

# Punishing the bullies

Operating a cartel is a criminal offence which could carry a five year prison sentence. But are companies taking the threat seriously enough? **Sally Ramage** reports



Cartel activity has been a criminal offence since the introduction of the Enterprise Act 2002 which brought widespread changes to competition regulation in the UK. The punishment for operating cartels is a maximum five year prison sentence and/or a fine.

A cartel – a group of companies which have entered into an agreement to fix their prices or to share the market so that they can raise prices by removing and/or reducing the competition – can appear in a number of guises. There are price fixing cartels, bid-rigging cartels and market sharing cartels.

The prosecution of the cartel offence of market sharing against the bus companies Arriva and FirstGroup is the most recent and indeed the first of the OFT fines under the new Act, and in this case the parties were found guilty and fined for engaging in a route-swapping cartel. Arriva was fined £318,000. FirstGroup was also fined but this was dropped on appeal. The cartel offence was that the two bus companies had agreed between them to withdraw from certain bus routes in Leeds and Wakefield. They had had a meeting in a hotel and agreed that Arriva would withdraw five buses from two complete routes in return for FirstGroup withdrawing from another two routes.

The OFT investigation into this cartel activity was triggered by an anonymous letter. Because FirstGroup had cooperated with the OFT by effectively becoming a whistleblower, they were granted leniency. Arriva's fine was also reduced because the company decided to cooperate.

Market sharing cartels such as this are often an agreement to decide the market share each company is to enjoy and to decide which company will win which contract in order to maintain that market share. It becomes bid-rigging when this agreement includes decisions on tendering for contracts.

But cartel activity is nothing new – it is just the criminality of it that is new. Under the Enterprise Act, not only will the guilty parties be fined, but they can be imprisoned for up to five years.

Persons found guilty will most likely be directors, being agents of the company.

There was the 1995 case of the Director of Fair Trading v Pioneer Concrete (UK) Ltd in which Pioneer had, at a senior level, put compliance procedures in place in order to comply with the Restrictive Trade Practices Act 1976, but some employees ignored these instructions and did otherwise. The company was prosecuted. The case went to the House of Lords and it was decided that the actions of a company's employees acting in the course of their employment amounts to the carrying on of business by the company. So, despite the compliance procedures being in place, the company was still liable for the acts of its employees in the same way as, for example, a company is liable when one of its employees makes a defective product. So what better compliance procedures would have prevented the employees from committing this offence? A good compliance programme will have four features – support of senior management; appropriate policy and procedures; staff training and regular evaluation of the programme's effectiveness; and a compliance manual that explains the legislation and gives examples of prohibited conduct. The compliance programme should be much more than just a policy document and should positively encourage whistleblowing so that the company can see the areas of risk and address them as a priority.

The Enterprise Act now allows criminal sanctions and calls for individual responsibility for compliance with competition law. This is a compelling reason for the upgrade of compliance programmes within any organisation.

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● *Further information about legislation on cartels can be found in the business information section at [www.of.gov.uk](http://www.of.gov.uk)*

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