

Response to BIS CMA Transition Team

CMA9con: Cartel Offence Prosecution Guidance

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CMA9con: CARTEL OFFENCE PROSECUTION GUIDANCE

This response represents the views of law firm Allen & Overy LLP on the draft Competition and Markets Authority (CMA) guidance document *CMA9con: Cartel Offence Prosecution Guidance* (the **Draft Guidance**). We have also responded separately to the following consultations:

- Competition Regime: Draft secondary legislation – part two
- CMA8con: Competition Act 1998: CMA Guidance and Rules of Procedure for investigation procedures under the Competition Act 1998
- CMA10con: Regulated Industries: Guidance on concurrent application of competition law to regulated industries
- CMA11con: Remedies: Guidance on the CMA’s approach to the variation and termination of merger, monopoly and market undertakings and orders
- CMA12con: Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance
- CMA13con: Vision, values and strategy for the CMA

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA’s website.

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 **Does the Draft Guidance fulfil its statutory purpose, namely to set out the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be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 We accept that it is not appropriate in this prosecution guidance for the CMA to attempt to provide further interpretation of the three new defences to the cartel offence introduced by the Enterprise and Regulatory Reform Act 2013 (**ERRA13**) to the Enterprise Act 2002 (**EA02**). This falls squarely within the role of the criminal courts.
 - 1.2 However, we consider it firmly within the remit of this prosecution guidance for the CMA to provide guidance on the new exclusions from the cartel offence. Its decision on whether an exclusion applies forms part of the exercise of its prosecutorial discretion – whether or not to institute proceedings. In this sense, we consider the Draft Guidance falls short (see our response to question 2 below).
2. **Is the evidential stage of the test of the decision making process explained clearly enough?**
 - 2.1 We consider that the Draft Guidance generally explains the evidential stage in a clear, sequential manner. We have a few comments however.
 - 2.2 We are disappointed that the Draft Guidance does not add much to the bare bones of the statute in terms of the exclusions. In particular, we would like to see articulated more of the CMA’s thinking as to the likely application of the new notification and publication exclusions.
 - 2.3 The introductory section of the Government’s “*Consultation on draft secondary legislation – part two*” (**SI Consultation 2**) contains, at chapter 2, additional information on the background and purpose of the exclusions. We believe the CMA could include and expand on these points in the Draft Guidance.

- 2.4 For example, paragraph 2.6 of the SI Consultation 2 states “*there are a limited number of agreements which may technically fall within the terms of s.188 in the absence of a requirement to prove dishonesty but which would not be unlawful in that they do not infringe the civil antitrust prohibitions against anti-competitive agreements*”. It would be useful if the Draft Guidance could include wording to this effect, and give examples of the types of agreements the Government/CMA is thinking of here. For example, would it include a joint venture between airlines involving the setting of common ticket prices? This is a horizontal agreement involving two or more undertakings engaging in price fixing. It therefore technically falls within the scope of the cartel offence. However, while such an arrangement would be caught by the civil prohibition in Chapter I CA98 or Article 101(1) TFEU, it would likely benefit from an exemption under section 9 CA98 or Article 101(3) TFEU.
- 2.5 We understand that it will be difficult for the CMA to give too much detail in any such examples they include, over concerns that they would be setting a precedent that certain fact patterns will fall outside the civil antitrust prohibitions. However, some more general examples would be very helpful.
- 2.6 In terms of more detailed comments on the text of the Draft Guidance:
- Given that market sharing is listed as one of the prohibited cartel activities we consider that, for completeness and absolute clarity, sharing markets should be included explicitly as a relevant restriction at paragraphs 4.7 and 4.8.
 - The example given under the heading “Operating at different levels of the supply chain” at paragraph 4.9 is not particularly helpful as it merely repeats paragraph 4.8(ii). Perhaps the example could refer to, say, a manufacturer and distributor (or other vertical relationship) to add some colour.
 - Paragraph 4.16 is drafted rather opaquely. It states that “[e]vidence of genuine steps being taken in relation to one of the statutory exclusions will be relevant to whether or not there was [an intention as to how the arrangements would operate] even if they failed to meet the requirements of section 199A”. This implies that an individual may still be able to rely on an exclusion even where inadvertent failures mean that the exclusion is not technically satisfied. If this is the case, the CMA should state this explicitly.
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 consider that the public interest factors detailed (and boiled down to four relevant questions) provide useful clear guidance as to the CMA’s approach to instituting a prosecution.
4. **Do you have any further comments on the Draft Guidance?**
- 4.1 Annexe B of the Consultation Document sets out the impact of the new cartel offence on existing Office of Fair Trading (OFT) guidance documents. We note that *OFT515: Powers for investigating criminal cartels* will become obsolete when the new cartel offence comes into force. The CMA will consider whether to issue new guidance. We would be grateful for an update on this workstream when appropriate. Similarly, we would welcome an update on work undertaken on the new memoranda of understanding to replace *OFT546: Memorandum of understanding between the OFT and the NCD, Crown Office, Scotland*, and *OFT547: Memorandum of understanding between the OFT and the Director of the SFO*, both of which we would expect to be finalised before the new offence applies.