

**RESPONSE OF CLIFFORD CHANCE LLP TO THE CMA CARTEL OFFENCE  
PROSECUTION GUIDANCE CONSULTATION DOCUMENT**

Clifford Chance LLP welcomes the opportunity to comment on the CMA cartel offence prosecution guidance consultation document (the "**Consultation Document**") and the draft guidance contained within it (the "**Draft Guidance**").

Our comments below are based on the substantial experience of lawyers in our Antitrust Practice of advising on competition law for a diverse range of clients, and across a large number of jurisdictions. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

**Q1. Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be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?**

- 1.1 We consider that the statutory purpose of the Draft Guidance should be understood in the context in which Section 190A of the Enterprise Act 2002 ("**EA2002**") was introduced, i.e. in response to concerns raised by numerous practitioners, businesses and representative bodies that the wording of the cartel offence in Section 188 EA2002 was excessively vague and imprecise and that, consequently, the removal of the requirement for dishonesty would harm legal certainty and inhibit a wide variety of legitimate commercial conduct that falls within the scope of Section 188. This is supported by the Department for Business, Innovation and Skills ("**BIS**") press release that accompanied the relevant amendments to the Enterprise and Regulatory Reform Bill, which stated that their purpose was to "*protect individuals, by providing guidance and a legal defence, from committing the criminal cartel offence*".<sup>1</sup>
- 1.2 In addition, in responding to industry concerns about the amendments, BIS specifically contemplated the issuance of prosecution guidance offering insight into enforcement priorities:
- "There may be circumstances where (for reasons of the parties' size or limited awareness of competition law, for example) the parties fail to provide in the arrangement for the notification of customers or publication of relevant information and, as a result, legitimate commercial arrangements remain within the scope of the offence. If additional certainty to business that such inadvertent failures would not lead to undue prosecutions is needed, this could be achieved through the publication of prosecutorial guidance committing that individuals involved in such legitimate arrangements would not be prosecuted."*<sup>2</sup>
- 1.3 Moreover, BIS noted that "*in practice, it is very hard to see the Office of Fair Trading ever prosecuting individuals for being party to agreements that are exempt under the*

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<sup>1</sup> BIS press release, "*Paving the way to business freedom*", 9 October 2012

<sup>2</sup> *A note on the application of the amended cartel offence to certain types of restrictive agreements*, BIS, at paragraph 28. Notably, the document states that it has "*benefited from exchanges which the Department has had with the Office of Fair Trading on these issues*".

*civil competition rules... If needed, additional certainty could be achieved through the publication of prosecutorial guidance to make clear that individuals will not be prosecuted for their involvement in legitimate business arrangements."*<sup>3</sup>

- 1.4 Accordingly, it seems to us that the objective of the Draft Guidance that underlies its statutory purpose is not only to guide decision-making of prosecutors, but also to protect individuals, by allowing them to understand the circumstances in which they are likely to be prosecuted under the cartel offence, and providing legal certainty ("committing", in the words of BIS) that they will not face prosecution for legitimate commercial arrangements.<sup>4</sup> Indeed, the wording of Section 190A places no limitation on the persons to whom the guidance is intended to be directed. The need for clarity and certainty for individuals is particularly acute when they face the loss of liberty for their conduct and, where in some instances (e.g. when no longer in the same employment) they may have limited resources to defend themselves against criminal proceedings.
- 1.5 In that context, our view is that the Draft Guidance does not fulfil its purpose. While it does provide a high level overview of the factors that the CMA will consider when determining whether to institute cartel offence proceedings against an individual, and does contain some useful pieces of specific guidance, we consider that additional guidance in a number of areas is required in order to meet that standard. This would also have the benefit of limiting unnecessary compliance costs for businesses.
- 1.6 In particular, the Draft Guidance would, in our view, create considerably more practical benefit if it included further guidance about the type of conduct the CMA has in mind in relation to factors and principles being considered. At present, only some factors contain practical indicators of the type of arrangements or the type of behaviour or arrangements contemplated, such as the list at para 4.9 of conduct amounting to a unilateral restriction which the CMA therefore considers to fall outside the scope of the cartel offence.
- 1.7 In addition, we are concerned that a great deal of uncertainty remains over how certain principles will be applied. For example, whilst the Draft Guidance clearly states that any decision not to bring a cartel offence prosecution will not preclude the CMA from considering whether to bring a civil enforcement action for infringements of EU or national competition law (para 3.4), we would be grateful for similarly clear guidance that:
  - 1.7.1 the CMA will usually only seek to prosecute individuals for the cartel offence in circumstances where such civil enforcement action is also contemplated; or
  - 1.7.2 at minimum, that it is not an enforcement priority of the CMA to prosecute individuals who are party to agreements which are manifestly not in breach of the civil competition rules. In this respect, a clear and very useful piece of

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<sup>3</sup> *Id.* at paragraphs 6 and 7.

<sup>4</sup> For an example of other statutory guidance serving a similar purpose, see: "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)", Ministry of Justice, March 2011.

guidance would be to indicate that the CMA would not ordinarily seek to prosecute conduct that satisfies the qualitative tests for exemption under a block exemption from the civil competition rules (regardless of whether it satisfies any applicable quantitative market share test). That would have the advantage of offering legal certainty – as the qualitative criteria for block exemption are reasonably well understood – while avoiding the need for complex economic assessments of relevant markets and associated market shares.

- 1.8 We recognise that the CMA is keen to avoid "*creating immunities that are not envisaged in the legislation*" by listing situations in which it would not prosecute (para 2.6 Consultation Document). However, it seems to us that there is a distinction between the creation of statutory immunities that prevent the CMA from prosecuting, and a statement of enforcement priorities, which would not prevent the CMA from prosecuting but would give comfort that it is unlikely to treat certain types of conduct as a priority for prosecution. Moreover, the CMA may revise or issue new guidance at any time. Therefore, while any statement as to the CMA's enforcement priorities would offer meaningful guidance to individuals, businesses and their legal advisers, it would not create immunities from the risk of prosecution.
- 1.9 It is clear from the government statements set out above that prosecutorial guidance was intended to clarify uncertainties arising from the wording of the amended cartel offence. As well as fulfilling a statutory requirement, the publication of clear and comprehensive prosecution guidance would benefit the broader public interest in criminalising cartel behaviour, namely to convey a sense of individual responsibility upon employees for conduct that could fall within the ambit of the offence. For this benefit to be realised, however, it is important that companies and individuals have clear guidance as to when conduct is likely to result in prosecution, and how to mitigate that risk. For that reason, we would encourage the CMA to offer greater clarity and detail in relation to the principles and priorities to be applied in determining whether to initiate proceedings for the cartel offence.
- 1.10 One simple way to achieve this would be to provide examples of conduct that would not be considered to be "serious" for the purposes of the "public interest" stage of the Code Test which, as the Draft Guidance notes, involves factors that "relate to matters which are not elements of the offence that need to be proved before the jury". This need not amount to "a list of cases in which the CMA will or will not prosecute" (para 1.6 of the Draft Guidance), but would instead be examples to illustrate how the CMA will apply the principles that are set out in the Draft Guidance.
- 1.11 Please refer to our responses to questions 2 and 3 for further detail on the areas of the draft guidance that we consider would benefit from greater detail and clarity.

<b>Q2. Is the evidential stage of the test of the decision making process explained clearly enough?</b>
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- 2.1 As discussed in response to question 1, we consider there to be a number of areas in the Draft Guidance that would benefit from additional guidance to enable businesses and their legal advisors to fully understand the principles that the CMA will apply

when determining, in any given case, whether to bring proceedings against an individual for the cartel offence.

### **Evidentiary standard**

- 2.2 Paragraph 4.1 of the Draft Guidance refers to the "realistic prospect" test that is set out in the Code for Crown Prosecutors (the "**Code**").<sup>5</sup> In our view, it should also include the following clarification of that test that is contained in the Code: *"It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged."* Given that conviction is only possible where guilt is established beyond reasonable doubt, this evidentiary standard is high.

### **Jurisdiction**

- 2.3 Para 4.5 Draft Guidance notes that *"if the agreement between the individuals is made outside the United Kingdom, proceedings may only be brought where the agreement has been implemented in whole or in part in the United Kingdom"*. We would welcome further detail from the CMA in relation to the types of conduct that will amount to "implementation" of the cartel agreement. Whilst direct sales to UK customers by non-UK entities located outside the UK would clearly meet this criterion, it is unclear, for example, whether sales by non-UK entities to non-UK customers could be caught, and in what circumstances. For instance, does the CMA consider that it would have jurisdiction to prosecute individuals who participated in price-fixing for a primary product sold to third parties outside the UK which was incorporated by those customers into a secondary product sold in the UK?

### **Agreement**

- 2.4 The Draft Guidance notes that the necessary conduct element of the cartel offence is that *"an individual agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities"* (para 4.3). It is unclear from the guidance, however, what principles the CMA will apply when considering whether an individual can be said to have made an agreement. For example, will the CMA seek to show that an individual participated in the cartel activities, or will prosecution be considered where the only evidence of an individual making an agreement is their signature on a relevant document?
- 2.5 We note that there is an important interplay between the above question, the public interest consideration of culpability of the suspect and the availability of exemptions and defences. This is because the Draft Guidance notes that the CMA will *"consider whether the individual is or was in a position of authority or trust within the undertaking"* (para 4.35), suggesting that more senior employees may be considered to have a higher level of culpability than junior employees.

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<sup>5</sup> The Code for Crown Prosecutors, Crown Prosecution Service, January 2013.

- 2.6 In many large companies, senior managers are called upon to sign commercial agreements negotiated and implemented by more junior staff. In such circumstances, senior managers are likely to rely heavily on those responsible for the day-to-day management of the project to ensure that the agreement is implemented in a manner compliant with all relevant regulations (and, therefore, to take the types of steps envisaged by the exemptions and defences to the cartel offence, such as obtaining legal advice). If the CMA considers that acting solely as a signatory to a document is sufficiently credible evidence of an agreement to bring a prosecution, this could place an onerous responsibility on senior managers to scrutinise the implementation of large numbers of commercial agreements to ensure, for example, that customers are notified and/or appropriate legal advice is sought, in order to protect those individuals from the risk of prosecution if the agreement is later deemed to fall within scope of the cartel offence.
- 2.7 We consider that such an approach is likely to pose significant practical difficulties for businesses. For that reason, we consider that the Draft Guidance should emphasise more clearly:
- 2.7.1 the standard of evidence of an individual's "agreement" that must be met before criminal proceedings will be instituted (see paragraph 2.2 above); and
- 2.7.2 that, if uncorroborated by any evidence of actual involvement in cartel activities, the fact that a senior employee has authorised or signed a commercial agreement would not generally meet that standard.

### **Relationship between undertakings**

- 2.8 The Draft Guidance notes that *"in respect of arrangements restricting pricing policy, supply or production the offence also requires that the restriction is reciprocal, and that the arrangement relates to undertakings operating at the same level of the supply chain"* (para 4.7). We would welcome further guidance on the principles that the CMA will apply when considering whether undertakings operate at the same level of the supply chain, including whether the CMA's primary focus will be on the level at which the agreement is established or whether an undertaking will be considered to operate on all levels on which it carries out activities. For example:
- 2.8.1 where a manufacturer enters into an agreement with a third party for exclusive distribution in one territory, but self-distributes in another, would the CMA consider that the manufacturer is operating at the same level of the supply chain as its exclusive distributor, and is therefore market sharing in respect of their respective territories?
- 2.8.2 similarly, might a distributor be treated as having implemented an agreement to share markets with a competing distributor if it agrees with a manufacturer that it will refrain from selling into the other distributor's territory, and that the manufacturer will impose a reciprocal obligation on the other distributor not to sell into the territory of the first? In other words, must the agreement be between individuals who are employed by (or otherwise represent)

undertakings who are competitors, or does it suffice that the agreement results in a sharing of markets between competitors?

2.9 Given that exclusive distribution arrangements of the types described above are extremely prevalent, and that the wording of Section 188 EA2002 is ambiguous on these points, these are important questions. In his speech to the Law Society, the then-Senior Director of OFT Cartels and Criminal Enforcement Group (Ali Nikpay) listed a number of arrangements that he considered would fall outside the scope of the cartel offence based on the relationship between the undertakings concerned, namely arrangements that:

2.9.1 are part of a 'network' of exclusive distribution agreements;

2.9.2 come within the scope of the verticals block exemption; or

2.9.3 would fall to be considered under the vertical restraints guidelines.<sup>6</sup>

2.10 As discussed at paragraph 1.10 above, we consider that it would be helpful for the Draft Guidance to set out examples of types of conduct that the CMA considers would not be in the public interest to prosecute, in a similar form to Mr Nikpay's list and the list of unilateral restrictions outside the scope of the offence presented at para 4.9 Draft Guidance.

## **Exclusions**

2.11 In para 4.13 Draft Guidance, the CMA notes that "*an individual will not commit an offence if under the terms of the arrangement customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected*". We understand that, in order to satisfy the exclusion, such notification cannot take the form of a "*broad general disclaimer that [...] agreements may contain price fixing/ market sharing provisions*". However, it would be helpful to have further guidance on how customer-specific the notification must be, and how soon prior to entering into a supply agreement the notification must be made. For example, we would be grateful for clarification over whether the CMA generally consider the notification exclusion to be satisfied in the following circumstances, assuming in each case that the notification contains all the 'relevant information' set out in para 4.12 Draft Guidance:

2.11.1 a generic email to all of the undertaking's customers sent when the price fixing or making sharing arrangements come into existence; or

2.11.2 a clause drafted into the standard terms and conditions of the undertaking's supply contract, making specific reference to the price fixing/ market sharing arrangement.

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<sup>6</sup> Ali Nikpay speech to the Law Society Anti-Trust Section on '*UK cartel enforcement – past, present, future*', 11 December 2012, accessed at [http://www.oft.gov.uk/shared\\_of/speeches/2012/1112.pdf](http://www.oft.gov.uk/shared_of/speeches/2012/1112.pdf) on 23 October 2013

## Defences

- 2.12 In order to pass the evidential stage of The Full Code Test, the CMA must consider there to be *"sufficient evidence against a suspect to provide a realistic prospect of conviction of that suspect"* (para 3.2 Draft Guidance). In making this assessment, the CMA states that it is required to consider *"what the defence case may be and how it is likely to affect the prospects of conviction"* by assessing *"whether there is evidence that any of the defences may apply"* (para 4.22 Draft Guidance) and *"the credibility and impact of any defence and any other information that the suspect has put forward or on which he or she might rely"* (para 4.2 Draft Guidance). Therefore, the CMA's prosecutorial role requires it to assess how the application of defences may affect the prospects of conviction.
- 2.13 In order to assess the credibility and impact of any defence, we consider that the CMA must necessarily interpret the meaning of the defences set out in the legislation and apply them to the facts of the case under consideration. We therefore disagree with the CMA's assertion that it would not be appropriate for the CMA *"to attempt to provide further interpretation on the legislation such as the availability or operation of defences to the offence"*. Whilst we recognise that the court's jurisprudence may, over time, change the CMA's initial assessment as to how defences operate, the Draft Guidance is incomplete in the absence of guidance on the principles the CMA will apply when considering the application of the defences in order to assess their credibility and impact on any given case. Support for this approach can be taken from the Bribery Act prosecution guidance on the defence of adequate procedures, which noted that *"clearly the defence [...] is likely to be highly relevant when considering whether there is sufficient evidence to provide a realistic prospect of prosecution"*, before offering the following guidance on the application of the defence:

*"Prosecutors must look carefully at all the circumstances in which the alleged bribe occurred including the adequacy of any anti-bribery procedures. A single instance of bribery does not necessarily mean that the organisation's procedures are inadequate. For example, the action of an agent or an employee may be wilfully contrary to the very robust corporate contractual requirements, instructions or guidance"*<sup>7</sup>.

*No intention to conceal the nature of the arrangements from customers or the CMA*

- 2.14 The CMA notes that *"it is a defence [...] for an individual to show that at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service"* (para 4.19 Draft Guidance). A similar defence exists in relation to undertakings who have no intention to conceal the nature of the arrangements from the CMA (para 4.20 Draft Guidance).

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<sup>7</sup> Section 7 of the Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, accessed at [http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf) on 1 November 2013.

- 2.15 The Draft Guidance states that the CMA will "*consider whether the evidence shows that it is likely there was an absence of intention to conceal the arrangements*" from either customers or the CMA (para 4.22 Draft Guidance) and clarifies that there is no obligation on an individual to notify the CMA about the agreement (para 4.23 Draft Guidance). However, no detail is provided on the type of evidence that the CMA may consider to be indicative of an absence of intention to conceal the arrangements. In our view, the absence of guidance on this point renders it very difficult to offer practical guidance to undertakings on how to structure commercial arrangements to ensure that one or both of these defences will be available, especially considering that there is, ordinarily, no obligation on companies to disclose commercial arrangements to their regulator.
- 2.16 We note that during his tenure as Senior Director of the Cartels and Criminal Enforcement Group at the Office of Fair Trading, Ali Nikpay commented that: "*the defences do not require the defendant to show that he/she had a **positive** 'intention **not** to conceal' the arrangement. Rather it will be sufficient for the defendant to show that there was an **absence** of an intention **to** conceal the arrangements from customers or the CMA*"<sup>8</sup>. Mr Nikpay further listed the following factors which, in his view, could indicate an absence of intention to conceal:
- 2.16.1 the arrangements were the subject of a written agreement;
  - 2.16.2 the agreement was discussed openly in relevant parts of the company, including with those responsible for ensuring the company's competition compliance; or
  - 2.16.3 the defendant did not take steps to ensure that others were unaware of the agreement.<sup>9</sup>
- 2.17 Again, it seems to us that it would not be controversial for the CMA to refer to similar factors in the Draft Guidance.

#### *Legal advice*

- 2.18 The CMA states that "*it is a defence [...] for an individual to show that before making the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice about them before they were made or implemented*".
- 2.19 We welcome the CMA's guidance that the term 'professional legal advisers' will cover "*both external and in-house legal advisors qualified in the UK and that it could also apply to legal advisors qualified in foreign jurisdictions with an equivalent legal qualification*" (para 4.24 Draft Guidance). We also recognise that the CMA has sought to provide further guidance on the operation of this defence, by stating that the

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<sup>8</sup> Ali Nikpay speech to the Law Society Anti-Trust Section on '*UK cartel enforcement – past, present, future*', 11 December 2012, accessed at [http://www.offt.gov.uk/shared\\_offt/speeches/2012/1112.pdf](http://www.offt.gov.uk/shared_offt/speeches/2012/1112.pdf) on 23 October 2013

<sup>9</sup> *Ibid*



requirement that an individual must take 'reasonable' attempts to seek legal advice indicates that "*this must genuinely have been an attempt to seek legal advice about the arrangement*" (para 4.24 Draft Guidance).

- 2.20 We remain concerned, however, that a large number of uncertainties remain in relation to the principles that the CMA will apply in considering the credibility and impact of the legal advice defence in any given case, including:
- 2.20.1 whether an individual can benefit from the legal advice defence when another person working for the same undertaking sought legal advice about the arrangement (i) with the direct knowledge, consent or under instruction by the relevant individual, or alternatively (ii) without the individual having any knowledge, consent or instructing that legal advice be sought;
  - 2.20.2 whether individuals from each undertaking involved in the arrangements need to obtain separate legal advice in order to benefit from the defence (for example, whether individuals at separate undertakings can rely on legal advice sought by a trade organisation on behalf of all undertakings involved in a commercial arrangement);
  - 2.20.3 whether the defence may apply where legal advice in relation to the arrangements is sought on the basis of a narrow scope of work, where consideration of issues related to the cartel offence fall outside that scope of work; and
  - 2.20.4 whether the defence will only apply where, at the time of seeking advice, the individual had a good faith intention to take any legal advice received into due consideration, as evidenced by factors such as an intention to wait a reasonable period of time to receive the legal advice before proceeding to make or implement the arrangement (whether or not the advice was in fact received or subsequently followed).
- 2.21 We are aware that limited guidance on the possible operation of the legal advice defence has been offered outside of the cartel prosecution guidance document. For example, earlier this year Stephen Blake, Senior Director in the Office of Fair Trading Cartels and Criminal Enforcement Group, commented that (subject to the publication of prosecutorial guidance), he expects that the legal advice defence will apply where an individual seeks legal advice, regardless of whether that advice is acted upon.<sup>10</sup> We consider this type of insight to be invaluable to provide practical advice to businesses and would strongly encourage the CMA to include further detailed guidance in the prosecution guidance document.

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<sup>10</sup> Law Society Competition Section Annual Conference, 16 May 2013

**Q3. Do you have any comments on the factors that the CMA will take into account in considering the public interest in instating a prosecution?**

*Seriousness of the offence*

- 3.1 The Draft Guidance notes that one of the public interest factors to be considered by the CMA when deciding whether to instate a prosecution is the seriousness of the offence, adding that "*the more serious and potentially harmful the cartel conduct the more likely it is that a prosecution is required*" (para 4.33). We welcome the clear list of factors that the CMA will take into account in assessing the seriousness of the offence. We recommend the addition of a two further factors, namely:
- 3.1.1 consideration of the level of fine that may be levied under the Commission Guidelines on the Method of Setting Fines introduced pursuant to Article 23(2)(a) of Regulation No 1/2003; and
- 3.1.2 whether the arrangement had the object of causing the resulting harm.
- 3.2 We consider that these two factors would be helpful to the assessment of the seriousness of the offence, especially as the CMA will not be required to prove dishonesty on the part of the individual and, as a result, some arrangements that were legitimate under the previous criminal cartel regime and the existing civil competition regime will now fall within scope of the offence. As an alternative to the above, we would welcome the inclusion in the prosecution guidelines of a statement that the CMA will not normally seek to prosecute individuals for the cartel offence unless it is also bringing civil enforcement proceedings in respect of the same arrangement.

*Culpability of the suspect*

- 3.3 The Draft Guidance notes that among the factors determining the culpability of the suspect is "*whether the individual is or was in a position of authority or trust within the undertaking*" (para 4.35), suggesting that more senior employees may be considered to have a higher level of culpability than junior employees. We have two observations in this regard.
- 3.4 First, we consider that the emphasis on seniority as a factor in the assessment of culpability is unjustified. In our view, culpability should be determined according to the level of involvement of the suspect. As noted below, this view is supported by the Code itself. We recognise that the degree to which an individual has directed or otherwise required the participation of others within the undertaking is a relevant factor in determining the level of involvement of that individual in the infringing conduct, and that the individual's seniority may be relevant in this respect. However, we disagree that it is standalone factor that may determine culpability regardless of the individual's level of involvement. As discussed at paras 2.4 to 2.6 above, in many large companies, senior managers may be called upon to sign or approve commercial agreements negotiated and implemented by more junior staff. In such circumstances, senior managers are likely to rely heavily on those responsible for the day-to-day management of the project to ensure that the agreement is implemented in a manner compliant with all relevant regulations (and, therefore, to take the types of steps

envisaged by the exemptions and defences to the cartel offence, such as obtaining legal advice).

- 3.5 Second, the Draft Guidance purports to sets out "*how the Code for Crown Prosecutors will be applied*" in cartel offence cases (para 1.10). However, the Code considers the existence of a "*position of trust or authority*" as relevant to the circumstances of, and harm caused to, the victim, i.e. whether a position of trust or authority existed "*between the suspect and the victim*" (para. 4.12(c) of the Code). There is therefore no support within the Code itself for the proposition that seniority can be treated as a stand-alone factor in the assessment of culpability. The only factor in this regard that is referred to in the Code as relevant to the issue of culpability is the suspect's "*level of involvement*" (para 4.12(b) of the Code).
- 3.6 Separately, we consider that the Draft Guidance should also refer to the relevance of evidence that the individual took steps to prevent or cease concealment of the relevant cartel conduct within his or her undertaking. For instance, if an individual took steps to ensure that legal advice was sought after making the agreement (in which case the defence under Section 188B(3) will be unavailable), or that senior managers became aware of the offending conduct, it seems to us that such steps ought to be relevant in this regard.

#### *Impact on the community*

- 3.7 We consider that the information contained in the Draft Guidance in relation to the arrangement's impact on the community is limited and opaque. Only three potential considerations are listed ("*a diminution of public funds, an effect on public safety or the stifling of innovation*") and none is explained further. Moreover, the Draft Guidance does not explicitly recognise that an arrangement may have positive effects on the wider community and therefore may be a factor tending against prosecution, for example where technological advancement or efficiency gains produce countervailing consumer benefits. By contrast, the prosecution guidance published in relation to the Bribery Act specifically lists factors tending against prosecution as part of the public interest analysis.<sup>11</sup> We would encourage the CMA to adopt a similar approach in relation to the cartel offence prosecution guidance.

#### *Proportionality of instituting prosecution*

- 3.8 We note that the Draft Guidance contains no guidance on whether there are proportionality considerations that are particularly relevant in the context of the cartel offence. It is therefore unclear whether the CMA will take into consideration, among other things, the number of individual suspects against whom prosecution could be instituted and any intention to bring civil proceedings in relation to the same arrangements. We would therefore welcome greater clarity on the principles the CMA will consider when determining whether prosecution is a proportionate response.

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<sup>11</sup> Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, accessed at [http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf) on 1 November 2013.

<b>Q4. Do you have any further comments on the draft guidance?</b>
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- 4.1 In the event that the CMA considers that it would be inappropriate to offer the additional guidance requested in the prosecution guidance, we respectfully request that the CMA considers alternative ways of providing further clarity for individuals, businesses and their professional advisors. For example, notwithstanding our comments in response to the Consultation Document, we would welcome any move by the CMA to publish decisions that it has made to not instigate prosecution against individuals, regularly and in an anonymised form.

**Clifford Chance LLP**  
**November 2013**