

1 Introduction and executive summary

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to comment on the draft guidance on prosecution by the Competition and Markets Authority (the "**CMA**") of the criminal cartel offence (the "**Draft Guidance**"), published by the CMA's Transition Team (the "**Transition Team**") in September 2013. BLP has considerable experience of representing clients on the basis of the existing Office of Fair Trading ("**OFT**") and Competition Commission guidance documents, including in relation to the criminal cartel offence introduced by the Enterprise Act 2002 (the "**2002 Act**"), and believes that the Transition Team's proposals are generally a welcome clarification of the CMA's approach to prosecution of the revised cartel offence introduced by the Enterprise and Regulatory Reform Act 2013 (the "**2013 Act**"). However, there are a number of respects in which we believe that the proposals may be improved.

1.2 The comments set out in this response relate principally to a number of concerns raised by the defences to the revised cartel offence discussed at paragraphs 4.19 to 4.21 of the Draft Guidance, and to the factors to be taken into consideration by the CMA at the 'public interest' stage of its two-stage test, listed at paragraphs 4.32 to 4.41.

1.3 The views expressed herein do not necessarily reflect the views of any of BLP's clients.

2 Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be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

2.1 We note that the purpose of the present consultation is not to solicit third party views on the substance of the revised cartel offence. However, we consider that certain elements of the proposed defences to the revised offence, referred to at paragraphs 4.18 to 4.24 of the Draft Guidance, give rise to particular uncertainty regarding how the revised offence is to be applied. We therefore regard it as appropriate to address these concerns for present purposes.

- a) We note that significant evidential difficulties frequently arise in the context of a requirement to prove a negative, such as the requirement to establish, on the balance of probabilities, the absence of an intention to conceal (as described at paragraphs 4.19 and 4.20 of the Draft Guidance). We consider that that it should in the first instance be for the prosecuting authority to demonstrate to the requisite standard of proof that an individual accused of the cartel offence has taken positive steps in an effort to conceal the arrangements in question, at which point the burden of establishing that such steps were not in fact motivated by an intention to conceal the arrangements should shift to the defendant.

- b) We note that the 'legal advice' defence (provided for at paragraph 4.21 of the Draft Guidance) appears to permit a situation to arise in which an individual may successfully adduce legal advice as a defence to the cartel offence, even though the individual may have ignored advice to the effect that the arrangement in question was likely to be unlawful. We therefore consider that the CMA should amend the drafting of paragraph 4.21 to make an exception to the application of the defence in circumstances where an individual has obtained unequivocal professional legal advice to the effect that the arrangements in contemplation are likely to constitute an infringement of applicable competition law.
- c) Further, we note that the 'legal advice' defence makes reference to 'reasonable' steps to disclose arrangements to professional legal advisers for the purpose of obtaining advice. We would welcome clarification as to the circumstances in which the CMA might regard it as reasonable to attempt *and fail* to make such disclosure and/or obtain advice. We encourage the CMA to provide guidance as to whether it considers that it may ever be reasonable for an individual to attempt and fail to disclose arrangements to professional legal advisers or, alternatively, to succeed in making such disclosure but fail to obtain legal advice. Additional clarification in respect of the latter set of circumstances would be particularly welcome, for example regarding whether an individual may reasonably be expected to seek legal advice from a second set of professional legal advisers, having failed to obtain such advice following disclosure of the arrangements to a first set of professional legal advisers.
- d) We consider that paragraph 4.24 of the Draft Guidance should be amended to refer to external legal advisers qualified in the UK or with an equivalent legal qualification in a foreign jurisdiction, and to any in-house legal adviser (regardless of whether or where they are qualified). This proposed amendment is to prevent the unfairness which we consider would arise if individuals were prevented from adducing the 'legal advice' defence in circumstances where they had relied on the advice of unqualified in-house legal advisers.
- e) Finally, we note that the 'legal advice' defence gives rise to concerns surrounding whether individuals (and, by extension, their organisations) will be required to waive legal professional privilege in order to adduce the defence. Any such waiver would of course have considerable implications for any civil enforcement proceedings and/or third-party claims.

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

3.1 Please see our response to question 2, above. In addition, we note our overarching concern that the notification and publication exclusions described at paragraphs 4.13 to 4.15 of the Draft Guidance are likely to be of limited utility in bringing conduct outside the scope of the revised cartel offence, given that secrecy is inherent in the nature of cartel activity. This is particularly so in the case of 'hard core' cartel activity of the type with which the revised cartel offence is concerned.

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

4.1 We note that the list of factors (referred to at paragraph 3.6 of the Draft Guidance) to be considered by the Procurator Fiscal when deciding whether to bring a prosecution of the revised cartel offence in Scotland differs, to an extent, from the list of 'public interest' factors for consideration by the CMA in equivalent circumstances (listed at paragraphs 4.32 to 4.41 of the Draft Guidance). In order to provide businesses and individuals with clarity regarding the factors which will be taken into account by one or both prosecuting authorities – particularly in the case of businesses operating in both Scotland and England and Wales – we consider that these lists should be more closely aligned. We therefore recommend that the CMA incorporate reference to the length of time since the alleged offence took place, the interests of the victim and the alleged offender's age at the public interest stage of its two-stage test.

4.2 We note that paragraph 4.29 of the Draft Guidance gives rise to a lack of clarity regarding circumstances in which the CMA will regard public interest factors as leading to the conclusion that a prosecution should not proceed, as opposed to circumstances in which the CMA regards it as appropriate to proceed with a prosecution in spite of such factors, but considers that the court should have regard to them when sentencing the individual in question. Further clarification of the division between factors going to the likelihood of prosecution, and those going to sentencing, would be welcome.

4.3 We consider that paragraph 4.34 of the Draft Guidance, which states that cartels which have gone on for a "prolonged period" are more likely to require prosecution, should not be included in the CMA's final published guidance. This is because the duration of an anticompetitive arrangement is best taken into consideration by the CMA when deciding whether to institute civil enforcement proceedings against an organisation in respect of suspected cartel activity. When deciding whether to bring a prosecution against an individual, it is more appropriate to have regard to:

- a) the duration of that individual's involvement in cartel conduct, and

- b) the proportion of the cartel's total duration represented by the period of the individual's involvement,

than to the overall duration of the cartel. Having regard to the duration of the cartel itself may lead to a distortion of the CMA's enforcement priorities in cases involving cartels of long duration, in respect of which an individual's participation was, however, very brief. The need to have regard to the duration of an individual's involvement in cartel conduct is already accounted for in the Draft Guidance at paragraph 4.35, although we consider that it may be advisable to amend the Draft Guidance to refer, in addition, to the proportion of the cartel's total duration represented by that period.

- 4.4 Further, we consider that paragraph 4.36 of the Draft Guidance gives rise to a lack of clarity with regard to the impact on the CMA's consideration of whether to prosecute an individual under the revised cartel offence of their desire to profit from the arrangements in question. Paragraph 4.36 refers to an individual's desire to preserve or increase the profits of his or her organisation or to profit personally, but does not indicate how the CMA is to strike a balance between these factors. It is unclear, therefore, whether a situation involving a significant overcharge to consumers by an organisation, but no personal profit to the individual in question, is to be regarded as more serious (and, therefore, more likely to result in prosecution of the individual) than a situation involving limited detriment to consumers but a significant personal profit to the individual.

5 Do you have any further comments on the Draft Guidance?

- 5.1 Given that the 2013 Act is to apply to agreements made after its commencement on 1 April 2014 and which relate to arrangements made or to be made after that date, we note that in practice there is likely to be a period for which prosecutions continue to be brought under the 2002 Act, given that the OFT (and, from April 2014, the CMA) generally deals with cartel arrangements of a historic nature. We encourage the CMA to make the best use of this run-in period by considering means of refining its guidance on prosecution of the revised cartel offence, to provide businesses and the CMA's own officials with the greatest possible degree of legal certainty as to the application of the offence in future cases. In particular, it may be advisable for the CMA to expedite consideration of its existing guidance on the disqualification of directors in competition cases in the light of the revised offence.

- 5.2 We remain available to discuss any of the issues raised in this submission.

Berwin Leighton Paisner LLP

11 November 2013