

**Competition and Markets
Authority (CMA)**

**Cartel Offence
Prosecution Guidance**

Consultation Document

September 2013

CMA9con

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Any enquiries regarding this publication should be sent to us at: CMA Transition Team on behalf of the CMA, Department for Business, Innovation, and Skills, 3rd Floor, 1 Victoria Street, London SW1H 0ET, or email cmaconsultation@bis.gsi.gov.uk.

This publication is also available at: www.gov.uk/cma.

Scope of this consultation

Topic of this consultation

This consultation seeks views on the attached draft guidance which the Competition and Markets Authority (CMA) Transition Team (the Transition Team) (on behalf of the CMA, and in consultation with the Office of Fair Trading (OFT) and the Competition Commission (CC)) proposes to issue in relation to the prosecution of the criminal cartel offence under section 188 of the Enterprise Act 2002 (EA 02) as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA 13). The revised cartel offence will come into force on 1 April 2014. The CMA has an obligation to publish prosecution guidance pursuant to section 190A of EA 02.

This consultation and the accompanying guidance have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and CEO Designate, and consists of individuals from the OFT, the CC and elsewhere.¹

Geographical scope

The geographical scope of the consultation is the UK.

Basic information

This consultation is aimed at those who have an interest in the cartel offence. In particular, it may be of interest to businesses and their legal and other advisors.

How to respond

We would welcome your comments on any aspect of the guidance contained in this document. Annex A contains the specific questions on which your feedback is sought.

You can respond to this consultation:

By email to cmaconsultation@bis.gsi.gov.uk

¹ Pending formal creation of the CMA on 1 October 2013, the OFT and CC act on behalf of the CMA

By post to:

The CMA Transition Team on behalf of the CMA

(c/o Easha Lam)
Department for Business Innovation, and Skills
3rd Floor, Orchard 2
1 Victoria Street
London
SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

Enquiries

If have any questions relating to this consultation please contact Easha Lam on the email address above or by telephone on 020 7215 2044.

Closing date

Responses should be received by 5pm on 11 November 2013.

Next steps

The Transition Team will consider the responses to this consultation document and make amendments to the guidance where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance, to be published in advance of 1 April 2014.

Compliance with the Cabinet Office Consultation Principles

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe C and D.

Consultation period

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the proposed approach to the guidance. Furthermore, the timetable for the formation of the CMA requires that consultation exercises on numerous proposed guidance documents need to be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway
Department for Business, Innovation, and Skills
Consultation Coordinator
1 Victoria Street
London
SW1H 0ET

Telephone John on 020 7215 6402 or e-mail to: john.conway@bis.gsi.gov.uk

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information

under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

CMACON9

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1 INTRODUCTION

- 1.1 The CMA will be established under the Enterprise and Regulatory Reform Act 2013 (ERRA13) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets:
- under the Enterprise Act 2002 (EA02), the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
 - the EA02 will also enable the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
 - the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the EA02) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
 - the CMA will also take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations such as under section 193 of the Communications Act 2003
 - the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under section 188 of the EA02, and
 - finally, under the Competition Act 1998 (CA98) the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.3 The ERRA13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT), in order to

improve the robustness of decision-making, increase the speed and predictability of the CMA's activities and strengthen the UK's competition regime as a whole.² The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA and is consulting publicly on them.

² An overview of the changes is contained in 'Towards the CMA' *document* (CMA1), published on 15 July 2013. The publication is available at: www.gov.uk/cma.

2 BACKGROUND/LEGAL FRAMEWORK TO THE DRAFT GUIDANCE

- 2.1 In summary a person commits the cartel offence if he or she agrees with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, namely fixing prices, market sharing, bid-rigging and limiting output.
- 2.2 The cartel offence originally required the individual to have acted dishonestly.³ It was the Government's view that the dishonesty element in the offence made it harder to prosecute and this was weakening the offence's deterrent effect. The rationale for reform of the cartel offence and the options considered are contained in the documentation published as part of the public consultation process that led to the ERRA13.⁴ The intention of the CMA is to focus its criminal enforcement efforts on prosecuting individuals involved in hardcore cartels. The removal of the dishonesty element does not affect this.
- 2.3 The ERRA13 makes the following changes to the cartel offence:
- provides a revised framework for combating behaviour by individuals leading to hardcore criminal cartels, removing the need to prove dishonesty
 - creates two new exclusions from the offence: (i) the notification exclusion⁵ and (ii) the publication exclusion⁶
 - retains the exclusion relating to the notification of bid-rigging arrangements⁷
 - provides that an individual will not commit an offence if the agreement is made in order to comply with a legal requirement⁸ and
 - creates three new defences to the cartel offence:⁹ (i) where there is no intention to conceal the nature of the arrangements from customers; (ii) where there is no intention to conceal the nature of the arrangements from the CMA; and (iii) where the defendant, before the making of the agreement, took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the

³ See subsection 188(1) of the EA02 prior to amendment by the ERRA13.

⁴ BIS: A Competition Regime for Growth – a consultation on options for reform (March 2011), Competition and the Competition Regime, Government response to Consultation (March 2012)

⁵ See subsection 188A(1)(a) of the EA02.

⁶ See subsection 188A(1)(c) of the EA02.

⁷ See subsection 188A(1)(b) of the EA02.

⁸ See subsection 188A(3) of the EA02.

⁹ See subsection 188B of the EA02.

purposes of obtaining legal advice about them before their making or (as the case may be) their implementation.

- 2.4 The ERRA13 requires the CMA to prepare and publish guidance on the principles to be applied in determining, in any case, whether proceedings for an offence should be instituted. This prosecution guidance is the subject of this consultation.
- 2.5 Prosecution guidance is inherently different to other guidance documents that the CMA may at any time publish. Principally this is because it is issued in the context of the criminal justice process rather than the civil competition enforcement regime, which is administrative in nature. The CMA's role as a prosecutor is to take a decision on the institution of proceedings for the cartel offence under the legislation and the draft prosecution guidance explains the factors that the CMA will consider in making that decision.
- 2.6 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. That is the role of the criminal courts. This is in contrast to the CMA's role when enforcing civil competition law in which the CMA is also the decision maker. Nor would it be appropriate for prosecution guidance to set out a list of examples or cases where the CMA would not prosecute, creating immunities that are not envisaged in the legislation.
- 2.7 The OFT has not published guidance on the principles it applies to making prosecution decisions on the cartel offence, although in its role as a prosecution agency those decisions have always been, and under the CMA will continue to be, governed by the Code for Crown Prosecutors.
- 2.8 The publication of prosecution guidance is therefore an attempt to bring as much transparency as is reasonably possible to the CMA's exercise of its prosecutorial discretion in relation to the criminal cartel offence in the context of the removal of dishonesty as an element of the offence.

3 PURPOSE OF THIS CONSULTATION

- 3.1 The purpose of this document is to consult on proposed guidance (the Draft Guidance) which sets out the principles that the CMA will apply in determining, in any case, whether proceedings for the cartel offence should be instituted. The draft guidance is at Annexe D.
- 3.2 The Transition Team is not seeking views on the changes to the cartel offence, which have already been the subject of a public consultation.
- 3.3 There are a number of existing OFT guidance documents that refer to the cartel offence. The Transition Team is consulting separately (see CMA12con) on its proposal to put existing OFT and CC guidance documents to the CMA Board (one established) for adoption.¹⁰ Those adopted guidance documents will however be kept under review once the CMA is in operation, in the light of its developing practice and case experience.
- 3.4 Annexe B lists the existing OFT guidance documents referring to the cartel offence that it is currently proposed will be put to the CMA Board for adoption. In some cases existing OFT guidance documents will need to be read in the light of the new cartel offence.¹¹

¹⁰ As those pre-existing documents were published prior to the amendments to the EA02 made by the ERRA13, they will (if and when adopted) need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERRA13 (for example, reading references to the OFT and CC as referring in each case to the CMA).

¹¹ For completeness, it is noted that Annexe B has been drafted (in common with the Draft Guidance) as assuming that the CMA has been established and that the existing OFT and CC documents listed have been adopted by the CMA Board. Notwithstanding this drafting, the list represents only the Transition Team's current proposal as to which documents will be put to the CMA Board for adoption. It is therefore provisional and subject to change.

ANNEXES

A. QUESTIONS

- A.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?
- A.2 Is the evidential stage of the test of the decision making process explained clearly enough?
- A.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?
- A.4 Do you have any further comments on the Draft Guidance?

B. IMPACT OF THE NEW CARTEL OFFENCE ON EXISTING OFT GUIDANCE DOCUMENTS

OFT CODE	TITLE	STATUS OF DOCUMENT FOLLOWING NEW CARTEL OFFENCE		
		Replaced/ obsolete ¹²	Adopted by the CMA board ¹³	Other (as specified) / further information
OFT1495	Applications for leniency and no-action in cartel cases		✓	(including 1495i and 1495b)
OFT 404	Powers of Investigation		✓	
OFT 510	Director disqualification in competition cases		✓	
OFT515	Powers for investigating criminal cartels	✓		Out of date CMA to consider issue of new guidance (separate workstream)
OFT435	Cartels and the Competition Act 1998 – a guide for purchasers		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those

¹² This column identifies the existing OFT guidance documents which are obsolete and/or will be replaced and superseded by new CMA guidance or a new CMA publication (as specified in the 'further information' column).

¹³ This column identifies the existing OFT guidance documents which will continue to be in force but need to be read in the light of the new cartel offence.

OFT CODE	TITLE	STATUS OF DOCUMENT FOLLOWING NEW CARTEL OFFENCE		
		Replaced/ obsolete ¹²	Adopted by the CMA board ¹³	Other (as specified) / further information
				individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date
OFT 423	OFT's guidance as to the appropriate amount of a penalty		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date
OFT 1263rev	A guide to the OFT's investigation procedures in competition cases	✓		Replaced by new guidance currently under consultation - Competition Act 1998:Guidance on the CMA's investigation procedures in Competition Act 1998 cases
OFT 738	Covert surveillance in cartel investigations	✓		Out of date replaced by revised Code of Practice issued by the Home Office in 2010 www.gov.uk/government/organisations/home-office/series/ripa-codes

OFT CODE	TITLE	STATUS OF DOCUMENT FOLLOWING NEW CARTEL OFFENCE		
		Replaced/ obsolete ¹²	Adopted by the CMA board ¹³	Other (as specified) / further information
OFT 739	Covert human intelligence in cartel investigations	✓		Out of date replaced by revised Code of Practice issued by the Home Office in 2010 www.gov.uk/government/organisations/home-office/series/ripa-codes
OFT1389	Public bodies and competition law		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date
OFT 442	Modernisation		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date
OFT546	Memorandum of understanding between the OFT	✓		New memorandum of understanding to be entered into in due course (separate

OFT CODE	TITLE	STATUS OF DOCUMENT FOLLOWING NEW CARTEL OFFENCE		
		Replaced/ obsolete ¹²	Adopted by the CMA board ¹³	Other (as specified) / further information
	and the NCD, Crown Office, Scotland			workstream)
OFT547	Memorandum of understanding between the OFT and the Director of the SFO	✓		New memorandum of understanding to be entered into in due course (separate workstream)
OFT740rev	How competition law applies to co-operation between farming businesses: FAQs		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date
OFT1330	Quick Guide to competition law compliance		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date

OFT CODE	TITLE	STATUS OF DOCUMENT FOLLOWING NEW CARTEL OFFENCE		
		Replaced/ obsolete ¹²	Adopted by the CMA board ¹³	Other (as specified) / further information
OFT430	Application to services relating to railways		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date
OFT447	Competing Fairly		✓	The transitional arrangements mean that dishonesty will continue to be relevant for those individuals prosecuted for cartels entered into prior to 1 April 2014 but not for cartels entered into after that date

C. CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
- departments will need to give more thought to how they engage with and consult with those who are affected
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

D. DRAFT GUIDANCE

Competition and Markets Authority (CMA)

Cartel Offence

Prosecution Guidance

September 2013

CMA9con

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1 INTRODUCTION

- 1.1 Section 47 of the Enterprise and Regulatory Reform Act 2013 (ERRA13) comes into force on 1 April 2014. This section makes important changes to the criminal cartel offence which was created by the Enterprise Act 2002 (EA02).
- 1.2 In this guidance references to 'the Act' mean references to the EA02 as amended by the ERRA13 and references to 'the offence' mean the criminal cartel offence under section 188(1) of the Act. All section references are to the Act unless otherwise stated.
- 1.3 In summary a person commits the offence if he or she agrees with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, namely price fixing, market sharing, bid-rigging, and limiting output. The offence is subject to certain exclusions and defences. The maximum penalty on conviction on indictment is five years imprisonment and/or an unlimited fine.
- 1.4 In England and Wales, and in Northern Ireland, prosecutions may only be brought by the Competition and Markets Authority (CMA) or the Serious Fraud Office (SFO), or with the consent of the CMA. Prosecutions will generally be undertaken by the CMA.
- 1.5 In Scotland, prosecutions will be brought by the Crown Office and Procurator Fiscal Service (COPFS), the sole prosecution authority in Scotland which is headed by the Lord Advocate. The question of the publication of prosecution guidance in relation to offences committed in Scotland is a matter for the Lord Advocate alone.
- 1.6 Where cross-jurisdictional issues arise within England, Wales, Northern Ireland and Scotland, the jurisdiction in which a case will be brought will depend on the outcome of discussions between the CMA, the SFO and the COPFS, and will follow the normal principles that govern prosecutions for other offences.
- 1.7 This guidance is issued under section 190A of the Act which stipulates that the CMA must prepare and publish guidance on the principles to be applied in determining, in any case, whether proceedings for an offence under the Act should be instituted. This guidance has been prepared for that purpose and does not seek to set out a list of cases which the CMA will or will not prosecute. The CMA may at any time issue revised or new guidance, please refer to the CMA website for the latest version.

- 1.8 The CMA has consulted with the SFO and the COPFS and other interested parties in the preparation of this guidance.
- 1.9 The guidance is not intended to be exhaustive and the CMA will be mindful of the wide range of circumstances and culpability which may arise in any particular case.
- 1.10 This guidance relates to agreements made on or after 1 April 2014 and which relate to arrangements made or to be made on or after that date. It sets out how the Code for Crown Prosecutors ('the Code') will be applied in such cases. The unamended criminal cartel offence under EA02 will still apply to agreements made before 1 April 2014 or which relate to arrangements made or to be made before that date. The Code will continue to be applied in the usual way in respect of such agreements and arrangements.
- 1.11 The Code does not apply to offences committed in Scotland. These are subject to considerations in the COPFS Prosecution Code.

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2 THE LEGISLATIVE BACKGROUND

- 2.1 The criminal cartel offence was created by the EA02 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'.¹⁴
- 2.2 In 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. Typically hardcore cartels are secret arrangements under which competitor businesses agree to coordinate their activity, usually in order to preserve or drive up prices.
- 2.3 There is an inherent public interest in individuals involved in such hardcore cartels being prosecuted, giving practical effect to Parliament's intentions in criminalising such behaviour.
- 2.4 The cartel offence originally required the individual to have acted dishonestly.¹⁵ Dishonesty as an element of the offence has been removed, and statutory exclusions and defences have been added.
- 2.5 The offence was amended following publication of draft legislation and a full consultation process.¹⁶
- 2.6 A full copy of the Act and its Explanatory Notes can be accessed at www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga_20130024_en.pdf
- 2.7 In summary, the Act:
- provides a revised framework for combating behaviour by individuals leading to hardcore criminal cartels, removing the need to prove dishonesty
 - creates two new exclusions from the offence: (i) the notification exclusion¹⁷ and (ii) the publication exclusion¹⁸

¹⁴ Department of Trade and Industry (DTI), A World Class Competition Regime. Cm 5233. (2001)

¹⁵ See subsection 188(1) of the EA02.

¹⁶ BIS: A Competition Regime for Growth – a consultation on options for reform (March 2011) and BIS: Growth, Competition and the Competition Regime, Government Response to Consultation (March 2012).

¹⁷ See subsection 188A(1)(a) of the Act.

¹⁸ See subsection 188A(1)(c) of the Act.

- retains the exclusion relating to the notification of bid-rigging arrangements¹⁹
- provides that an individual will not commit an offence if the agreement is made in order to comply with a legal requirement, and²⁰
- creates three new defences to the cartel offence:²¹ (i) where, at the time of the making of the agreement, there is no intention to conceal the nature of the arrangements from customers; (ii) where, at the time of the making of the agreement, there is no intention to conceal the nature of the arrangements from the CMA; and (iii) where the defendant, before the making of the agreement, 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 before their making or (as the case may be) their implementation.

¹⁹ See subsection 188A(1)(b) of the Act.

²⁰ See subsection 188A(3) of the Act.

²¹ See section 188B of the Act.

3 THE DECISION MAKING PROCESS

- 3.1 The CMA's decision to prosecute the offence will be made by application of the Full Code Test as set out in the Code www.cps.gov.uk/publications/code_for_crown_prosecutors. The Full Code Test has two stages: (i) the evidential stage; and (ii) the public interest stage. In most cases the evidential stage must be considered before the public interest stage. A case which does not pass the evidential stage must not proceed. Further guidance on this is set out in paragraphs 4.1- 4.24 below.
- 3.2 If the evidential stage is passed, meaning the CMA considers that there is sufficient evidence against a suspect to provide a realistic prospect of conviction of that suspect, then the CMA will go on to consider whether a prosecution is in the public interest. Further guidance on this is set out in paragraphs 4.26 – 4.41 below.
- 3.3 There may be cases where it is clear, prior to the collection and consideration of all likely evidence, that the public interest does not require a prosecution. In these instances the CMA may decide that the case should not proceed further.
- 3.4 A decision by the CMA that a prosecution should not proceed on either evidential or public interest grounds does not preclude the CMA from considering whether the collusive arrangements between undertakings should be subject to civil enforcement for infringements of EU or national competition law under Article 101 of the Treaty on the Functioning of the European Union (TFEU)²² or section 2 of the Competition Act 1998 (CA98) respectively, nor whether a Competition Disqualification Order should be sought against any individual.²³

Scotland

- 3.5 In Scotland, the Procurator Fiscal (a prosecutor acting under the authority of the Lord Advocate) considers the evidence and decides whether to prosecute in the public interest.
- 3.6 Where there is sufficient evidence in the case, the Procurator Fiscal will consider a number of additional factors when deciding whether to prosecute. These are set out in full in the COPFS Prosecution Code

²² Article 101, – OJ2008/C 115/88-89

²³ Provision for Competition Disqualification Orders are made in section 9A to 9E to the Company Directors Disqualification Act 1986 as amended by the EA02

www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf but include the following:

- seriousness of the offence
- length of time since the offence took place
- interests of the victim and other witnesses
- age of the offender, any previous convictions and other relevant factors
- local community interests or general public concern, and
- any other factors at his discretion, according to the facts and circumstances of the case.

4 THE OFFENCE AND THE APPLICATION OF THE CODE FOR CROWN PROSECUTORS

The evidential stage

- 4.1 At the evidential stage the CMA must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect. It must be satisfied that the evidence is admissible, reliable and credible. The Act contains statutory exclusions which the CMA must consider. If they apply then no offence will have been committed – see paragraphs 4.11- 4.16 below.
- 4.2 At the evidential stage the CMA must also consider what the defence case may be and how it is likely to affect the prospects of conviction. It must consider the credibility and impact of any defence and any other information that the suspect has put forward or on which he or she might rely. In particular the Act contains three statutory defences which may be raised – see paragraphs 4.18 - 4.24 below.
- 4.3 The offence is contained in subsection 188(1) of the Act. The necessary conduct element is that an individual agrees with one or more other persons that undertakings will engage in one or more of the prohibited cartel activities. These are price fixing, limitation of supply or production, market sharing and bid-rigging.^{24,25}
- 4.4 The offence applies in respect of agreements both to make or implement such arrangements and also to cause such arrangements to be made or implemented. The offence will be committed irrespective of whether the agreement reached is actually implemented by the undertakings.
- 4.5 If the agreement between the individuals is made outside the United Kingdom, proceedings may only be brought where the agreement has been implemented in whole or in part in the United Kingdom.
- 4.6 The cartel offence applies only to individuals who ‘agree’ arrangements between them. The cartel offence does not cover conduct that falls short of an agreement. For example, the mere fact of an individual passing on confidential future pricing information to an individual at a competitor would

²⁴ See subsection 188 (2) of the Act.

²⁵ ‘Bid-rigging arrangements’ are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom: (a) A but not B may make a bid, or (b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.

not in and of itself be caught by the offence, although it may be evidence of a cartel agreement by which the offence is committed.

- 4.7 In respect of arrangements restricting pricing, supply or production the offence also requires that the restriction is reciprocal,²⁶ and that the arrangement relates to undertakings operating at the same level of the supply chain.²⁷
- 4.8 The offence will not therefore be committed in the case of arrangements that: (i) contain unilateral restrictions (that is, restrictions on only one party); (ii) contain restrictions on more than one party but that do not relate to the same level of the production or supply chain; or (iii) do not contain restrictions that relate to the pricing, supply or production of a product or service, or to bid-rigging arrangements.
- 4.9 The following is a non-exhaustive list 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 agreement about them (though the undertakings may be subject to enforcement under EU or national competition law):

Unilateral restrictions:

- cooperation agreements that contain restrictions on only one party to limit production or supply of the contract product
- non-reciprocal non-compete restrictions in a joint venture; for example, investment vehicles whereby an undertaking invests in a new production joint venture with a manufacturer and, in return, the manufacturer agrees not to compete with the joint venture, and
- a non-compete restriction on a seller in the context of the sale of an undertaking.

²⁶ See subsections 188(1) and 188(2) of the Act.

²⁷ See section 189 of the Act.

Operate at different levels of the supply chain:

- cooperation agreements that impose restrictions on supply or production on more than one party but at different levels of the supply or production chain.

4.10 The criminal cartel offence is therefore reserved for agreements between individuals to make reciprocal arrangements that relate to at least two undertakings and whose purpose is to fix prices, restrict output, allocate markets or rig bids.

Exclusions

4.11 Section 188A of the Act makes further provision for circumstances where the offence will not be committed. Parties to arrangements that would otherwise fall within the offence may bring the arrangements outside the scope of the offence by ensuring that the arrangements satisfy the requirements of the notification exclusion,²⁸ the bid-rigging notification exclusion,²⁹ or the publication exclusion,³⁰ each of which involves the provision of 'relevant information'.

4.12 '**Relevant information**' for the purpose of the exclusions means (a) the names of the undertakings to which the arrangements relate; (b) 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; (c) the products or services to which they relate; and (d) any other information as may be specified in an order made by the Secretary of State.

4.13 **The notification exclusion** provides that an individual will not commit an offence if under the terms of the arrangement customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected. 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.

4.14 **The bid-rigging notification exclusion** provides that an individual will not commit an offence if, in the case of bid-rigging arrangements, the person

²⁸ See subsection 188A(1)(a) of the Act.

²⁹ See subsection 188A(1)(b) of the Act.

³⁰ See subsection 188A(1)(c) of the Act.

requesting bids would be given relevant information about them at or before the time when a bid is made.

4.15 **The publication exclusion** provides that an individual will not commit an offence if, under the arrangement, relevant information about the arrangement would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State. The manner in which the arrangements are to be published is by advertising them once in any of the London Gazette, the Edinburgh Gazette or the Belfast Gazette.³¹

4.16 The exclusions are framed in terms of how it was intended that the arrangements would operate at the time the individual agreed to make or to implement them. Evidence of genuine steps being taken in relation to one of the statutory exclusions will be relevant to whether or not there was such an intention even if they failed to meet the requirements of section 188A, for example:

- customers were notified of the agreement as required by subsections 188A(1)(a) or (b), but there is evidence of an inadvertent failure to notify a minority of all relevant customers, or
- a limited number of products or services covered by the agreement were inadvertently sold shortly before the relevant disclosures were made to customers under subsection 188A(1)(a) or (b), or published in the appropriate format under subsection 188A(1)(c).

4.17 In addition to the exclusions identified above, an individual will not commit an offence if the agreement is made in order to comply with a legal requirement.³² 'Legal requirement'³³ means a requirement:

- a) imposed by or under any enactment in force in the United Kingdom
- b) imposed by or under TFEU or the European Economic Area Agreement and having legal effect in the United Kingdom without further enactment or
- c) imposed by or under the law in force in another European Union Member State and having legal effect in the United Kingdom.

³¹ [Insert reference to SI]

³² See subsection 188A(3) of the Act.

³³ See paragraph 5 of Schedule 3 to the CA98.

Defences

- 4.18 The insertion of section 188B into the Act creates three statutory defences to the offence. It will be sufficient for the defendant to prove that any one of the defences applies. The standard of proof the defendant will need to discharge in order to prove one of the defences is the balance of probabilities.
- 4.19 It is a defence (under subsection 188B(1)) where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, for an individual to show that at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply to them of the product or service.³⁴
- 4.20 It is a defence (under subsection 188B(2)) for an individual to show that at the time of the making of the agreement, he or she did not intend that the nature of the arrangements would be concealed from the CMA.³⁵
- 4.21 It is a defence (under subsection 188B(3)) for an individual to show that before making the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice about them before they were made or implemented.³⁶
- 4.22 The CMA will need to consider whether there is evidence that any of the defences may apply. It will need to assess the credibility and strength of that evidence. In relation to the defences under subsection 188B(1) and 188B(2) it will need to consider whether the evidence shows that it is likely there was an absence of intention to conceal the arrangements.
- 4.23 The defence under subsection 188B(2) does not place an obligation on the individual to notify the CMA about the agreement and there is no duty on the CMA to respond to any such notifications that are made. Any evidence of attempts by an individual to bring the arrangements to the attention of the CMA will be considered. If an arrangement is notified to the CMA, this will not preclude the CMA from taking civil enforcement action in relation to it under EU or national competition law, either at the time or at any later date.

³⁴ See subsection 188B(1) of the Act.

³⁵ See subsection 188B(2) of the Act.

³⁶ See subsection 188B(3) of the Act.

- 4.24 The CMA takes the view that the term ‘professional legal advisers’ under subsection 188B(3) is intended to cover both external and in-house legal advisers qualified in the UK and that it could also apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification. For the defence under section 188B(3) to succeed, an individual must show that the purpose for which he or she took steps to disclose the arrangements to a professional legal adviser was to obtain advice about them. The steps must also have been ‘reasonable’. The CMA takes the view that this must genuinely be an attempt to seek legal advice about the arrangement.

No action letters

- 4.25 The CMA will not prosecute any individual who has received a written notice under subsection 190(4) of the EA02 except in the circumstances specified in that notice.

The public interest stage

- 4.26 It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the CMA is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.
- 4.27 When deciding the public interest, the CMA will consider each of the questions set out below (as set out in the Code) so as to identify and determine the relevant general public interest factors tending for and against prosecution. These general factors, together with the explanatory text for them in the Code and the more offence specific factors set out in this guidance, will enable the CMA to form an overall assessment of the public interest.
- 4.28 Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. The questions identified are not exhaustive, and not all the questions may be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case. It is possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. There may be an overlap between factors.
- 4.29 Although there may be public interest factors tending against prosecution in a particular case, the CMA should consider whether nonetheless a prosecution should go ahead and those factors put before the court for consideration before sentencing.

4.30 These public interest factors relate to matters which are not elements of the offence that need to be proved before a jury.

4.31 The CMA will consider each of the following questions.

How serious is the offence committed?

4.32 The more serious the offence the more likely it is that a prosecution is required. Hardcore cartels are generally serious and individuals involved in them are likely to have caused serious harm requiring prosecution.

4.33 The more serious and potentially harmful the cartel conduct the more likely it is that a prosecution is required. Factors that are likely to be relevant to assessing the degree of harm involved will include the CMA's assessment as to the potential impact of the cartel on any particular market or the risk of that impact, the degree of limitation on consumer choice created by the arrangements, and the potential for the cartel to raise prices or restrict the supply of goods or services, as well as issues such as the vulnerability of the customers affected or potentially affected by the cartel.

4.34 Cartels that have been carried on for a prolonged period are more likely to require prosecution.

What is the level of culpability of the suspect?

4.35 This is likely to be determined by the individual's level of involvement in the making or enforcing of the arrangements concerned. The CMA will consider the extent to which the individual was the instigator or ringleader in the cartel. It will also consider whether the individual is or was in a position of authority or trust within the undertaking. If an individual had a very limited role in the arrangements, for a short period of time and/or was in a vulnerable position acting under the direct instructions of others that will be a factor in deciding whether a prosecution of that individual will be required.

4.36 The CMA will look at the extent to which the individual's purpose was to preserve or increase the profits of their organisation or to profit personally, by overcharging customers or by depriving them of choices between products or services, and so harming their interests.

4.37 Whether an individual was acting openly or not is an important factor to be considered by the CMA. The greater the degree of evidence of clandestine conduct and of conscious participation in a hardcore cartel, the more likely it is

that a prosecution will be required. Conduct such as deliberate concealment, covert behaviour or misrepresentation are likely to be relevant.

- 4.38 Whether an individual's conduct was contrary to guidelines laid down in an undertaking's compliance policy will be a relevant factor, as will evidence of attempts by individuals to report arrangements to senior management within the undertaking.
- 4.39 If an individual has previously been found by a competition authority or a court to have participated in, or has admitted to previous participation in, cartel conduct, either criminal or civil, it is more likely that a prosecution will be required.

What is the impact on the community?

- 4.40 Criminal cartels can have a wider impact on the community and markets than will be apparent to individual customers and where present this will be a factor that the CMA will need to consider. Such wider effects can include a diminution of public funds, an effect on public safety or the stifling of innovation.

Is prosecution a proportionate response?

- 4.41 The CMA should also consider whether prosecution is proportionate to the likely outcome.

5 TRANSITIONAL ARRANGEMENTS

- 5.1 The Act applies to agreements falling within section 188(1) which are made after the commencement of the Act and which relate to arrangements made or to be made after that commencement.³⁷

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³⁷ Section 47(8) ERR13