The City of London Law Society – Competition Law Committee

RESPONSE TO THE COMPETITION AND MARKETS AUTHORITY CONSULTATION ON THE CARTEL OFFENCE PROSECUTION GUIDANCE AND TO THE DEPARTMENT OF BUSINESS, INFORMATION AND SKILLS CONSULTATION ON THE DRAFT ENTERPRISE ACT 2002 (PUBLISHING OF RELEVANT INFORMATION UNDER SECTION 188A) ORDER 2014

1. Overview

1.1 This response is submitted by the Competition Law Committee of the City of London Law Society (the "**Committee**") 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 and to section 2 of the Department of Business, Information and Skills' ("**BIS**") consultation entitled "Competition Regime: Draft Secondary Legislation - Part Two" dated 17 September 2013 (the "**SI Consultation**").

1.2 The CLLS represents approximately 15,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to competition law matters.

1.3 The Committee members responsible for the preparation of this response were:

- Angus Coulter, Partner, Hogan Lovells International LLP
- Nicole Kar, Partner, Linklaters LLP
- Dorothy Livingston, Consultant, Herbert Smith Freehills LLP
- Becket McGrath, Partner, Edwards Wildman Palmer UK LLP
- Isabel Taylor, Partner, Slaughter and May and Leader of Working Party on Cartel Prosecution Guidance.

1.4 The Committee appreciates the opportunity to respond to the Consultation. In light of the considerable changes to the criminal cartel offence (the "**Offence**") that are taking place, the considerable expansion in the scope of the offence and the uncertain scope of the new exclusions and defences we believe that having clear and comprehensive prosecution guidance is crucial. This is especially the case as the Offence is not easily comparable with other criminal offences, and so little guidance can be drawn from guidance and practice in other areas as to how the Offence might operate.

1.5 The Committee appreciates that the Guidance constitutes criminal prosecutorial guidance rather than general guidance on the legislation. However, the Committee considers, having looked at analogous prosecution guidance issued in relation to other offences, that considerably more detail and explanation could be provided.

1.6 In particular, and as discussed in more detail below, the Committee considers that:

(i) the CMA has interpreted the restrictions on their ability to provide specific examples and general guidance in prosecution guidance too narrowly and that it could and should try to provide further clarity, especially with reference to certain specific agreements that, while not falling foul of the civil regime or being generally viewed as anti-competitive, seem to *prima facie* fall foul of the Offence; and

(ii) the Guidance provides insufficient certainty as to (i) the CMA's understanding of the outer limits of the Offence and whether it applies in a range of routine commercial contexts where businesses operating in the UK are entitled to expect a clear steer on what they need to do to comply with the law (ii) how and under what circumstances the CMA will exercise its discretion to prosecute.

1.7 In relation to the SI Consultation, the Committee believes that the manner of publication of "relevant information" would be detrimental to commerce both (i) in terms of the delay between submitting information to the Gazette and publication and (ii) the cost of doing so. It is also unclear how practical this mechanism will be as it is very difficult to accurately predict the number of submissions that will be made to the Gazette in relation to the Offence, but there is a possibility that the sheer volume will undermine the purpose of publication.

2. General comment: the Guidance can and should provide further clarity

2.1 With the removal of the "dishonesty" element, the Offence will capture a much wider range of activity than was previously the case. Recognising that, without further amendment, the Offence would be over-inclusive the Government has included certain new exclusions and defences. However, the statute provides no guidance as to how the new Offence, the exclusions and defences will work in practice.

2.2 During the parliamentary debates on the amendment to the Offence, concerns were raised both in the Commons and Lords about how the Offence was to operate in practice.[1] Unfortunately, no further clarity was provided in the Commons despite reassurances that the points raised would be reflected upon at the report stage.[2]

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[1] House of Commons, Column number 556, 10 July 2012 and House of Lords, Column GC507-GC508, 18 December 2012

[2] House of Commons, Column number 556-557, 10 July 2012

Instead, Lord Marland,[3] speaking on behalf of the reform in the Lords, noted that "further comfort [as to the operation of the Offence] will be provided by prosecutorial guidance and by the statutory defences in the Bill."

2.3 Section 190A of the Enterprise Act 2002 (as amended) obliges the CMA to "prepare and publish guidance on the principles to be applied in determining, in any case, whether proceedings for [the Offence] should be instituted." Such a statutory obligation on a prosecution body to publish guidance is not common and demonstrates the importance that Parliament attached to this Guidance and to the need to provide clarity in respect of an uncertain area of law.

2.4 Given this background, we are extremely disappointed at the scope of the guidance that is being offered which, in our view, falls short of what was promised and indeed falls short of that provided in other areas of the law and in other jurisdictions.

2.5 It is not sufficient to suggest, as the Consultation does, that clarification will be provided by "the criminal courts",[4] as this will leave considerable and unacceptable uncertainty in the interim period, which, considering the size and complexity of most cartel cases, may be lengthy. In addition, we note that only the CMA itself can offer guidance on how it will exercise its own discretion, which is not a matter for the courts.

The Guidance can provide more clarity

2.6 Paragraph 2.6 of the Consultation states that it is "not appropriate in prosecution guidance … to provide further interpretation of the legislation such as the availability or operation of defences to the offence…[or] to set out a list of examples or cases where the CMA would not prosecute." While the Committee appreciates that there are some limits to what the Guidance can provide, we consider that the CMA has taken too narrow a view of these limits.

2.7 A comparison can be drawn here between the level of detail proposed in this Guidance and that provided in relation to other offences. By way of examples: the prosecution guidance on the offence of assisting or encouraging suicide (the "**Assisted Suicide Guidance**")[5] and the prosecution guidance for offences under the Bribery Act (the "**Bribery Act Guidance**")[6] both go into greater detail than the Guidance. In particular, they provide more information (i) on where the boundaries of

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[3] House of Lords, Column 1518, 14 November 2012

[4] Consultation, Paragraph 2.6

[5] Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide, issued by the Director of Public Prosecutions, February 2010; http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html

[6] Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf

the law lie and (ii) on the treatment of specific types of cases that are known to cause difficulties in the interpretation of the legislation.

2.8 In relation to where the boundaries of the law lie (and by way of example):

(i) the Assisted Suicide Guidance section entitled "Explaining the law," notes that "[f]or the avoidance of doubt, a person who does not do anything other than provide information to another which sets out or explains the legal position in respect of the offence of encouraging or assisting suicide under section 2 of the Suicide Act 1961 does not commit an offence under that section" [7]; and

(ii) the Bribery Act Guidance notes that the "Act does not seek to penalise [Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith]." Noting, in effect, that such activities were, in the view of the authority, outside the scope of the offence.

2.9 These types of statements are important as they clarify the prosecutorial authorities' understanding of where the limits of the offence are. The rationale for providing such information is clear; it provides reassurance that certain behaviour, that may arguably come within the scope of the offence, does not do so.

2.10 In relation to the application of the law to specific situations (again by way of example):

(i) the Assisted Suicide Guidance at paragraph 20 addresses the specific topic of websites that promote suicide noting that; "In the context of websites which promote suicide, the suspect may commit the offence if he or she intends that one or more of his or her readers will commit or attempt to commit suicide"; and

(ii) the Bribery Act Guidance when dealing with the issue of "Facilitation Payments,"[8] which are small payments made to public officials to secure and/or expedite the performance of routine and/or necessary processes, states specifically that "there is no exemption in respect of facilitation payments. They were illegal under the previous legislation and the common law and remain so under the Act."

2.11 Further comparison can be made with prosecution guidance issued in relation to equivalent criminal cartel prohibitions in other jurisdictions. For instance, Section 2 of the Canadian Competitor Collaboration Guidelines[9] (the "**Canadian Guidelines**") describes the "Criminal Prohibition" which, similar to the Offence, makes it a criminal

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[7] Paragraph 35

[8] Pages 8-9

[9] Competition Bureau Canada Enforcement Guidelines, Competitor Collaboration Guidelines, 23 December 2009 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf

offence to enter into an agreement with a competitor to fix prices, allocate markets or restrict output that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture.

2.12 In relation to the scope of the "Criminal Prohibition" the Canadian Guidelines express, in far more detail than the Guidance, the precise scope of the law. For example, at Section 2.4.1, the Canadian Guidelines note that "an agreement among competitors to implement certain measures designed to protect the environment or implement a new industry standard may increase the costs of producing a product and ultimately result in an increase in price. However, the [Canadian Competition Bureau] does not consider such initiatives alone to be agreements to fix or increase prices."

2.13 The Canadian Guidelines also include the Canadian Competition Bureau's normal approach to certain specific agreements. For example, at Section 2.4.2, the Canadian Guidelines state that "the [Canadian Competition Bureau] will not normally apply [the Criminal Prohibition] to agreements that allocate markets for the resale of products supplied by a supplier to a customer, even where the supplier also competes with the customer in respect of the sale of that product."

2.14 The Committee appreciates the CMA's concern to avoid creating "immunities that are not envisaged in the legislation." However, the above examples indicate that it is possible to set out specifics without undermining the relevant legislation.

2.15 We therefore consider the types of clarifications and elaboration that we are asking for (as further elaborated in section 3 below) to be entirely possible for the CMA to provide within the limits of the scope of prosecutorial guidance.

2.16 We are concerned that without more specific guidance the consequent uncertainty around the scope and application of the Offence and the CMA's approach to enforcement could potentially have a serious chilling effect on the entry into and carrying on of legitimate and efficiency enhancing commercial agreements (see, in particular, those agreements identified at 3.5 and 3.17 below).

3. Specific Comments on the Guidance

3.1 We set out below, by reference to the relevant sections of the document, our more specific comments on the proposed Guidance.

The Legislative Background (section 2 of the Guidance)

3.2 Although the criminal cartel offence may have been created with the intention of criminalising and deterring "hardcore cartels" (paragraph 2.1), the offence as drafted encompasses or potentially encompasses a wider range of activities that would not necessarily be considered to be "hardcore cartels" as the term is generally understood in competition law. In particular we note that, unlike general competition law and the description of a hardcore cartel that is given in paragraph 2.2 of the Guidance, the Offence does not contain any principle that requires an agreement to be assessed by reference to its countervailing consumer benefits or efficiencies.

3.3 It is therefore misleading to suggest that all agreements that fall within the scope of the cartel offence are necessarily "hardcore cartels". It follows from this that the principle set out in paragraph 2.3 – that there is an inherent public interest in individuals involved in hardcore cartels being prosecuted – should not be used as a touchstone to determine the approach to prosecution and that the first bullet point of paragraph 2.7 is not, in our view, an accurate summary of the scope of the Offence.

The evidential stage (paragraphs 4.1 to 4.25 of the Guidance)

3.4 Given the potential breadth of the Offence we consider it to be critical that clear guidance is given as to the CMA's understanding of its scope. In the course of the development of this legislation there was extensive debate as to the potential application of the Offence to a range of widely understood business practices and agreements. Concerns about the ambiguity surrounding the proposed treatment of such agreements were also raised by a number of parties, including the Committee, in relation to the original BIS consultation over the changes to the Offence.

3.5 Situations that are of particular concern to the Committee in this context include (but are not limited to):

(i) co-insurance and co-reinsurance agreements: These are insurance agreements where the insured receives his policy from a pool or group of insurers who share the risk between them. These types of agreements could arguably be seen as "price fixing" for the purposes of the Offence as the insurance companies who participate co-ordinate to provide a single premium to the insured. However, these agreements are not generally regarded as anti-competitive and the customer receives considerable utility in having to pay a "single price" to be insured by a larger pool of insurers, who are able to spread the risk. These agreements provide customers with competitive premiums and often (for very large potential liability items) the only option for insurance.

(ii) syndicated loan agreements: These are loan agreements where funds are lent to the borrower from a group or syndicate of entities. These agreements could be seen as "price fixing" for the purposes of the Offence, in that the various members of the syndicate agree a single interest rate and repayment schedule for the borrower. As with co-insurance agreements, however, these agreements are very common in the market and are generally regarded as pro-competitive as they provide a means by which a borrower can obtain a single price to access a pool of lenders.

(iii) underwriting agreements: These agreements spread risk on the underwriting of new share and bond issues and assist the issuer by providing certainty as to the floor price and cost of underwriting for the whole issue (on a common basis). As with (i) and (ii) above, the customer (i.e. the insured, borrower, issuer) enters into negotiations precisely to obtain the common commitments that mean the resulting agreement adopts a form that could be regarded as having the elements stated in the cartel offence definition. Particularly in underwriting and insurance, the contract formation arrangements do not necessarily provide for the customer to be appraised of the identity of all its contracting counterparties

in advance, although it will be aware of the class from which they are drawn and those identifying the parties will have the authority of the customer. This causes particular problems for parties seeking to avail themselves of the exclusions.

(iv) FRAND and other common licensing schemes: These are a form of standardisation agreement. That is agreements that "have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply."[10] Such schemes could be seen as limiting markets because they result in competitors "agreeing" on the use of particular standards. However, such agreements have been recognised by the European Commission as being generally pro-competitive because they "usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions."[11]

3.6 We are aware that during the passage of the Bill there was also some discussion between BIS and the CBI in relation to a range of agreements that were, on the face of it, considered to be vulnerable to criminal prosecution under the Offence. We had expected that the conclusions of that discussion would be reflected in this Guidance (or, if the CMA disagreed with it, that these points would be flagged).

3.7 We would stress that it is essential to have clarity as to whether these types of agreements are, if implemented in the conventional form, inside or outside the scope of the Offence (or what factors would determine this e.g. the circumstances in which an exclusion or a defence would apply). It is not sufficient to rely on prosecutorial discretion in these cases as, if an Offence is committed, it raises broader considerations than just the decision whether or not to prosecute an individual. In particular there are, already, concerns about whether the underlying agreements are, or could be, void for illegality and, therefore, whether they will be enforceable. It could also raise concerns as to whether reporting obligations under the Proceeds of Crime Act 2002 are triggered. To the extent that these concerns are misplaced the effect will simply be to delay and frustrate legitimate business activity and to raise costs for business (for example, if the uncertainty creates a need for greater D&O insurance or makes such cover more expensive). We do not believe that this is the result Parliament intended when it asked the CMA to issue guidance.

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[10] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the "**Horizontal Guidelines**"); Paragraph 257

[11] Horizontal Guidelines; Paragraph 263

Exclusions

3.8 We expected to see more detail in the Guidance on the operation of the two exclusions specified in the Act (the "**Notification exclusion**" and the "**Publication exclusion**").

3.9 The Notification exclusion requires that customers be notified "before [customers] enter into [the affected agreements]." We would for example have expected the Guidance to address:

(i) the situation where not all the 'relevant information' is available to disclose at the outset. For example, in a co-underwriting agreement the organiser may enter into the agreement to provide insurance to the customer before knowing the identities of all his fellow co-insurers. Is it then sufficient to disclose all that is known to the party, followed perhaps, by further notifications at a later date – and if not, what is expected?

(ii) the situation where there is a change in the status of existing arrangements. For example, where a company supplying customers enters into a joint venture agreement with another company in relation to a supplied product. If the joint venture agreement contains features that may bring it within the Offence, do companies then need to inform existing customers that their agreements may be affected and of the existence of the joint venture? Do they need to enter into new agreements with those customers?

3.10 The Publication exclusion will exclude from the Offence any agreement where the 'relevant details' are published in the Gazette before the relevant arrangements are implemented. However, we would have expected the CMA to be able to provide more guidance on the level of detail that it would consider to be sufficient to meet the requirements of this exclusion. In particular, is it necessary, in the CMA's view, for a notice to describe particular clauses within an agreement? If so, this would seem to raise the prospect of competitively sensitive information being published, something which, in itself, could be a breach of competition law and is certainly an undesirable consequence, in any event, from both a competition and commercial standpoint. On a practical level it would be helpful if the CMA could provide an example publication that would, in their opinion, come within the exclusion (see also the Committee's comments on the SI Consultation at Section 4 below).

3.11 We also note that neither the guidance nor the draft order appear to address the application of the Publication regime to existing agreements. We note that by virtue of section 47(8) of the Enterprise and Regulatory Reform Act the amendments to the Offence will only apply in relation to agreements that are made after commencement of the relevant provisions but it would be helpful to clarify how the new regime would apply to the situation where an existing agreement is amended. Take, for example, a situation where an agreement is entered into prior to the change in the law and so not published. If, after the change in the law, the agreement were amended to, say, alter the names of the parties, would this trigger an obligation to publish and if so does the obligation to publish only extend to those provisions that have changed?

The Defences

3.12 We also expected more information on the scope of the statutory defences. For example

(i) guidance on the type of evidence that the CMA considers to be sufficient to show "no intention to conceal" and how this applies to commercial arrangements such as joint venture agreements. Parties to these types of arrangements often have legitimate reasons for not wanting to publish the details of the arrangement but the existence of the joint venture itself in general terms would be public. Is this, in the ordinary course of events, sufficient to show that there was no intention to conceal the arrangements?

(ii) guidance on what is required of a party that wishes to rely on the second defence (that at the time of making the agreement, the party had no intention to conceal the nature of the arrangements from the CMA). Is an email to the CMA summarising/attaching the agreement sufficient and if not, why not? It would also be helpful if the CMA could elaborate on how it will handle information that it receives as a result of these provisions and in particular explain the confidentiality arrangements that would attach to such notifications; and

(iii) in relation to the third defence, we would have expected the Guidance to confirm that (consistent with our understanding of the legislation):

- there is no requirement for the legal advice to be sought from a UK qualified lawyer or a lawyer that is based in the UK, or who has particular specialist expertise in this area. We are not sure what the CMA intends when it says that the defence "could also apply" to legal advisers qualified in other jurisdictions;[12]

- that the requirement is that the "nature of the arrangements"[13] is disclosed for the purpose of obtaining legal advice about the arrangements i.e that it is not necessary for the individual to have specifically sought advice in relation to the Offence (which an individual could not necessarily be expected to have identified as an issue); and

- that the content of the advice that is given (e.g. whether it was correct) does not affect the availability of the Defence.

3.13 In relation to the third defence, we also note that the CMA indicates that, in its opinion, this defence will only be available where there was "genuinely [an] attempt to seek

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[12] The Guidance, Paragraph 4.24

[13] Enterprise Act 2002, Section 188B(3)

legal advice about the arrangement."[14] Whilst we can understand the desire to exclude entirely "sham" arrangements, it is not clear to us how the CMA might seek to assess whether or not an approach for legal advice is "genuine". For example, we would not consider the fact that a client chooses not to follow the advice that is given is in itself evidence that the advice was not genuinely sought. We are also doubtful that there is any basis in the legislation for the addition of this requirement.

The public interest stage (paragraphs 4.46 to 4.41)

3.14 Our general observation is that the factors that are identified in this section of the Guidance are of a very general nature: there is no indication given as to the relative weight or significance of different factors and the emphasis tends to be on the circumstances that would support a decision to prosecute. As noted above, in the public interest section of the Assisted Suicide guidance, numerous specific factors are provided and these are divided between the factors that would tend to support prosecution and those that would not. We do not see any reason why a similar list of specific factors could not be provided in the public interest section of the Guidance.

3.15 Paragraph 4.26 notes that "prosecution will usually take place" unless the public interest assessment weighs against it. We assume that this reflects the underlying assumption, set out in paragraph 2.3, that there is an inherent public interest in the prosecution of individuals that are involved in "hardcore cartels". For the reasons set out above, we do not consider this to be the appropriate starting point for consideration of the Offence. We therefore also question whether it is appropriate to have such a presumption in favour of prosecution. It would be better for the presumption to be that no prosecution will be brought unless there is, on balance, a public interest in doing so.

3.16 The public interest section also appears to contain a number of omissions. In particular, we are surprised that there is no discussion of the impact on civil proceedings of prosecutions brought for violations of the Offence and the interrelationship between the civil and criminal regimes. For example, we would expect the Guidance to explain;

(i) whether, and, if so, in what type of circumstance, a prosecution could be considered appropriate when no civil investigation is being pursued; and

(ii) whether the impact of a prosecution on a civil investigation relating to the same facts (whether in the UK or the EU) would be a relevant factor to take into account – bearing in mind that the decision to bring a criminal prosecution typically has the effect of materially delaying the civil investigations, and that there is also a public interest in the efficient pursuit of these cases?

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[14] The Guidance, Paragraph 4.24

3.17 Related to point 3.16(i) above, another factor which seems fundamentally relevant but which is omitted is the extent to which an agreement will produce anti-competitive effects. It would seem surprising if there was a public interest in prosecution in relation to an agreement that was not considered to be compatible with general competition law due to its pro-competitive effects. The Guidance should, therefore, make clear that the fact that an agreement may be, on balance, pro-competitive, is a relevant factor when deciding whether to prosecute.

3.18 We also note in this context the decision of Court of Appeal in *IB v the Queen*[15], on the question of whether the cartel offence was "national competition law" for the purposes of Regulation 1/2003/EC and, if so, whether the effect of that Regulation was to exclude the jurisdiction of the courts to try an indictment alleging the "cartel offence" in relation to cartels falling within the scope of the European rules. The Court of Appeal, in reaching its conclusion that the jurisdiction of the criminal courts was not excluded, took some comfort from the fact that the risk of inconsistency between a cartel offence prosecution and a decision on the validity of an agreement under Articles 101/102 was likely to be small on the basis that it was "very probable" that an arrangement that fell within the scope of the cartel offence, as then defined, would be regarded in European terms as an 'object' infringement of Article 101. This statement no longer appears to be true and it follows that, without further clarity, it is possible that the jurisdiction of the courts to try individuals for breaching the Offence may again be questioned

3.19 Finally, we note two specific points:

(i) in paragraph 4.34 the CMA indicates that "[c]artels that have been carried on for a prolonged period are more likely to require prosecution." It is not clear to us why duration, in and of itself, is a relevant factor in deciding which offences require prosecution. There could be many agreements that need to be assessed by the CMA, which are long running but essentially benign. In such a situation it seems strange to suggest that, even though the agreement is benign, it is more deserving of prosecution because it has been operating for some time. The CMA should consider removing this factor or at least clarifying its secondary importance;

(ii) in paragraph 4.38 the CMA indicates that it will consider whether an individual's conduct was contrary to guidelines laid down in an undertaking's compliance policy. We would suggest that this is amended to make clear that this consideration only applies to the provisions of policies that relate to compliance with UK and EU competition law. To the extent that a company's compliance policy imposes standards that are higher than those imposed by the legislation, or addresses other matters (e.g. bribery and corruption) we do not think that non-compliance should be a relevant consideration to prosecution under the Offence.

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[15] [2009] EWCA Crim 2575, Paragraph 36

4. Comments on the Draft Secondary Legislation relating to the Cartel Offence

4.1 This section of this response refers and responds to Section 2 of SI Consultation. Section 2 of the SI Consultation asks three questions in relation to the proposed secondary legislation for the Publication Exclusion. The consultation questions and the Committee's response are provided below. Please also refer to our more general comments on the Publication Exclusion at 3.10 -3.11 above

Question 1: What is your view on the proposed manner of publication of relevant information?

4.2 The Committee considers that the Gazette may be ill suited to the role of publication medium. The financial cost, which BIS estimate to be £190 per publication,[16] is of concern (especially if each agreement notice must be published separately) as it would, in effect, be a tax on doing business and, thus, detrimental to the economy. Of greater concern, however, is the delay involved between notifying an agreement and its publication in the Gazette, as the agreement can only be finalised after publication this will, in many cases, delay (and thus increase the cost of) doing business, as well as making certain time critical transactions impossible.

Question 2: Can you estimate the number of advertisements which might be placed in one of the Gazettes?

4.3 The Committee has no basis on which to make such an assessment. However, unless more clarity is provided on the scope of the offence and the factors that inform the CMA's decision to prosecute this number is likely to be considerable as companies may take a defensive approach and publish anything that is not clearly outside the scope of the Offence.

Question 3: Do you have any other comments on the draft order?

4.4 No other specific comments

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City of London Law Society Competition Law Committee

11th November 2013

[16] SI Consultation Paragraph 2.9