

The UK criminal cartel offence

This Quickguide provides an overview of the revised criminal cartel offence under Part 6 of the Enterprise Act 2002, in light of the reforms implemented by the Enterprise and Regulatory Reform Act 2013.

Introduction

The UK criminal cartel offence was created by the Enterprise Act 2002, with the intention of criminalising and deterring the most serious and damaging forms of anti-competitive agreements, known as "hard core cartels". These include agreements relating to price-fixing, the sharing of markets or customers, limiting production or supply, or bid-rigging. Significant sanctions, including a prison sentence of up to five years, were introduced for individuals found guilty of the offence.

However, in practice the UK criminal cartel offence has thus far been rarely used, limiting the deterrent effect of the risk of criminal prosecution. Only one successful prosecution was brought between 2003 and 2012, against individuals involved in the *Marine Hose* cartel who pleaded guilty to the offence as part of a plea bargaining arrangement in the USA. A second, high profile prosecution against four British Airways executives collapsed in 2010. The competition authorities argued that the reason for the lack of prosecutions was that it was difficult to show that an individual had acted dishonestly, which was one of the requisite elements of the offence. In 2012, the Government therefore decided to remove the dishonesty requirement and thereby broaden the scope of the offence. The jury acquittals in 2015, under the old rules, of two executives involved in the *Water Tanks* cartel appeared to confirm the difficulties of convincing a jury that cartel participants acted dishonestly.

A revised criminal cartel offence, which does not require dishonesty to be proven, was implemented by the Enterprise and Regulatory Reform Act 2013, and entered into force on 1 April 2014. The amendments to the offence were intended to increase the number of successful

criminal prosecutions for involvement in cartel activity, and the Competition and Markets Authority ("CMA") has publicly stated that it intends to bring at least one prosecution each year under the new regime (while also continuing to apply the old rules where appropriate to conduct pre-dating 1 April 2014, as illustrated by the conviction in September 2017 (following a guilty plea) of one individual in relation to the *Precast Concrete Drainage Products cartel*).

It is therefore very important to understand the scope of the revised offence and how to minimise the risk of prosecution. This Quickguide outlines the key elements of the offence, including the exclusions and defences, as well as practical guidance on how to minimise the risk of prosecution.

The scope of the UK criminal cartel offence

With effect from 1 April 2014, an individual will be guilty of the revised criminal cartel offence if he or she agrees to make or implement arrangements which involve:

- price-fixing;
- market sharing;
- customer sharing;
- limiting production;
- limiting supply; or
- bid-rigging.

There is no longer any requirement to show that the individual acted dishonestly, or even that the individual intended to restrict competition as a result of the agreement. It is sufficient if the arrangements would fix prices/limit supply etc. if they operated as the parties to the agreement intended, even if the agreement is never actually implemented.

The potential scope of the offence is therefore very broad, and on the face of it, it is clear that "innocent" conduct could technically be caught by the offence. However, there are a number of exclusions and defences set out in the legislation which individuals may rely on to avoid prosecution.

Moreover, the CMA has issued prosecution guidance¹ which makes clear that it intends to focus on "hard core" cartel activity. This guidance includes a non-exhaustive list of examples of conduct which the CMA would not consider to fall within the scope of the revised offence (discussed further below).

Examples of conduct considered not to fall within the scope of the offence

The CMA's prosecution guidance states that the following types of conduct will not fall within the scope of the revised offence:

- co-operation 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;
- non-compete restrictions on a seller in the context of the sale of a business; and
- where the parties to the agreement operate at different levels of the supply/production chain, co-operation agreements that impose restrictions on supply or production on more than one party but at different levels of the supply/production chain.

The CMA's prosecution guidance also expressly states that passing on confidential future pricing information to a competitor would not, in and of itself, be caught by the UK criminal cartel offence (due to the lack of any "agreement"). However, any such transfer of information could amount to evidence of a cartel agreement by which the offence is committed.

Exclusions

There are three exclusions which may be relied upon by individuals to avoid prosecution for the revised criminal cartel offence:

- **the "customer notification" exclusion:** this can be relied upon where specified "relevant information" has been given to customers before entering into agreements for supply of the affected products or services;
- **the "publication" exclusion:** this can be relied upon where specified "relevant information" has been published in the London, Edinburgh or Belfast Gazette before the arrangements are implemented; and
- **the bid-rigging notification exclusion:** this can be relied upon in the case of bid-rigging arrangements, if the person requesting bids is given specified "relevant information" about the arrangements at or before the time when a bid is made (this exclusion is essentially retained from the pre-2014 offence).

The specified "relevant information" which must be disclosed is the same for all three exclusions, namely:

- the names of the businesses to which the arrangements relate;
- a description of the nature of the arrangements which is sufficient to show why they are/might be arrangements within the scope of the offence; and
- details of the products or services to which the arrangements relate.

Concerns were raised during the Government's consultation on the amendments to the UK criminal cartel offence regarding the lack of clarity about the level of detail required when describing the nature of the arrangements, as well as the costs incurred by businesses seeking to rely on the publication exclusion. In practice, if it is not possible to ensure that the arrangements fall outside the scope of the offence entirely, it may be preferable from a commercial perspective to rely on one of the defences outlined below instead of the exclusions.

Defences

Three defences to the UK criminal cartel offence were introduced in 2014:

- **No intention to conceal the arrangements from customers:** it is a defence 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. This defence does not expressly require any form of disclosure to customers, but in practice this would be the most straightforward way to demonstrate an unambiguous absence of any intention to conceal.
- **No intention to conceal the arrangements from the CMA:** it is a defence 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. Proving the absence of an intention to conceal is more difficult in practice without some form of disclosure, although the CMA's guidance states that this defence does not require notification of the arrangements to the CMA, and that it is under no duty to respond if any notification is made.
- **Seeking legal advice:** it is a defence 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. There is no requirement to show that the advice was followed (or indeed actually received), or to disclose any advice received. This is a somewhat odd defence: it would seem to apply even if the legal advice was that the actions were unlawful and that advice was ignored.

Sanctions

The sanctions which may be imposed on an individual convicted of the UK criminal cartel offence are up to five years imprisonment and/or unlimited fines. In appropriate cases, alternative sanctions to imprisonment may be considered, such as a suspended prison sentence, a community service order, or (as seen in the recent *Precast Concrete Drainage Products* prosecution) the imposition of an overnight curfew. In addition, confiscation proceedings can be brought against the individuals under the Proceeds of Crime Act 2002, and director disqualification orders may be imposed for up to 15 years.

Transitional arrangements: agreements made prior to 1 April 2014

The amended offence only applies to agreements made on or after 1 April 2014. Any prosecution in respect of an agreement made prior to that date will continue to be brought under the old regime, and dishonesty will need to be proven. Two prosecutions have been brought under the old regime since the amended offence entered into force, against individuals involved in the *Water Tanks and Precast Concrete Drainage Products* cartels (although convictions were only secured in those cases against the individuals who pleaded guilty). At the time of writing (August 2018) no prosecutions have yet been launched under the reformed offence.

How to minimise the risk of prosecution

In addition to general competition law compliance measures, the risk of prosecution of individuals for the UK criminal cartel offence can be minimised by taking steps to ensure that

any arrangements fall outside the scope of the offence or, alternatively, that the requirements of one of the exclusions or defences are met.

Seek legal advice

The most important first step is to seek legal advice if you have any concerns that proposed arrangements could be considered to prevent, restrict or distort competition (even if this is not the primary aim of the arrangements), prior to entering into any agreement.

It may be possible to take steps to minimise the risk that the arrangements fall within the scope of the cartel offence in the first place, for example by disclosing at the outset that a bid is being made jointly, or that joint purchasing arrangements are in place.

Seeking legal advice at an early stage should also ensure that an individual can rely on the "legal advice defence", in the event that the arrangements are subsequently considered to fall within the scope of the offence. Any advice received should be protected by legal advice privilege, and should not be disclosable under English law.

Consider disclosing details of the arrangements

Where it is commercially acceptable to do so, disclosing information about the arrangements to customers should ensure that the individuals involved can rely on the "notification" exclusion and/or the "no intention to conceal" defence, as discussed above. Whether disclosure is advisable in the circumstances will need to be considered on a case-by-case basis.

In some circumstances, publishing relevant information about the arrangements in one of the London, Edinburgh or Belfast Gazette publications may also be worth considering, although in practice this is likely to be a less attractive option from a commercial perspective, and will also incur advertising costs. At the time of writing, we are not aware of such a notice being published.

Those involved in joint tenders, or in consortium bids for contracts or in the context of corporate auction processes should make it clear that the tender/bid is being made in joint names and ensure that the "relevant information" discussed above is disclosed, including, for example, the nature of the co-operation between the joint bidders and how it will impact on the contract/auction bid.

Further advice

If you are concerned about the impact of the UK criminal cartel offence on your business, we would be happy to discuss these issues further with you.

For further information on any of these areas please speak to one of the contacts listed below or your usual Ashurst contact.

1. Cartel Offence Prosecution Guidance (CMA9) (March 2014).

Key Contacts

We bring together lawyers of the highest calibre with the technical knowledge, industry experience and regional know-how to provide the incisive advice our clients need.



Euan Burrows
PARTNER
LONDON
+44 20 7859 2919
euan.burrows@ashurst.com



Nigel Parr
PARTNER
LONDON
+44 20 7859 1763
nigel.parr@ashurst.com



Neil Cuninghame
PARTNER
LONDON
+44 20 7859 1147
neil.cuninghame@ashurst.com



Alexi Dimitriou
COUNSEL
LONDON
+44 20 7859 1191
alexidimitriou@ashurst.com



Charles Hammon
COUNSEL
LONDON
+44 20 7859 1662
charles.hammon@ashurst.com



Duncan Liddell
PARTNER
LONDON
+44 20 7859 1648
duncan.liddell@ashurst.com



Ross Mackenzie
PARTNER
LONDON
+44 20 7859 1776
ross.mackenzie@ashurst.com



Steven Vaz
PARTNER
LONDON
+44 20 7859 2350
steven.vaz@ashurst.com