Response to the Competition and Markets Authority (CMA) Cartel Offence Prosecution Guidance Consultation Document dated September 2013

1 Introduction

1.1 This response is submitted by Linklaters LLP in response to the Competition and Markets Authority's ("**CMA**") consultation (the "**Consultation**") on the "Criminal Cartel Offence Prosecution Guidance" (the "**Guidance**"), published on 17 September 2013.

2 General comments

2.1 Linklaters welcomes the opportunity to comment on the draft prosecution guidance. We provide some general comments below and some specific points in section 3 and 4.

2.2 The amendments to the cartel offence considerably expand the scope of the offence and significantly amends the evidential test for bring a prosecution, in particular by the removal of the dishonesty element of the offence. It is, therefore, important for confidence in the regime and certainty as to individuals' criminal responsibility that there is clear and practical guidance.

2.3 Paragraph 2.6 of the background / legal framework to the draft Guidance, states that *'it is not appropriate in prosecution guidance for the CMA to attempt to provide further interpretation of the legislation …*'. Further, surprisingly, the guidance does not provide examples of circumstances where the CMA would not prosecute. We accept that the CMA should not usurp the role of the courts but we nevertheless consider that the CMA permissibly has scope to provide more specific guidance than that currently included in the Guidance.

2.4 We note that the legal basis for the prosecution guidance on the offence of assisting and encouraging suicide ("**the Assisted Suicide Guidance**"), *R (on the application of Purdy) v DPP* [2009] UKHL45, provided that the DPP should *'clarify what his position is as to the factors that he regards as relevant for and against prosecution',* which, in terms of the level of detail required, is not significantly dissimilar to s.190A(1) which provides that the *'CMA must prepare and publish guidance on the principles to be applied in determining … whether proceedings for [the] offence … should be instituted'*. As the assisted suicide guidelines are significantly more specific as to the factors that militate for and against prosecution, we consider that there is considerable scope for the CMA to be more specific as to principles, including the types of activities that would fall within and without the offence, for determining whether proceedings will be brought without encroaching on the role of the courts or the primacy of parliament.

2.5 Furthermore, whilst it is clear that judicial interpretation will be vital for determining the scope of the offence, there is likely to be a considerable period of time before such clarification is provided by the criminal courts, particularly for "less serious" cases, as the CMA is likely to focus on more serious ones first, thereby extending the period of uncertainty for business. Given the CMA's express obligation to prepare and publish guidance we believe, for the reasons set out above, that there is scope for the CMA to provide further clarity in respect of when it would bring a prosecution under the offence, a duty which is made more pressing given the considerable uncertainty that is likely to prevail until clarification is provided by the criminal courts.

3 Specific comments on legislative background (paragraphs 2.1 – 2.7 of the Cartel Offence Draft Guidance)

3.1 Paragraph 2.1 of the Guidance provides that the *'criminal cartel offence was created … with the intention of criminalising and deterring behaviour by individuals leading to the most serious and damaging forms of anti-competitive agreements, namely 'hardcore cartels".* The term "hardcore cartel", however, does not appear in either the Enterprise Act 2002 or the Enterprise and Regulatory Reform Act 2013 but is summarised in paragraph 2.2 of the Guidance which provides that *'[i]n essence, a hardcore cartel is 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'*. This definition of hardcore cartel, encompasses a more narrow range of activity than the offence as drafted in the legislation. It is therefore misleading to include paragraphs 2.1 and 2.2 as currently drafted in the "legislative background" section of the Guidance as this potentially indicates that the definition of 'hardcore cartel' is a faithful reflection of the legislation whereas, in fact, it amounts to a limitation of the offence as drafted.

3.2 As, however, the term 'hardcore cartel' is used subsequently in the Public Interest Stage of the Guidance it would be helpful to include the summary of the term in this section so as to clarify at least some of the uncertainly surrounding the offence. We note that helpfully the explanatory notes to the un-amended Enterprise Act 2002 provide that the *'civil regime applies to a much wider range of anti-competitive activities than are targeted by the criminal offence'* providing some basis for the proposition that the offence, certainly prior to its amendment, was intended to cover a narrow range of particularly deleterious anti-competitive activities. Such an amendment would go partially to clarifying the intended scope of the offence.

4 Specific comments on the evidential stage (paragraphs 4.1 – 4.25 of the Cartel Offence Draft Guidance)

Scope for greater clarity

4.1 The removal of the 'dishonesty' element from the offence means that a much broader range of conduct will be caught by the offence. Given the now strict liability nature of the offence (given the absence of mens rea in the offence itself), the Government sought to include certain new exclusions and defences. We consider the draft guidance could provide greater clarity with regard to how the exclusions and defences will operate in practice whilst still avoiding creating 'white list' immunities that are not envisaged in the legislation. This would be of particular assistance for companies in the exercise of their compliance functions.

4.2 In this regard, we note that guidance, for the reasons above, may be drawn from the level of detail contained in the Assisted Suicide Guidance and the prosecution guidance for the offence under the Bribery Act ("**the Bribery Act Guidance**"), both of which provide greater level of detail with regard to (i) clarifying the prosecutorial authorities' understanding of the limits; and (ii) identifying specific types of cases that give rise to difficulties in interpretation of the relevant legislation.

4.3 We consider this to be important in the context of arrangements which are exempt or potentially justifiable under the civil regime but would fall within the scope of the amended offence, for example:

4.3.1 A crisis cartel;

4.3.2 Cooperation agreements between horizontal competitors (such as commercialisation and standardisation agreements) which include a price fixing element or which limit output;

4.3.3 Determining premiums in joint underwriting arrangements;

4.3.4 Non-compete arrangements between two or more parties in the context of setting up a joint venture or multiple parties in an existing joint venture;

4.3.5 R&D agreements which restrict exploitation of the results, allocate territories/customers or limit the production/supply of competing products; and

4.3.6 Specialisation agreements which restrict production/supply or set prices to immediate customers in the context of joint distribution.

4.4 We note that the Department for Business, Innovation and Skills ("**BIS**") has itself recognised that some of the above would fall within the offence whilst falling outside the civil regime.[1] BIS has also recognised that in certain instances businesses may inadvertently fail to notify or publish the relevant information as envisaged under the legislation. In which instance, *'[i]f 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 in such legitimate arrangements would not be prosecuted*.[2] We consider that the CMA can afford to be more explicit that activities that do not infringe the civil regime fall outside the scope of the offence in the Guidance and, furthermore, the CMA should follow BIS's suggestion that the Guidance should clarify that inadvertent failure to notify or publish the relevant information should not lead to undue prosecution for the offence.

4.5 In particular, we consider it a perverse outcome for business that agreements justifiable under 101(3) TFEU have to potentially then rely on a "defence" or "exclusion" to fall outside the scope of the offence. This will drive a need for greater clarity in the prosecution guidance as a practical means for providing comfort to business entering into legitimate and efficiency enhancing commercial agreements - i.e. that the CMA will not prosecute agreements which would be civilly exempt on an efficiencies basis. Indeed, we note that this has been partially recognised this in paragraph 2.2 of the Guidance where it states that "hardcore cartels" are without *'any countervailing benefits'*. For the reasons set out above, however, we do not consider it appropriate to include this section in the "Legislative Background" and submit that a more conclusive statement that agreements justifiable under 101(3) would fall outside the offence would be helpful.

Exclusions

4.6 Paragraphs 4.11 to 4.16 of the Guidance provides that parties to arrangements that would otherwise fall within the offence may bring those arrangements outside the scope of the offence by ensuring that the arrangements satisfy the requirements of the notification exclusion or the publication exclusion.

4.7 Each of the exclusions provided for in Section 188A of the Enterprise Act 2002 requires the provision of 'relevant information' which means the names of the undertakings to which the arrangements relate; a description of the nature of the arrangements which is sufficient to

[1] Paras. 22 – 23 BIS, *'A note on the application of the amended cartel offence to certain types of restrictive agreement'*.

[2] Para. 28, Ibid.

show why they are or might be arrangements which fall within the scope of the offence; the products and services to which they relate; and any such information as may be specified in an order by the Secretary of State.

4.8 However, it would be useful if the Guidance provided additional clarity in respect of the following:

4.8.1 What level of detail 'description of the nature of the arrangements' means? For example, is it sufficient to say on X date Company A and Company B propose to enter into an agreement or does it then need to say Clause 4 of the agreement provides that for the duration of the term the parties will not sell in competition with each other in each other's territories?;

4.8.2 How the potential disclosure of confidential terms in an agreement might be managed. The obligation to disclose terms of an agreement may result in confidential competitively sensitive information being published, something which may given rise to a potential breach of competition law;

4.8.3 Not all 'relevant information' may be known/available to the notifying party "*before entering into the agreement*" (for example, a co-underwriting agreement where the organiser may enter into the agreement to provide insurance to a customer before knowing the identity of the co-insurer); and

4.8.4 The status of existing commercial arrangements may be amended over time, but it is not clear whether, if amendments to such agreements contain features that may bring it within the scope of the offence, companies would need to inform existing customers prior to entering into such arrangements. Similarly, the Guidance does not explain how the CMA proposes to address the publication regime in the context of existing agreements. Under section 47(8) of the Enterprise and Regulatory Regime Act the amendments to the offence will only apply to agreements entered into on or after 1 April 2014 but will it apply to existing agreements that are subsequently amended?

4.9 Absent more specific guidance in relation to the types of agreements caught, business would have to make a judgement on how the CMA's discretion would be exercised. It may also result in an unnecessarily large number of Gazette advertisements if the Guidance is not made more specific.

Defences

4.10 We believe that there is scope to provide more information in respect of the applications of the statutory defences.

4.11 Additional guidance could be provided in respect of the 'types of evidence' that the CMA would consider sufficient to demonstrate that there was 'no intention to conceal' and how this would apply. For example, in the context of joint ventures, parties will have a legitimate commercial interest in not wanting to publish or otherwise make known specific details of the arrangements. Would the disclosure of the existence of the joint venture be sufficient? Would this be regarded as 'credible'?

4.12 In relation to '*no intention to conceal from the CMA*', paragraph 4.23 of the Guidance states that there is no obligation on the individual to notify the CMA about the agreement and there is no duty on the CMA to respond to such notification. Given this statement is the CMA expecting active engagement? If a party to an agreement elects to notify the CMA, is

an email to the CMA summarising / attaching the agreement sufficient or not? If the CMA receives information it is not clear how they would manage such information, particularly in relation to maintaining confidentiality.

4.13 Paragraph. 4.24 of the Guidance relates to the defence of *'taking reasonable steps to ensure that the nature of the agreements would be disclosed to professional legal advisors for the purpose of obtaining advice about them …'*. While paragraph 4.24 provides guidance on the scope of "professional legal advisors" there are a number of issues on which it would be helpful to include further information:

4.13.1 There is inherent uncertainty in relation to what "reasonable" steps are required to be taken in order to satisfy the requirements of the defence. It would be helpful if there could be further guidance on what constitutes "reasonable" steps to obtain legal advice.

4.13.2 Whilst judicial interpretation will be key (from an in-house counsel perspective especially) what would be a "genuine attempt" is not currently clear.

4.13.3 Whether the advice sought needs to be specifically in relation to the offence or whether, in particular, it would be sufficient for the advice to be in relation to Article 101 TFEU / Chapter 1 Competition Act 1998; and

4.13.4 Would the position of the defendant be different if he or she proceeded with the agreement in the situation where he or she either: (i) chose to implement in the time between requesting and receiving the advice; for example, is the fact they requested advice sufficient or does it have to be advice in relation to the offence; or (ii) chose not to take account of the advice in the executed agreement? Would the content of the advice received affect the ability to rely on the defence?

4.14 In addition to the above, we note that the Guidance does not discuss the impact of the defence on legal privilege. It is unclear whether in order to substantiate the defence it would be necessary to waive legal privilege that would otherwise cover correspondence between in-house counsel and / or external counsel and other employees of the undertaking concerned. It would be helpful for the CMA to clarify whether this is the case.

5 Specific comments on the public interest stage (paragraphs. 4.25 – 4.41 of the Cartel Offence Draft Guidance)

5.1 We also consider that additional clarity could be provided with regard to the 'public interest stage' for example:

5.1.1 Paragraph 4.27 states that in deciding the public interest, the CMA will consider each of the public interest questions so as to identify and determine the relevant general public interest facts tending for and against prosecution, but these factors would benefit from an explanation of relative weighting and significance to be applied;

5.1.2 Paragraph 4.33 states that the harm caused is a relevant factor for determining the seriousness of the offence committed. We note that this is consequently an economic assessment of the harm caused by the arrangement in question and such an assessment should also be part of determining whether the offence has been committed at all.

5.1.3 The public interest stage would also benefit from an explanation of the interrelationship between the criminal and civil enforcement regimes. It would be helpful to provide greater clarity as to whether criminal proceedings are likely to be brought in circumstances where civil enforcement is not being pursued;

5.1.4 The relevance of whether the alleged cartel arrangements will not result in any anti-competitive effect, for example, because it is capable of exemption as a result of efficiencies (and see paragraphs 4.3 to 4.5 above).