

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6: Cartel Offence

Cartel Offence

401. Sections 188-202 provide for a criminal offence for individuals who dishonestly engage in cartel agreements ('the criminal offence'). The criminal offence will operate alongside the existing regime that imposes civil sanctions on undertakings that breach the competition provisions of CA 1998. The civil regime applies to a much wider range of anti-competitive activities than are targeted by the criminal offence.
402. The proposal to introduce criminal sanctions as a deterrent to individuals engaging in cartel activity was included in the July 2001 White Paper, '*Productivity and Enterprise: A World Class Competition Regime*', and views were invited from consultees on the general concept and on a number of detailed aspects of the proposal.
403. In the light of responses to the consultation and of contacts with the authorities likely to be responsible for the new offence, the Government announced in November 2001 further details of its proposals for the introduction of the criminal offence, as follows:
- the definition of the offence to be based on individuals having dishonestly entered into horizontal agreements (i.e. agreements at the same level in the supply chain) to fix prices, share markets, limit production or rig bids;
 - the investigation to be carried out by OFT investigators under a case controller from the Serious Fraud Office ('SFO'); appropriate investigatory powers to be made available to the OFT;
 - the OFT to be able to issue 'no-action letters' to protect informants from prosecution;
 - for investigations that lead to prosecution, the SFO to be the lead prosecutor; the OFT also to be a named prosecutor;
 - the offence to be triable in either the Magistrates' Courts or the Crown Courts; the maximum penalty for the offence to be five years' imprisonment; fines to be available in addition or as an alternative.
404. Sections 188-202 make the necessary legislative provisions to implement the criminal offence.

Section 188: Cartel offence

405. Subsections (1) to (6) define the offence. They provide that an individual will be liable to criminal prosecution if he dishonestly agrees with one or more other persons that two or more undertakings will engage in one or more of the prohibited cartel activities. The offence only applies in respect of horizontal agreements (i.e. agreements

relating to products or services at the same level in the supply chain). The offence is committed irrespective of whether or not the agreement reached between the individuals is implemented by the undertakings, and irrespective of whether or not they have authority to act on behalf of the undertaking at the time of the agreement.

406. The prohibited activities are: price-fixing; limitation of production; market-sharing; and bid-rigging. These activities comprise the most serious forms of anti-competitive activity and as such are a sub-set of the practices for which undertakings may be pursued under the civil provisions of CA 1998.
407. *Subsection (2)* specifies the four categories of prohibited cartel activity: price-fixing, limitation of production or supply, the sharing of markets, and bid-rigging. Price-fixing is defined so as to include the direct or indirect fixing of prices. Examples of indirect price-fixing would be likely to include, but would not be restricted to, agreements about relative price levels or price ranges, rebates, discounts, price-change indices, transport charges or methods of quotation. Market-sharing is defined in terms of customers so as to include the sharing of an individual customer or customers.
408. *Subsection (3)* requires, in the case of price-fixing or limitation of production or supply, that for the offence to be committed the other party must reciprocally have intended that the agreement, if implemented according to the intentions of the parties, should result in one of these activities. This means that agreements are not criminal where the agreement only requires one party to fix prices or limit production or supply as defined. This further requirement does not apply in the case of market-sharing and bid-rigging where the activities are by definition reciprocal.
409. *Subsections (5) and (6)* provide a definition of the activities that constitute bid-rigging for the purposes of the criminal offence. Bid-rigging is the only one of the prohibited activities where for all practical purposes the carrying out of the activity described in this section will in itself invariably indicate a dishonest intention and amount to the commission of the offence. Arrangements of which the person requesting bids is aware are not subject to the criminal offence.

Section 189: Cartel offence: supplementary

410. This section relates to subsections 1(2)(a)-(d) and 1(3)(a)-(c) of section 183. It provides that, for agreements involving price-fixing, limitation of production and market-sharing, undertakings must be operating at the same level in the chain of supply or production. The criminal offence does not apply to so-called vertical agreements, which relate to intended activity where the two or more parties are operating at different levels in the chain of supply or production (e.g. as producer and distributor or as distributor and retailer).

Section 190: Cartel offence: penalty and prosecution

411. *Subsection (2)* sets out that the OFT and SFO will be the only named prosecutors for the offence in England, Wales and Northern Ireland. A third party could only bring a prosecution with the OFT's consent. This is designed to enable the OFT to prevent vexatious private prosecutions against recipients of leniency (see below). The Lord Advocate will prosecute the criminal offence in Scotland; no legislative provision is required.
412. The scope of the offence generally extends to agreements that are implemented or intended to be implemented in the UK. This means that in general agreements do not need to have been implemented for an offence to have been committed. *Subsection (3)* provides for the exception to this, which is that agreements reached overseas may only be prosecuted if some subsequent action is taken within the UK to further the agreement. An instruction to others to implement the agreement, delivered into the UK by telephone or electronic mail, might be a sufficient action for this purpose.

413. *Subsection (4)* provides for the leniency process. It provides the OFT with the power to issue an applicant for leniency with a written notice that he or she will not be prosecuted for the particular matter under investigation provided certain contractual conditions set out in the notice are met. These conditions would be likely to include that the applicant: makes an admission of guilt; must not be the lead cartel member; must cease all involvement in the cartel (except as directed by the OFT to avoid arousing the suspicions of the other parties); must co-operate fully with the investigation; and must make a full disclosure. The notice is intended to encourage informants to come forward by providing them with sufficient comfort that they will not be prosecuted. In Scotland, the decision to prosecute rests with the Lord Advocate, who will take into account a report from the OFT.

Section 191: Extradition

414. This section provides that the criminal offence, or a conspiracy or an attempt to commit it, shall be an extraditable offence to which Schedule 1 to the Extradition Act 1989 applies. That Schedule preserves the old extradition regime under the Extradition Act 1870. This will allow extradition in respect of the offence from the UK to countries with whom the UK signed bilateral extradition treaties before 1989 – this group includes the United States of America. Requests for extradition to other countries with whom the UK has extradition arrangements (including members of the Council of Europe, Commonwealth countries and Hong Kong, and countries with whom the UK signed bilateral treaties since 1989) are considered under the main provisions of the Extradition Act 1989. Extradition from the UK to these countries will apply in respect of the criminal offence without a specific legislative provision. The extradition provisions do not apply retrospectively.
415. Dual-criminality applies (i.e. a request for extradition may only ever be made to a country that has criminal penalties for the same activity). Thus the introduction of criminal penalties in the UK will make it possible for other countries that criminalise the same activity to request the extradition of individuals from the UK. Requests made by the UK for the extradition of individuals from other countries will be governed by the law of those countries.

Criminal investigations by OFT

416. **Sections 192-202** make provisions for appropriate powers of investigations in respect of the criminal offence. They provide the OFT with powers modelled broadly on those already available to the SFO under Section 2 of the Criminal Justice Act 1987 ('CJA87'). The OFT will investigate the criminal offence under the powers provided in these sections, working closely with the SFO, who may draw on their CJA87 powers.

Section 192: Investigation of offences under section 188

417. This section provides that the OFT is only to exercise the powers in sections 193 and 194 in relation to the criminal offence. The OFT will continue to conduct investigations in relation to infringement of Chapter I civil prohibitions of CA 1998 by using investigatory powers set out in Part I, Chapter III of CA 1998. The OFT can only exercise the powers if there are reasonable grounds for suspecting an offence under section 188.

Section 193: Powers when conducting an investigation

418. *Subsection (1)* provides powers for the OFT to require in writing the person under investigation, or any other person, to answer questions or provide information that the OFT considers relates to any matter relevant to the investigation.
419. *Subsection (2)* provides that the OFT may require the production of documents that appear to the OFT to relate to the investigation. The documents required must be

specified or described in a written notice or must fall within a category specified or described in the notice.

Section 194: Power to enter premises under a warrant

420. This section makes provision for the OFT to make an application to a judge of the High Court, or in Scotland for the procurators fiscal to apply to the sheriff court, for a warrant authorising a named officer of the OFT to enter premises. The warrant may also cover any other person whom the OFT has authorised in writing to accompany the named officer. This section parallels section 28 CA 1998, which requires the OFT to seek a warrant from the High Court or the Court of Session in order to investigate infringements of the civil prohibitions in Chapter I of CA 1998.
421. *Subsection (1)* grants a judge of the High Court or a sheriff the power to issue a warrant if he or she is satisfied that there are reasonable grounds for believing there are documents on any premises that the OFT has the right to require under section 193. The judge or the sheriff must be satisfied that one of the following circumstances applies before he or she may issue a warrant: (i) that a person has failed to comply with a requirement under section 193 to produce documents; (ii) that it is not practicable to serve a notice under section 193; or (iii) that the service of such a notice might seriously prejudice the investigation (i.e. there are reasonable grounds to believe that information might be destroyed or tampered with).
422. *Subsection (4)* allows people who are not employees of the OFT to accompany and assist OFT officers who are exercising powers under this section. It is anticipated that such people will have expertise that is not available within the OFT but is required to exploit fully the terms of the warrant (e.g. IT experts).
423. *Subsection (6)* amends Part I of Schedule 1 of the Criminal Justice and Police Act 2001 ('CJPA 2001') to add to it the powers of seizure conferred by subsection (2). This will have the effect of incorporating the amendments to statutory powers of seizure introduced by section 50 CJPA 2001.
424. These amendments enable an officer to seize material if it is not reasonably practicable to determine on the premises whether the material is seizeable or not, or, in the case of property some of which is seizeable, which items he or she would be entitled to seize. The exercise of the powers is subject to strict safeguards, which include a requirement to give written notice (section 52 CJPA 2001) and a duty to return legally privileged material (section 55).
425. The OFT's existing civil powers of seizure under section 28(2) CA 1998 are already contained in Part I of Schedule 1 of the CJPA 2001.

Section 195: Exercise of powers by authorised person

426. This section grants the OFT the power to authorise any competent investigator who is not an officer of the OFT to exercise the powers conferred on the OFT under sections 193 and 194. However, no person under investigation is bound to comply unless such authorised person produces evidence of his or her authority.

Section 196: Privileged information etc.

427. This section requires legal professional privilege - i.e. the principle that legal advice is confidential to the client to whom it is given - to be respected in the exercise of powers under sections 193 and 194 and reproduces the requirements in respect of banking professional privilege in section 2(10) CJA 1987.

Section 197: Restriction on use of statements in court

428. This section provides that statements made under compulsion in response to powers exercised under sections 193 and 194 may only be used in court in respect of a

prosecution of the person who made them: (i) for making false or misleading statements under subsection 201(2); or (ii) for making an inconsistent statement in respect of a prosecution for another offence.

Section 198: Use of statements obtained under Competition Act 1998

429. The Chairman of the OFT ("the Chairman") will continue to have the powers of the former DGFT to require the provision of information by an individual on behalf of an undertaking under Part I, Chapter III of CA 1998 as part of a civil investigation. This section amends CA 1998 to provide a safeguard with regard to the use of any such oral information obtained under CA 1998 by compulsion, for the purpose of the criminal offence under section 188. This is intended to provide protection against self-incrimination.

Section 199 & Schedule 26: Surveillance powers & Repeals and revocations

430. **Section 199** and Schedule 26 amend the Regulation of Investigatory Powers Act 2000 ('RIPA 2000') to grant the OFT access to intrusive surveillance powers for the United Kingdom. With these powers the Chairman may issue an authorisation for the planting of surveillance devices in residential premises (including hotel accommodation) and private vehicles. (A designated officer may grant an authorisation in an urgent case if the Chairman is not available.) Acting on information received from an informant, the OFT could, for example, use these powers to record a meeting of cartelists in a hotel room.
431. Under section 32(3)(b) RIPA 2000, one of the criteria for which an authorisation may be granted is for 'the purpose of preventing or detecting serious crime'. All applications for authorisations are subject to the scrutiny and approval of the surveillance commissioners in line with the existing procedural safeguards in RIPA 2000. When an authorisation is granted, the OFT intends to outsource the technical deployment of the intrusive surveillance activity to other public authorities which already have access to these powers and practical experience of exercising them.
432. The OFT has applied separately to the Home Office for an Order to grant authorised officers access to directed surveillance (essentially monitoring the movement of people and vehicles) and covert human intelligence sources (essentially the use of informants) under sections 28 & 29 RIPA 2000. OFT has also applied to the Home Office for an Order to grant authorised officers access to communication data (primarily postal and telephone records) under section 22 RIPA 2000. These powers will be available for both civil and criminal investigations.

Section 200: Authorisation of action in respect of property

433. This section amends Part III of the Police Act 1997 to grant the Chairman and a designated officer the powers to issue authorisations to interfere with private property. Such authorisations are required to gain access to premises in order to undertake intrusive surveillance.

Section 201: Offences

434. This section makes it an offence for a person to fail to comply with any requirement imposed on him or her in an investigation by the OFT under sections 193 and 194. It is an offence for a person knowingly or recklessly to provide false or misleading information to the OFT or for a person to destroy or falsify documents that he or she has been required to produce. It is also an offence for a person to obstruct a person exercising powers under a warrant issued under section 194.