The UK Criminal Cartel Offence

What you need to know…
From 1 April 2014 the **Dishonesty** requirement will be removed from section 188 of the Enterprise Act 2002:

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

Types of arrangements caught:

- Price fixing
- Market/customer sharing
- Bid-rigging
- Output limitation
Cartel Offence: Key Changes

> The offence is subject to the following *exclusions*:
> The notification exclusion
> The publication exclusion
> Notification of bid-rigging arrangements
> Compliance with a legal requirement
The offence is subject to the following *defences*:

- No intention to conceal the arrangements from customers
- No intention to conceal the arrangements from the CMA
- Reasonable steps were taken to disclose to legal advisers for the purposes of obtaining advice about the nature of the arrangements before their implementation
Cartel Offence: Key Challenges for Business

> Wide scope of criminal conduct: no requirement for conduct to infringe Chapter 1 CA 98 or Article 101 TFEU – will it encourage leniency pleas/leniency applications?

> Will the offence capture innocent participants/individuals acting within the ordinary course of business?

> Potentially reduces the gap between personal and corporate liability?
Cartel Offence: Key Challenges for the CMA

> Requirement for ‘sufficient evidence to provide a realistic prospect of conviction’

> Prosecution to prove that individuals ‘agreed’ to arrangements

> Need for arrangements to contain reciprocal restriction and relates to undertakings operating at the same level of supply

> The CMA is required to publish prosecution guidance on the principles to be applied in determining, in any case, whether proceedings for an offence under section 188(1) should be instituted
Cartel Offence: Application to Agreements

Exempt or potentially justifiable arrangements under the civil regime may be caught by the amended cartel offence:

> Crisis cartel

> Cooperation agreements between horizontal competitors (such as commercialisation and standardisation agreements) which include a price fixing element or which limit output

> Determining premiums in joint underwriting arrangements

> Non-compete arrangements between two or more parties in the context of setting up a joint venture or multiple parties in an existing joint venture

> R&D agreements which restrict exploitation of the results, allocate territories/customers or limit the production/supply of competing products

> Specialisation agreements which restrict production/supply or set prices to immediate customers in the context of joint distribution.

Source: BIS Department for Business Innovation and Skills
Cartel Offence: penalties

> The maximum penalty for the cartel offence is 5 years imprisonment and / or an unlimited fine for conviction of the offence on indictment.

> In the OFT’s *Marine Hose* criminal cartel proceedings, three individuals pleaded guilty to the cartel offence and were initially subject to between 2 ½ and 3 years imprisonment and director disqualification for between 5 and 7 years. The Court of Appeal reduced their prison sentences to between 20 months and 2 ½ years.

> Two of the three individuals were ordered to pay £366,354 and £649,636 under confiscation orders.
Panel Discussion

What does this mean in practice?
188 Cartel offence (as amended)

(1) An individual is guilty of an offence if he 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).

(2) 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.

(3) 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 or service, or
(c) limit or prevent production by B in the United Kingdom of a product.

(4) In subsections (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 189).

(5) “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.

(6) [...] 

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

(8) This section is subject to section 188A.
188A Circumstances in which cartel offence not committed

(1) An individual does not commit an offence under section 188(1) if, under the arrangements—

(a) in a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service so affected,

(b) in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time when a bid is made, or

(c) in any case, relevant information about the arrangements would be published, before the arrangements are implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.

(2) In subsection (1), “relevant information” means—

(a) the names of the undertakings to which the arrangements relate,

(b) a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies,

(c) the products or services to which they relate, and (d) such other information as may be specified in an order made by the Secretary of State.

(3) An individual does not commit an offence under section 188(1) if the agreement is made in order to comply with a legal requirement.

(4) In subsection (3), “legal requirement” has the same meaning as in paragraph 5 of Schedule 3 to the Competition Act 1998.

(5) A power to make an order under this section—

(a) is exercisable by statutory instrument,

(b) may be exercised so as to make different provision for different cases or different purposes, and

(c) includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate.

(6) A statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

188B Defences to commission of cartel offence

(1) In a case where the arrangements would (operating as the parties intend) affect the supply in the United Kingdom of a product or service, it is a defence for an individual charged with an offence under section 188(1) 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.

(2) It is a defence for an individual charged with an offence under section 188(1) 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.

(3) It is a defence for an individual charged with an offence under section 188(1) to show that, before the making of 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 purposes of obtaining advice about them before their making or (as the case may be) their implementation.
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