CARTELS
by SALLY RAMAGE®

Cartel activity has become a criminal offence since the Enterprise Act 2002 which brought widespread changes to competition regulation in the UK. The punishment for operating cartels is now a maximum of five years imprisonment and/or a fine

A cartel is 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 around. 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 plc and First-group plc 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 and First group was also fined but First-group's fine 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 First-group withdrawing from another two routes.

The Office of Fair Trading investigation into this cartel activity was triggered by an anonymous letter . Because First-group plc had co-operated with the Office of Fair Trading by becoming a whistle-blower as per the Enterprise Act , they were granted leniency. Arriva's fine was also reduced because Arriva also 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. and is known as bid-rigging when it is to do with tendering for contracts

But cartel activity is nothing new; it is just the criminality of it that is new. in that under the Enterprise Act, not only will the guilty parties be fines 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 Concrete(UK) Ltd 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 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 the compliance manual should explain the legislation and give examples of prohibited conduct. The compliance programme should be much more than just a policy document and should regularly positively encourage whistle-blowing, so that the company can see the areas of risk and address those as a priority.

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

To remind us, the Enterprise Act 2002, section 188 gives the definition of a cartel offence:

(*1) An individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).*

> *(1) The arrangements must be ones which, if operating as the parties to the agreement intend, would –*
>
> > *(a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,*
> > *(b) limit or prevent supply by A in the United Kingdom of a product or service,*
> > *(c) limit or prevent production by A in the United Kingdom of a product,*
> > *(d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,*
> > *(e) divide between A and B customers for the supply in the United Kingdom of a product or service, or*
> > *(f) be bid-rigging arrangements.*
>
> *(2) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would-*
>
> > *(a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,*
> > *(b) limit or prevent supply by B in the United Kingdom of a product .*
>
> *(3) In subsections (2)(a) to (d) and (3), references to supply or production in the appropriate circumstances(for which see section 189).*
>
> *(4) "Bid-rigging arrangements" are arrangements under which, in response to a request for*

bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom-

(a) A but not B may make a bid, or

(b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.

(5) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.

(6) “Undertaking” has the same meaning as in Part 1 of the 1998 Act. “

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