

11 March 2014

Mr Paul Griffiths
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

FINANCIAL
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COMMITTEE

Dear Mr. Griffiths

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 takes this opportunity to comment on the draft Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 (the “**draft Order**”) on which the Department for Business, Innovation and Skills (“**BIS**”) consulted in September last year (the “**Consultation**”).¹ This letter also makes reference to the consultation document released by the Competition and Markets Authority (the “**CMA**”) in September 2013 enclosing the draft Cartel Offence Prosecution Guidance (the “**draft Guidance**”) to the extent that the draft Guidance is relevant to the discussions herein.²

The FMLC’s concerns relate to the treatment of the exclusions to the cartel offence in the draft Guidance and the draft Order, and the application of these exclusions to individuals entering standard commercial transactions.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 the legal risks identified.

Background

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

Commercial transactions and the exclusions to the cartel offence

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.

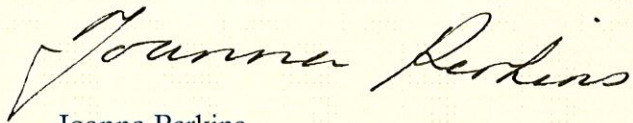
The provisions of section 188A(1)(c) state that the publication exclusion will apply if the relevant information about the arrangements is published “in the manner specified at the time of the making of the agreement in an order made by the Secretary of State”. The draft Order specifying the manner of publication was published last year and comments were invited in the Consultation. According to the draft Order, the exclusion will apply if the relevant information is published in the London Gazette, Edinburgh Gazette or Belfast Gazette.

The FMLC notes that the publication exclusion is, in any event, 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 in the Gazette 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 in a letter to the CMA (attached), 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 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 suggests 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 hopes that the issues flagged in this letter are taken up for consideration by BIS. 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 sincerely



Joanna Perkins
Chief Executive

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¹ Department for Business, Innovation and Skills, '[Competition Regime: Draft Secondary Legislation - Part 2](#)' (17 September 2013).

² Competition and Markets Authority, '[Cartel Offence Prosecution Guidance—Consultation Document CAM9con](#)' (September 2013).