



Cartel Offence Prosecution Guidance (CMA 9con)

Response of Herbert Smith Freehills LLP

1. Introduction

1.1 HSF welcomes the opportunity to comment on the CMA's draft cartel offence prosecution guidance (the Draft Guidance) which sets out the principles the CMA will apply in determining, in any case, whether proceedings for the cartel offence should be instituted.

1.2 Although the revised wording of the cartel offence became final following the Enterprise and Regulatory Reform Act's (ERRA) passage through Parliament, it should remain possible to address the impact of some of the uncertainty resulting from the revised wording of the offence, by adopting clear and effective prosecution guidance.

1.3 Without the dishonesty requirement the cartel offence has virtually become a strict liability offence, thereby increasing the need for clarity and certainty as to the application of the offence. Individuals who are at risk of breach of the offence are entitled to a reasonable degree of certainty as to its application and sufficiently detailed and offence-specific prosecution guidance should increase this certainty.

1.4 The Draft Guidance contains some useful guidance and clarification as to how the CMA intends to apply some of the concepts of the offence in practice when reaching a decision whether or not to prosecute. In our view, there are a number of areas which would benefit from further guidance and examples as to the exercise of prosecutorial discretion. In particular:

- The Draft Guidance should contain a positive statement that the CMA will not prosecute agreements that are not in breach of the civil competition law provisions.
- In respect of the exclusions set out in section 188A the Draft Guidance should expand on what the CMA will accept as adequate notification or publication when deciding whether to prosecute.
- The Draft Guidance should clarify how the CMA will assess the strength of the defences.
- The Draft Guidance should expand on the public interest factors likely to be relevant in the CMA's decision whether or not to prosecute.

1.5 We have set out our comments on these points in the order they appear in the Draft Guidance. The comments in this response are those of Herbert Smith Freehills LLP and do not represent the views of our individual clients.



2. The evidential stage

Agreements

- 2.1 We welcome the clarification in paragraph 4.6 that the cartel offence does not cover conduct that falls short of an agreement and that "the mere fact of an individual passing on confidential future pricing information to an individual at a competitor would not in and of itself be caught by the offence".
- 2.2 The non-exhaustive list in paragraph 4.9 of examples of arrangements between undertakings which would not constitute evidence of the commission of the offence on the part of the individuals who reach the agreement about them is also helpful.
- 2.3 In addition, we would argue that the CMA should make it clear in the guidance that it will not prosecute conduct that does not infringe the civil competition provisions. Following the removal of the dishonesty requirement in the definition of the cartel offence, stakeholders raised concerns that the new cartel offence and its form-based nature would potentially criminalise the participation by individuals in agreements to engage in a wide range of otherwise lawful commercial conduct, including agreements that do not infringe the Chapter I prohibition/Article 101 TFEU.
- 2.4 The obligation on the CMA to publish prosecution guidance set out in the new Section 190A, was added to the legislation by way of Government amendment, in response to an opposition amendment which expressed concern that the redrafted cartel offence could catch legitimate business activities between competitors. That opposition amendment was withdrawn after the Government indicated that it would consider those points and would look at ways of improving the drafting of the offence. The requirement for the CMA to publish prosecution guidance is one of these improvements, and the Draft Guidance should therefore endeavour to provide that clarification.
- 2.5 During the ERRAs' passage through Parliament the same arguments were raised by the business community and the CBI published a list of agreements which it argued would be compatible with the civil competition rules but could nevertheless be caught under the new offence.
- 2.6 BIS' note in response to the CBI list states that in practice it is very hard to see [the CMA] ever prosecuting individuals for being party to agreements that are exempt under the civil competition rules, and that, 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*** (emphasis added).



- 2.7 The above clearly indicates that Government intended for clarification on this point to be made in the prosecution guidance. As this clarification relates to the CMA's discretion as to whether or not it will prosecute as opposed to providing further interpretation of the legislation, this falls clearly within the remit of the guidance. We note for example that the Bribery Act 2010 Joint Prosecution Guidance makes it clear that hospitality or promotional expenditure which is reasonable, proportional and made in good faith is an established and important part of doing business and that the Act does not seek to penalise such activity (although hospitality could form the basis of an offence under the Act). There is no reason why CMA's prosecution guidance cannot make a similar statement in respect of agreements not in breach of the civil provisions.
- 2.8 Without this clarification, businesses may be reluctant to proceed with certain agreements which in form are caught by the offence but in substance do not have anti-competitive effects, which risks having a chilling effect on legitimate business activities and innovation. This is the case in particular in respect of certain insurance and banking arrangements¹. As a minimum the Draft Guidance should therefore make it clear that the CMA will not prosecute agreements which do not infringe the Chapter I prohibition and Article 101 TFEU.

Exclusions

- 2.9 The exclusions set out in the new section 188A are drafted in very general terms and it is therefore important that the CMA clarifies in its prosecution guidance how it will interpret the scope and requirements of these exclusions when deciding whether or not the evidential threshold will be met and whether or not it will therefore be able to prosecute.
- 2.10 In respect of the notification and publication exclusions, 'relevant information' has not been further specified by the Secretary of State. The legislation currently provides that 'relevant information' means the names of the undertakings, a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements which fall within the scope of the offence and the products or services to which they relate. It would be helpful to have some guidance which demonstrates what the CMA recognises as a sufficient description of the nature of the arrangements in order to benefit from the exclusions.
- 2.11 Paragraph 4.13 of the Draft Guidance states that "the exclusion will not be satisfied if the arrangement merely provides that customers would be provided with a broad general disclaimer that its agreements may contain price fixing/market sharing provisions". Again, it would be helpful if the guidance would expand on this point and clarify what the CMA, in

¹ Co-insurance agreements, where the insured receives his policy from a pool or group of insurers who share the risk between them or syndicated loan agreements, where funds are lent to the borrower from a group or syndicate of entities at a common rate of interest.



considering whether or not to prosecute, would accept as constituting adequate notification for this purpose, with some specific examples.

- 2.12 In paragraph 4.15 the Draft Guidance could helpfully include a sample publication extract which, according to the CMA, would satisfy the requirements of the publication exclusion.
- 2.13 Furthermore, absent clarification in the Draft Guidance, it would be reasonable to assume that the term "before" in new sections 188A(1)(a) to (c) refers to any time before the arrangement is entered into/the bid is made/the arrangement is implemented (as the case may be). It would be helpful if the Draft Guidance would expressly state this.

Defences

- 2.14 The defences in section 188B are drafted very widely and there is no further guidance as to how they will be interpreted by the CMA when exercising its discretion whether or not to prosecute. Under the revised wording of the cartel offence, it will now be up to the defendants to prove that one of the defences is met, rather than on the CMA to prove the defendant's dishonesty. It is therefore important that the CMA clarifies its interpretation of the scope of these defences.
- 2.15 As with the requirement for the CMA to issue guidance, the defences were added to the revised text of the cartel offence at a later stage, in order to address concerns that the offence would otherwise be unduly wide in its application. It is therefore clear that Government intended that the defences should further limit the scope of the offence and provide extra protection for individuals, but unless the CMA clarifies how it considers these defences will operate in practice, they will not provide much comfort.
- 2.16 It is possible to envisage a number of scenarios which demonstrate a potential tension between the individuals and the company in the context of the defences and it would be helpful if the Draft Guidance would clarify how the CMA intends to deal with this. For example, what would happen if customers are not informed of the nature of the arrangements because of the company's decision not to do so, but where the individual did not personally intend that the nature of the arrangements would be concealed from customers. Similarly, for the legal advice defence, what if an individual wants to seek legal advice in respect of the arrangements but is persuaded by the company that it is unnecessary (or indeed is prevented from seeking advice), would this qualify as 'reasonable steps' to seek legal advice?
- 2.17 Paragraph 4.23 of the Draft Guidance makes it clear that the defence in section 188B(2) does not place an obligation on the individual to notify the CMA and that any evidence of attempts by an individual to bring the arrangements to the attention of the CMA will be considered. It would be helpful if the Draft Guidance would illustrate this with examples of what the CMA will accept as sufficient for this purpose.



- 2.18 The CMA should also clarify what level of protection will be available for any such information about the arrangements that is brought to its attention for the purpose of section 188B(2).
- 2.19 Clarification in paragraph 4.24 of the Draft Guidance in respect of the legal advice defence that the term 'professional advisers' covers both external and in-house legal advisers qualified in the UK is helpful. The Draft Guidance goes on to state that this 'could' apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification. Without further guidance as to when this will be the case, this is not a helpful qualification and it would be more useful if this were to state that it will also apply to foreign qualified legal advisers.
- 2.20 An important point requiring clarification is whether it will be sufficient for the company to have sought (or taken reasonable steps to seek) legal advice on behalf of the individuals concerned in order to allow the individuals to be in a position to benefit from this defence.

3. **Public interest stage**

- 3.1 This section of the Draft Guidance should deal with the factors the CMA will take into account when considering the public interest in deciding whether or not it will institute a prosecution, once it is clear that the evidential threshold has been met.
- 3.2 The public interest factors currently listed in the Draft Guidance are drawn very narrowly and do not provide much scope for not prosecuting where the evidential threshold is satisfied:
- Seriousness of the offence: a cartel offence that qualifies under the criminal cartel offence provision will always be considered to be a serious offence
 - Level of culpability of the suspect: culpability of the individual is an element of the offence and will therefore already have been established at evidential stage
 - Whether an individual was acting openly or not: if the individual was acting openly he/she should benefit from the defences set out in section 188B
 - The extent to which the individual's purpose was to preserve or increase the profits of their organisation or to profit personally: it is difficult to envisage a cartel not entered into for the benefit of the company or individual
 - Wider impact on the Community: there will generally be found to be such impact as a result of a criminal cartel offence
- 3.3 The Draft Guidance mainly repeats the factors listed in the Code for Crown Prosecutors and adds very little guidance that is specific to the cartel offence. The purpose of offence-



specific prosecution guidance should be to provide sufficient information about the factors likely to be relevant for the prosecutor's decision whether or not a prosecution is required. The CMA should expand this section and set out a list of those circumstances and factors that would support prosecution and those that would not.

- 3.4 The CMA should also reiterate here the principle that agreements that do not infringe the civil prohibitions will not be prosecuted.

4. Transitional Arrangements

- 4.1 The legislation (Section 190A(8)) provides that the new offence will only apply to agreements entered into after [1 April 2014] and that relate to arrangements made or to be made after [1 April 2014]. It would be useful if the CMA would confirm in the Draft Guidance that arrangements made before 1 April 2014 but which remain ongoing thereafter will therefore be prosecuted under the current criminal cartel offence regime as opposed to the regime as amended by ERRRA.

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