CONSULTATION ON
COMPETITION AND MARKETS AUTHORITY (CMA) GUIDANCE – PART 2

Response of Edwards Wildman Palmer LLP

Cartel Offence Prosecution Guidance

Introduction

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 15 other locations across the United States, Europe and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting the Government and the CMA Transition Team. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the CMA website.

- This response relates to the *Cartel Offence Prosecution Guidance Consultation Document* (**Consultation Document**), which includes as Annex D the draft *Cartel Offence Prosecution Guidance* (**Draft Guidance**). To the extent that terms have been defined in the Consultation Document and/or Draft Guidance, this response adopts the same terms.

General comments

- Before responding to the specific questions raised in the Consultation Document, we would like to provide some general comments.

- During the consultation and parliamentary debates relating to the reform of the cartel offence, many stakeholders expressed concern that that removal of the dishonesty element could have a chilling effect on legitimate business activity by creating undue uncertainty regarding the scope of the offence and the attendant risk of prosecution. The extent of these concerns led to the introduction of the new exclusions and defences in the ERRA, as well as the statutory duty on the CMA to issue prosecutorial guidance. It was hoped that the prosecutorial guidance would give a degree of reassurance to individuals and businesses that legitimate business practices would not be penalised under the revised offence.

- Unfortunately, the Draft Guidance does not provide such assurance. This outcome is not inevitable. Contrary to the CMA's assertion in the Consultation Document that its hands are effectively tied with regard to the extent of the guidance it can provide, we believe that more could be done in terms of providing meaningful guidance of how the CMA views the offence and how it expects to prosecute it. There is ample evidence in other areas of law of prosecutorial guidance providing meaningful detail as to the types of actions which may or may not trigger prosecution. The Draft Guidance, on the other hand, only describes general principles relating to the manner in which it will approach the evidential and public interest stages when considering whether to prosecute, which do

not provide much further detail beyond what is already contained in the ERRA or in the Code for Crown Prosecutors. We believe it is open to the CMA to provide further, more meaningful guidance on the way in which it will interpret the revised offence and exercise its discretion.

- The wording of s.188 EA02 is sufficiently wide to capture practices that may involve elements of collective price-fixing, market-sharing, customer allocation or the limitation of output, but which would not be viewed as 'hardcore cartels' under civil competition rules or even as infringements of those rules. While public statements made by the CMA suggest that it will prosecute individuals only for participation in 'hardcore cartels', and this point is reflected at paragraph 2.2 of the Consultation Document (noting that it is the intention of the CMA "*to focus its criminal enforcement efforts on prosecuting individuals involved in hardcore cartels*"), the Draft Guidance itself does not include such a clear statement. Such analysis could be readily included, for example in the section dealing with consideration of the seriousness of the offence at the public interest stage.

- It is insufficient simply to state, as the Draft Guidance does (at paragraph 4.32), that "*Hardcore cartels are generally serious and individuals involved in them are likely to have caused serious harm requiring prosecution*". What is needed, in addition, is a statement that conduct that does not amount to hardcore cartel involvement is unlikely to be prosecuted, together with more explanation of what the CMA views as conduct falling within and outside the concept of a 'hardcore cartel'. Given the central importance of this point for any meaningful guidance, the omission of more detailed analysis on this point is a major flaw in the Draft Guidance.

- Finally, the new s.188B EA02 introduces a concept of 'negative intention' relating to the defences to the cartel offence. In other words, the burden will be on the individual being prosecuted to prove that he or she did not have the intention to conceal the arrangement in question. It is far from clear how this burden will be discharged in practice, to the requisite legal standard. It is difficult to believe that the CMA has not given thought to and sought advice on the standard or *mens rea* which would satisfy this condition, and it is disappointing that the CMA has chosen not share its current thinking on this in the Draft Guidance.

Questions

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?**

1.1. In our view the Draft Guidance does not fulfil its statutory purpose, since it fails to provide sufficient concrete guidance on the CMA's views on the scope of the offence or on the circumstances in which the CMA is likely to exercise its discretion to prosecute an individual.

1.2. As noted above, paragraph 2.2 of the Consultation Document states that it is the intention of the CMA "*to focus its criminal enforcement efforts on prosecuting individuals involved in hardcore cartels*". We note that Chapter 2 of the Consultation Document also provides some background on the original statutory intention behind the cartel offence, namely to criminalise and deter participation in "hardcore cartels". A hardcore cartel is described in paragraph 2.2 of the Consultation Document as "*an agreement between competitors to fix prices, share markets, rig bids or limit output* ***at the expense of the interests of customers and without any countervailing customer benefits***" (emphasis added). However, it is clear that the scope of the offence goes far wider than this, since the wording of s.188 EA02 makes no mention of the "interests of customers" or of "countervailing customer benefits". There is no further analysis of the role of these elements in the Draft Guidance itself and, as noted above, there is only limited consideration of the focus on hardcore cartels in that document. (See further below our comments on the public interest stage in response to Question 3.) Without more explicit guidance from the CMA, individuals will be left uncertain as to the delineation between practices which technically fall within the scope of the offence and those which the CMA views as hardcore cartels justifying prosecution.

1.3. Paragraph 2.6 of the Consultation Document states that "*It is not appropriate in prosecution guidance for the CMA to attempt to provide further interpretation of the legislation such as the availability or operation of defences to the offence*". The same paragraph also states that "*it would* [not] *be appropriate for prosecution guidance to set out a list of examples or cases where the CMA would not prosecute*".

1.4. While we appreciate the more limited role of the CMA when acting as a criminal prosecutor, compared for example with its role as decision maker in civil antitrust cases, we do not believe that the CMA has struck an appropriate balance in this case, in terms of providing adequate guidance to individuals and businesses to allow them to delineate between benign and potentially criminal conduct and to assess the risk of prosecution. A comparison with prosecutorial guidance issued in other contexts suggests that it is possible to provide some interpretation of legislation and concrete examples of conduct which would not be viewed as criminal or which would not merit prosecution, without overstepping the boundaries set by the underlying legislation.

1.5. For example, the Bribery Act 2010 prosecution guidance[1] states specifically that the "*Act does not seek to penalise*" certain hospitality or promotional expenditure. This helpful guidance, which was specifically sought at the time of that act's enactment, is not, could not logically be viewed as, "*creating immunities that are not envisaged in the legislation*", but rather provided helpful clarification and reassurance that reasonable hospitality and promotional expenditure would not be affected.

1.6. Similarly, the C*PS Guidance on Racist and Religious Crime* states explicitly, in relation to racist chanting at football matches, that (i) the crime does not apply to chanting which is of a religious nature, and (ii) the offence was introduced to combat the problem of mass racist chanting.

[1] *Bribery Act 2010: joint prosecution guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.*

1.7. These examples show that it is clearly possible for a prosecuting authority to provide further guidance on how it will enforce the law than that contained in the Draft Guidance. Given the nature of the parliamentary debates that preceded the changes to the s.188 EA02 offence, it is particularly important that the CMA provides meaningful guidance on the impact of a material change in the law that was hotly debated because of the uncertainty it creates.

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

2.1. As noted above, we have a general concern that the document fails to give sufficient guidance on the revised scope of the cartel offence or on how the CMA intends to prosecute.

Agreements not constituting evidence of a cartel offence

2.2. While there is a list of examples of arrangements which would not constitute evidence of the commission of an offence, this list does little beyond stating the elements of s.188 EA02; it is apparent from the wording of the section, for example, that unilateral restrictions and vertical agreements are not to be viewed as potential criminal offences.

2.3. We are concerned that the amended offence will catch participation in agreements which:

(a) are not caught by Article 101(1) TFEU/the CA98 Chapter I prohibition, on the basis that they do not give rise to a restriction of competition or qualify as *de minimis* agreements;

(b) fall within the safe harbor of a block exemption, such as research and development agreements that provide for the joint pricing of contract products in compliance with the Research and Development Block Exemption; or

(c) are individually exempt from the application of Article 101(1) TFEU/the Chapter I prohibition pursuant to Article 101(3) TFEU/section 9 CA98.

2.4. The wording of s.188 EA02 does not explicitly exclude such agreements from the scope of the criminal cartel offence. It does not seem logical that entering into an agreement that would not constitute a civil cartel offence may nevertheless be viewed as commission of the criminal cartel offence. Clear guidance from the CMA is needed to assure individuals and businesses that it is not the intention of Government or the CMA to criminalise behaviour that is viewed as benign under civil competition rules. It is worth noting that clarity is needed not just because it affects the CMA's decision to prosecute, but also because whether an agreement falls within the legal scope of the offence could affect its enforceability and raise wider compliance issues, including reporting obligations under the Proceeds of Crime Act 2002.

2.5. On a narrower point, it appears to us that the reference in footnote 26 of the Guidance should be to subsection 188(3) EA02, rather than to subsections 188(1) and (2), since it is that subsection that specifies the reciprocity requirement.

Exclusions

2.6. The Draft Guidance adds very little in the way of guidance beyond that which is already provided by the wording of the EA02 (as amended). For example, it would have been helpful if the CMA had clarified circumstances in which the publication of less information than that listed under "Relevant Information" would nevertheless be acceptable, e.g. when not all Relevant Information is available at the time the agreement is entered into.

2.7. There is reference to consideration being given to "genuine steps" being taken in relation to the statutory exclusions (paragraph 4.16 of the Draft Guidance), without any further guidance on what is meant by "genuine steps". The second bullet of paragraph 4.16 also seems to suggest that all agreements that may potentially fall within the scope of s.188 EA02 must be effectively suspended until the notification requirement or publication requirement have been met. The potential delay caused by this requirement, combined with the fact that benign agreements are currently potentially subject to prosecution, is likely to have a chilling effect on legitimate business practices.

Defences

2.8. Again, the Draft Guidance adds very little beyond the wording contained in the ERRA. Further guidance on how the CMA will interpret the concept of "no intention to conceal" would be appreciated. It is important to note that businesses often have very good reasons for concealing information about agreements from customers and the public generally, not least of which is the requirement commonly contained in commercial agreements that confidential information will be kept confidential. In addition, commercial agreements often prevent either party disclosing the details or even existence of the agreement without the other's consent. In such circumstances, such provisions could be viewed as indicating an "intention to conceal", albeit one that was not driven by a desire to hide anti-competitive conduct.

2.9. Further guidance on the steps to be taken to ensure that arrangements are not concealed from the CMA in order to qualify for the defence would also be appreciated. The statement that "*Any evidence of attempts by an individual to bring the arrangements to the attention of the CMA will be considered*" is ambiguous, as are its implications. What procedures does the CMA propose to put in place to handle such notifications? How will information disclosed to the CMA in this way be handled? Will information be used for civil antitrust enforcement? Are parties to an agreement required to notify the CMA of the same Relevant Information required to meet the notification or publication exclusions? Will the CMA introduce a specified form or will a simple letter, phone call or email suffice?

2.10. It is unclear why the CMA has felt able to provide guidance that effectively limits the scope of this defence, by at least calling into question its availability when advice is provided by a non-UK lawyer, while declining to offer similar guidance elsewhere that may limit the scope of the *offence*. The defence in s.188B(3) EA02 requires only that an individual took "*reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them*". Most of paragraph 4.24 simply restates this language in a slightly different way. It remains unclear whether legal advice must be sought on whether the arrangement

constitutes an offence under s.188 EA02 or whether the seeking of *any* legal advice (such as contract law, IP law or employment law advice) is sufficient to qualify for this defence (we assume that it is the latter). It may also be helpful to clarify that the key factor is that advice is sought, irrespective of whether advice is forthcoming, the content of the advice given or whether it is followed.

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. We do not believe that paragraphs 4.26 – 4.41 of the Draft Guidance, covering the public interest stage, are adequate to provide any real certainty because they are so general.

3.2. Paragraph 2.3 of the Draft Guidance states that there "*is an inherent public interest in individuals in such hardcore cartels being prosecuted*", and this is echoed in paragraph 4.26. This appears to suggest that, if the evidential stage is passed, a rebuttable presumption will effectively be created that prosecution will be in the public interest, unless the public interest stage indicates otherwise. This seems to us to be the wrong starting point: the public interest stage should be used to assess whether there is evidence that a prosecution is actually in the public interest, not to rebut a presumption that a prosecution is automatically in the public interest if it meets the evidential requirements of s.188 EA02. The approach adopted is particularly troublesome, given the concerns raised above regarding the potential practices falling within the definition of the offence in s.188 EA02 and the lack of clarity as to which business practices would be viewed as hardcore cartels by the CMA.

3.3. We would have expected some more consideration of the relationship between the civil and criminal offence, and the circumstances in which a criminal prosecution may be considered when no civil action is pursued. The Draft Guidance also makes no mention of any consideration being given to the impact that a criminal prosecution may have on a civil prosecution.

3.4. As noted in response to Question 1, paragraph 2.2 of the Draft Guidance makes reference to the impact on customers and countervailing customer benefits. However, these factors are not mentioned in relation to the consideration of the seriousness of the offence committed (although there is a generic reference to impact on the community in paragraph 4.40 of the Draft Guidance). It appears to us that a consideration of the impact of an alleged offence on competition and any countervailing customer benefits should form part of the public interest consideration. Indeed, the wording of paragraph 2.2 of the Draft Guidance suggests that this may be the CMA's intention, but it is not reflected anywhere in paragraphs 4.26 – 4.41.

3.5. Paragraph 4.41 adds nothing to the Draft Guidance. It seems inconceivable that the CMA has not given consideration to factors that will be taken into account when deciding whether prosecution is proportionate and it is disappointing that the CMA has chosen not to provide further detail on the proportionality test. This is also linked to the lack of guidance on whether prosecution would be deemed to be in the public interest in the absence anti-competitive effects and harm to consumers: would it be proportionate to

prosecute in such circumstances? If the answer is no, why then does the Draft Guidance not clearly state that this is the position?

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

4.1. For reference, our comments on the Draft Secondary Legislation relating to the Cartel Offence are attached as **Annex 1** to this response. In accordance with the consultation requirements, these comments will be submitted separately to BIS.

Edwards Wildman Palmer LLP
11 November 2013

EDWARDS WILDMAN

ANNEX 1

BIS CONSULTATION ON
COMPETITION REGIME: DRAFT SECONDARY LEGISLATION – PART TWO

Response of Edwards Wildman Palmer LLP

Cartels: Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014

Introduction

- This response has been prepared by Edwards Wildman Palmer LLP (**Edwards Wildman**), an international law firm with offices in London and 15 other locations across the United States, Europe and Asia. The views set out in the response reflect our lawyers' experience representing clients before the EU and UK competition authorities and are provided in the interests of assisting Government and the CMA Transition Team. We have not consulted with our clients as part of the preparation of this response and, as a result, the response does not necessarily represent their views. We are happy for this response to be published on the BIS website.

- To the extent that terms have been defined in the Draft Secondary Legislation, this response adopts the same terms.

Questions

1. **What is your view on the proposed manner of publication of relevant information?**

1.1. We do not consider the proposed manner of publication to be appropriate. In particular, the cost of publication in a *Gazette* is likely to be create concerns, and the delay between notification and publication may (i) discourage publication of agreements whose implementation is time critical, and (ii) at the same time, have a chilling effect on business by discouraging parties from engaging in legitimate business practices which they do not wish to notify (e.g. for confidentiality reasons) or time-critical agreements which they feel they cannot enter into prior to publication.

1.2. It is unclear why the Secretary of State has adopted such a prescriptive and limited method of satisfying the requirement of publication specified in s.188A(1)(c) EA02. We note that there are any number of other public forums for publication of relevant information, including companies' own websites which can easily be reviewed by parties interested in relevant agreements. Given that the use of such methods are deemed sufficient for various formal purposes, and will for example be sufficient to ensure that "facts are made public" under section 24(2)(b) EA02, it is not clear to us why such alternatives have not been considered in the Draft Secondary Legislation.

2. **Can you estimate the number of advertisements which might be placed in one of the *Gazettes*?**

2.1. It is impossible to estimate this, as it remains unclear how businesses and their advisers will respond to the new legislation. On the one hand, the lack of clarity in the Draft *Cartel Offence Prosecution Guidance* may encourage the advertisement of large numbers of benign agreements which are not clearly outside the scope of s.188 EA02. On the other hand, various factors may discourage advertisements, in particular (i) the cost and administrative burden involved of notifying each individual agreement, particularly in industries where (legitimate) cooperation between competitors is commonplace and frequent, (ii) concerns regarding the commercial confidentiality of the information that must be published and (iii) risk that customers could misinterpret or misunderstand information so published.

3. **Do you have any other comments on the draft Order?**

3.1. We have no further comments on the draft Order.

Edwards Wildman Palmer LLP
11 November 2013