



JONES DAY
COMMENTARY

THE UK'S NEW CARTEL OFFENCE

From April 1, 2014, a new regime for criminal antitrust investigations applies in the UK with the entry into effect of the new Competition and Markets Authority (CMA) (see [Antitrust Alert](#)). The CMA recently has published guidance on how this new regime will work. The goal is to make it easier for the CMA to bring criminal proceedings against individuals who allegedly have been involved in cartels.

This commentary, the fourth and final in our series on changes to UK competition enforcement, summarizes the key changes to the cartel offence and implications for businesses.

THE MAIN CHANGE

Prior to April 1, 2014, the criminal cartel offence required that an individual must have “dishonestly” agreed with one or more other persons to engage in cartel activities. Under the new regime, this dishonesty element will be removed, but new defenses are allowed. To establish criminal cartel activity the CMA need only prove intent to enter into an agreement

and to operate the arrangement in question. The Government’s view is that the inclusion of the dishonesty element in the cartel offence inhibited the successful prosecution of cases (only one cartel offence has been successfully tried since 2003, where three executives were jailed for involvement in a cartel involving marine hoses) and anticipates that the change to the law will improve enforceability and increase deterrence.

THE NEW CARTEL OFFENCE

The new cartel offence removes the need to prove that:

- The defendant’s behavior was dishonest according to the ordinary standards of reasonable and honest people (the objective element); and
- The defendant himself must have realized that his behavior was by those standards dishonest (the subjective element).

Accordingly, the new cartel offence will allow the CMA to prosecute any individuals involved in an agreement between competitors to fix prices, share markets, rig bids or limit outputs, in addition to pursuing the companies employing these individuals for violation of UK and/or EU laws prohibiting cartels.

However, there are a number of exclusions or defenses.

EXCLUSIONS

A change to the law introduces circumstances where the cartel offence will not have been committed. Parties to arrangements that would otherwise fall within the offence may bring the arrangements outside the scope of the offence by ensuring that the arrangements satisfy the requirements of the following exclusions:

- The **notification exclusion** provides that an individual will not commit an offence if under the terms of the arrangement customers are given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service affected. For example, this exclusion might conceivably apply to a joint selling agreement between two competitors whereby groups of customers are directed to deal exclusively with either competitor. However, the exclusion will not be satisfied if the arrangement merely provides that customers are provided with a general disclaimer that a supplier's agreements may be subject to price fixing/market sharing arrangements.
- The **bid-rigging notification exclusion** provides that an individual will not commit an offence if, in the case of bid-rigging arrangements, the person requesting bids is given relevant information about the arrangements at or before the time of a bid. For example, this exclusion might conceivably apply to joint bidding between competitors whereby prices are set jointly.
- The **publication exclusion** provides that an individual will not commit an offence if relevant information about the arrangement is published before the arrangement is implemented, by advertising them once in any of the London Gazette, the Edinburgh Gazette, or the Belfast Gazette.

“Relevant information” for the purpose of the exclusions means (a) the names of the companies to which the arrangements relate, (b) a description of the nature of the arrangements sufficient to show why they are or might fall within the scope of the offence, (c) the products or services to which they relate, and (d) any other information as may be specified in an order made by the Secretary of State.

In addition to the exclusions identified above, an individual will not commit a cartel offence if the agreement is made in order to comply with a law in force in the UK or elsewhere in the European Union, or is imposed directly by the Treaty on the Functioning of the EU or the European Economic Area Agreement.

DEFENSES

There are three new statutory defenses to the cartel offence, only one of which need be proved in any given case, using the balance of probabilities as the standard of proof:

- First, if an individual can 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.
- Second, if an individual can 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.
- Third, if an individual can 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.

“Professional legal advisers” under the third defense is intended to cover both external and in-house legal advisers qualified in the UK and could also apply to legal advisers qualified in foreign jurisdictions with an equivalent legal qualification. The defense applies where the individual took

reasonable steps to seek legal advice about the arrangements in question.

Perhaps surprisingly, these exclusions and defenses do not explicitly include arrangements between competitors that are exempt from the civil competition laws prohibiting anti-competitive agreements on the grounds that they give rise to economic efficiencies and consumer benefits. This has led to criticism of the new cartel offence and potential conflicting interests between companies and their employees.

PRACTICAL IMPACT

The new cartel offence has been branded as the most significant of the reforms to the UK's competition law regime which came into force on April 1. It is likely to make it easier for the CMA to pursue prosecutions against individuals it suspects are involved in price fixing, customer sharing, or market allocation arrangements. An increase in prosecutions should be anticipated.

The impact on businesses is potentially far reaching. For instance, Confederation of British Industry (CBI) has argued that the new cartel offence is unworkable and "risks criminalising a wide range of standard commercial transactions, in areas such as distribution, mergers and banking." The CBI also considers that the proposed defense of publishing details of the transaction in the London Gazette is unworkable by business and likely to create a chilling effect on normal business activity. Although firms are permitted to enter into certain restrictive agreements, such as non-compete arrangements in the context of setting up a joint venture, employees may find themselves uncertain whether such arrangements still expose them to the cartel offence (they ought not to) and as a result may seek publication to protect themselves from possible prosecution. This could create a conflict with their employer who has a legitimate interest in maintaining confidentiality.

In light of this, companies doing business in the UK should consider updating their competition compliance procedures to address their and their employees' potentially divergent interests.

LAWYER CONTACTS

For more information, please contact your principal Jones Day representative or either of the lawyers listed below.

Matt Evans

Partner, Antitrust & Competition
London

+44.20.7039.5959

mevans@jonesday.com

Vincent Brophy

Partner, Antitrust & Competition
London

+44.20.7039.5192

vbrophy@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.