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

1.1 Given the significant changes to the cartel offence and the introduction of new exclusions and defences, we consider that it is essential for the CMA to provide clear and meaningful prosecution guidance. Whilst we are aware that prosecution guidance is by nature different to the more general guidance that the CMA is currently consulting on, we consider that there is still scope to provide further detail and clarity.

Scope of the Offence – focus on hardcore cartels

1.2 While we appreciate the difficulty of providing criminal prosecution guidance, we are concerned that the Draft Guidance does not adequately deal with many of the issues raised by the broad and uncertain scope of the offence. Most crucially, despite the recognition in section 2.1 that the intention of creating the criminal cartel offence is to criminalise and deter the most serious and damaging forms of anti-competitive agreements, namely 'hardcore cartels' and the useful definition of such cartels provided in section 2.2, the Draft Guidance as a whole does not reflect this intention. The ERRA13 does indeed provide a revised framework for combatting behaviour by individuals leading to hardcore criminal cartels, as summarised in section 2.7, but it does so by creating an offence which is apt, when read literally and giving the words their ordinary meaning as statutory interpretation requires, to cover a dramatically broader range of agreements. The function of the Draft Guidance should be precisely to indicate how prosecutorial discretion will focus on the former hardcore cartels without impeding the legitimate business arrangements included in the latter broader range of agreements. In addition to the specific comments below, we suggest that this precise function of the Draft Guidance could be furthered:

- by adding at the end of section 4.10, dealing with the evidential stage, that prosecutions are likely only in respect of such agreements that amount to hardcore cartels (as discussed in section 2.1-2.2) and not other agreements which technically meet the requirements for the offence without amounting to hardcore cartels; and

- by adding in section 4.26, dealing with the starting point for the public interest stage, that a prosecution will not usually be brought except where the evidential stage demonstrates the existence of a hardcore cartel (as discussed in section 2.1-2.2).

Examples where prosecution should not be instituted

1.3 Section 4.9 of the Draft Guidance gives examples of arrangements which are clearly completely outside the scope of the cartel offence (being unilateral or operating at different levels of the supply chain). So these examples do not address the purpose of the Guidance which is to set out the principles to be applied in determining whether proceedings should be

instituted against an individual, since it is self-evident that proceedings cannot be instituted if the requirements for the offence are clearly not met. What the Guidance should address is those cases where the technical requirements for the offence may be met but a prosecution should nevertheless not be brought.

1.4 Numerous examples of such agreements have been given during the consultation relating to the legislative changes to the cartel offence (and it is our understanding that it was precisely the wealth of such examples which led to the inclusion in the ERRA13 of the somewhat unusual requirement for the CMA to issue this prosecutorial guidance). While no exhaustive list of examples of such non-hardcore agreements could be given, it is vital, in our view, if the final Guidance is to fulfil its purpose, to set out as least those examples which have been provided and are not contested, including joint production ventures where the parties set the price to be charged to immediate customers, research and development agreements that contain a customer or territorial restriction on the exploitation of results of the R&D by the parties, as well as certain co-insurance and co-reinsurance agreements, syndicated loan agreements, underwriting agreements and standardisation agreements. Section 4.10 should be extended not only by the general qualification proposed in paragraph 1.2, first bullet, above but also by the addition of these illustrative examples.

Exclusions

1.5 The Draft Guidance could usefully expand upon the detail to be provided to meet the requirement to provide "relevant information" and to describe the nature of the arrangements in section 188A and 188B of the Enterprise Act 2002 as amended by the ERRA13. As a matter of policy, we suggest that this requirement should be interpreted so as to shield from prosecution individuals who have provided frank disclosure in a normal business manner, without necessarily having given a formal list of the information.

1.6 In particular, we suggest, the requirement to provide the names of the undertakings should be satisfied by a reference to the name of the group to which the undertakings belong (so e.g. "the Alpha group" should suffice without naming Alpha (United Kingdom) Limited and Alpha Holdings (United Kingdom) Limited).

1.7 As regards the nature of the arrangements, indicating that named parties are making the offer to supply as a joint venture or are bidding jointly should suffice without listing any detailed terms applying within the scope of the joint venture or joint bidding arrangement (so an example clarifying that stating in a bid that "the Alpha group and Beta Ltd are pleased to present this joint bid" will meet the requirement for the exclusion would be useful).

1.8 As regards the requirement to give the products or services to which the arrangements relate, it should be clarified that this information does not need to be provided separately in a case where the arrangements relate to the products or service which are subject to the supply or bid in question (so in the example just given, indicating that "the Alpha group and Beta Ltd are pleased to present this joint bid" should suffice without adding the superfluous but arguably required "in relation to the widgets to which this bid relates"). Absent these clarifications, individuals could face prosecution and at least the need to prove that a defence applies even when, in business terms, they had been entirely frank.

1.9 Finally, the Guidance could usefully address the situation where not all the "relevant information" is available to disclose at the outset. This is another example to add to those in section 4.16 where the intention as to how the arrangement should operate is crucial.

2. Is the evidential stage of the test of the decision making process explained clearly enough?

2.1 Please see our response to Question 1 above.

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?

3.1 Guidance dealing with the public interest stage could usefully be tailored more specifically to the issues likely to arise in relation to the cartel offence. A key clarification will be the reference to hardcore cartels and the fact that prosecution is unlikely where the evidence does not support this qualification (as suggested in paragraph 1.2 second bullet point above).

3.2 In assessing the seriousness of the offence – Draft Guidance sections 4.32-4.34 - the focus should be on the seriousness of the anti-competitive effects and harm caused rather than, for example, the duration of the arrangement.

3.3 As to the level of culpability of the suspect, the individual's dishonest intention, if any, is clearly relevant to prosecutorial discretion even if no longer an element of the offence and dishonesty should be referred to in section 4.35.

3.4 The discussion of whether the individual was acting openly in section 4.37 could usefully make clear how consideration of this factor will relate to consideration of the defences of no intention to conceal.

4. Do you have any further comments on the Draft Guidance?

Defences

4.1 Additional detail as to the defences would be helpful. As regards specifically the legal advice defence, we welcome the recognition that legal advisors qualified in foreign jurisdictions are frequently consulted about business arrangements but suggest that "will" rather than "could" would be the appropriate word in line 3 of 4.24 dealing with this point.

4.2 The requirement that foreign-qualified legal advisors should have "equivalent legal qualification" is, in our view entirely inappropriate and should be deleted as individual business people cannot possibly be expected to review the equivalence of legal qualifications and nor should the criminal courts be faced with needing to do so.

4.3 It should also be clarified that so long as legal advice is sought in relation to the arrangements, it need not necessarily have been sought specifically in relation to the possible applicability of the cartel offence. It would also be useful to clarify that the defence will apply regardless of the content of the advice, if any, provided.

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