11 March 2014

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

FINANCIAL MARKETS LAW COMMITTEE

Dear Sirs

Issue 002 (Cartel Offence)

The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which give rise to material risks, and to consider how such issues should be addressed.

The FMLC would like to draw the attention of the Competition and Markets Authority (the "**CMA**") to legal uncertainties arising in draft guidance set out in its consultation released September 2013 (the "**draft Guidance**").[1] This letter will also make reference to the draft Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 (the "**draft Order**") included in the consultation document released by the Department for Business, Innovation and Skills ("**BIS**") on 17 September 2013 entitled "Competition Regime: Draft Secondary Legislation—Part Two" (the "**BIS consultation**") to the extent that the draft Order is relevant to the discussions herein.[2]

The FMLC's concerns relate to the treatment of the exclusions to the cartel offence in the draft Guidance and the draft Order, and the application of these exclusions to individuals entering standard commercial transactions. These concerns are summarised in this letter together with some proposals to mitigate risks posed by the related legal uncertainties.

Background

The scope of the cartel offence in section 188 of the Enterprise Act 2002 (the "**Act**") was widened pursuant to Enterprise and Regulatory Reform Act 2013 (the "**2013 Amending Act**") by removing the requirement that agreements made to commit the offence described in the provision must be made "dishonestly".

At the same time, this expansion of the criminal offence was to some extent restricted and ameliorated by the provision of a new section 188A to the Act which creates exclusions intended to perform a similar function to the dishonesty requirement in certain circumstances. Under section 188A(1), arrangements are excluded from the scope of the cartel offence if "relevant information" about the arrangements is:

1. provided to customers before they enter into the agreement (the "**notification exclusion**");
2. provided to the person requesting bids, in the case of bid-rigging arrangements; or
3. published before such arrangements are implemented (the "**publication exclusion**").

Section 188A(2) further defines the "relevant information" requirement in section 188A(1)(a) as satisfied by the provision of the names of the undertakings, the products

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or services to which the arrangements relate, a description of the nature of the arrangements that is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies and such other information as may be specified in an order made by the Secretary of State.

The removal of the dishonesty requirement has increased the likelihood that common commercial transactions may fall within the scope of the criminal offence. The introduction of the exclusions under section 188A(1) does not preclude the possibility that transactions which have generally been accepted hitherto as being legitimate and not anti-competitive will now be classified as cartel offences owing to uncertainty regarding the delimitation of the exclusions and their manner of operation.

The CMA's prosecutorial guidance—on the scope of the cartel offence, its exclusions and the approach to evidential requirements taken by authorities when launching cartel offence prosecutions—has unfortunately not resolved this uncertainty. The points covered below are concerned chiefly with the notification exclusion and the apparent reluctance of the CMA to furnish detailed guidance on how the concept of "relevant information" will be interpreted for the purpose of determining whether a cartel offence has been committed. (Paragraph 4.13 of the draft Guidance, which purports to address the need for "relevant information", merely repeats the broad definition set out set out in the statute without providing any further detail.)

Difficulties arise for market participants in the provision of "relevant information", in particular, in the context of risk-sharing transactions which may be entered into by providers acting as a syndicate, such as syndicated loans or many insurance and reinsurance arrangements. The FMLC understands that the identity of the participants in the syndicate is often settled at the last moment of contractual commitment and that the syndication structures may involve a number of members who enter and leave the syndicate from time to time. This results in constant changes to the identities of the parties to the agreements but the syndicate as a whole is represented by a common broker who enters into contracts on their behalf. Given that the "relevant information" which must be provided, if one of the statutory exclusions is to apply, includes the names of the undertakings involved in the arrangements for which exclusion is sought, it is highly desirable to ascertain whether a change of syndication participants during the life of the contract will cause a transaction to fail the requirement as to the provision of relevant information.

To overcome this difficulty in the case of brokered transactions, the draft Guidance might stipulate that informing the insured parties of the identity of the broker would be sufficient to fulfil the statutory requirement to provide "relevant information".

Brokered transactions also present a further difficulty which is that the providers of the arrangements have little ability to ascertain whether, where customers are themselves represented by a broker, the notification provided to the customers' broker has been duly transmitted to the customers themselves. The matter of whether the knowledge of the terms of the agreement which brokers then possess (while acting as agents on behalf of the customers) can be imputed to their principals to fulfil the requirements of prior notification should be clarified.

More generally, the FMLC notes the position adopted in paragraph 4.16 of the draft Guidance that

> 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

and considers that it would be helpful to have confirmation that contracts with retrospective "effective dates" (which is common among insurance policies) will satisfy the requirement to provide the requisite notification prior to entry into the agreement notwithstanding the "effective date" of the contract may pre-date both notification and the date of contracting.

Publication Exclusion

The FMLC notes that the publication exclusion is very unlikely to afford real protection to transactions in the wholesale securities and insurance markets which are its area of chief concern, given that participants in those markets proceed on the basis of rapid legal commitment to the key contract terms (i.e. price and risk) and contracts are often effective immediately, making it virtually impossible to publish prior to contract. This has the consequence that the FMLC's concerns regarding the legal uncertainties in respect of the notification exclusion, which it has expressed above, are all the more pressing.

Notwithstanding the limited relevance of the publication exclusion to the wholesale financial markets, the FMLC is concerned that in the residue of cases where it may be *prima facie* feasible, the very severely restricted methods of publication set out in the draft Order (i.e. publication in the Gazette) may cut across contractual and other confidentiality requirements in such a way as to preclude market participants from relying on the exclusion altogether. The FMLC has suggested in a letter to BIS (attached) that an alternative approach might be, in Article 2 of the draft Order, to include other methods of publication, including "deemed" publication by the communication of relevant information directly to the authorities. Such communication could be by way of confidential email, or through filings made on an online portal (such as those completed in relation to supporting documents for listing applications). The FMLC draws this suggestion to your attention.

The FMLC hopes that the issues flagged in this letter are taken up for consideration by the CMA. I and Members of the Committee would be delighted to meet with you to discuss the issues raised in this letter. Please do not hesitate to contact me to arrange such a meeting or should you require further information or assistance.

Yours faithfully

Joanna Perkins

Joanna Perkins
Chief Executive

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1 Competition and Markets Authority, 'Cartel Offence Prosecution Guidance—Consultation Document CAM9con' (September 2013).

2 Department for Business, Innovation and Skills, 'Competition Regime: Draft Secondary Legislation - Part 2' (17 September 2013).