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Important Changes to the UK's Competition Regime

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Some important changes to the UK's competition regime come into force today, including the creation of a new competition enforcement body and a significantly broadened criminal cartel offence.

A new competition body

The UK Competition and Markets Authority (CMA), created by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013), comes into being today. The CMA has existed in "shadow" form since 1 October 2013, but now it becomes fully functional. The Competition Commission and the Office of Fair Trading (OFT) cease to exist and the CMA assumes their competition enforcement powers as well as certain of the OFT's consumer protection powers.

The CMA has published a number of guidance documents outlining how it will exercise its powers. Broadly, while there are some changes compared to the way in which the OFT and Competition Commission operated, the UK's civil enforcement of competition law will not change substantially. Notably, the system remains administrative in nature; the CMA will take infringement decisions itself, rather than having to prosecute a case before a court. (This is different from Department of Justice actions in the United States, which must be brought in Court, although the US Federal Trade Commission prosecutes some cases through administrative litigation.) Additionally, the current voluntary merger notification system will remain in place with some procedural changes compared to how mergers were notified in the past. Notably, there is now a statutory 40 working day time limit for Phase I investigations and all notifications must be made using a standard "Merger Notice" form.

The criminal cartel offence

The more significant substantive changes are to the UK's criminal cartel offence. From today, the prosecution no longer needs to prove dishonesty to secure the criminal conviction of an individual for cartel behaviour under the Enterprise Act 2002, as amended by the ERRA 2013. The revised offence only applies to agreements that are made on or after 1 April 2014.

As under the old law, the offence can be committed regardless of whether the agreement to engage in prohibited arrangements is actually implemented. However, the new offence is defined to exclude agreements that are made openly. Under a new section 188A of the Enterprise Act, the cartel offence will not be committed where, under the arrangements:

1. customers are to be given relevant information about the arrangements before entering into agreements for the supply to them of the product or service affected; or
2. in the case of bid-rigging arrangements, the person requesting bids is to be given relevant information about the arrangements before or at the time a bid is made;[1] or
3. relevant information about the arrangements is to be published in the London Gazette before they are implemented.

"Relevant information" includes the names of the companies, a description of the nature of the arrangements (sufficient to show why they are or might be arrangements falling within the scope of the offence) and the products and services to which they relate.

The CMA's recently published *Cartel Offence Prosecution Guidance* (The Guidance) does not indicate what form the notification to customers should take, except to say that a "broad general disclaimer" will be insufficient. Although the intention presumably is that the information should be made available to all customers in order for the notification exclusion to apply, this is not specified in the legislation. However, the Guidance states that "evidence of genuine steps being taken in relation to one of the statutory exclusions will be relevant to whether or not there was such an intention [i.e. to notify or publish] even if they failed to meet the requirements for section 188A." Examples given include the inadvertent failure to notify a minority of all relevant customers, or the inadvertent selling of a limited number of products before making the relevant disclosures.

Section 188A also provides an exclusion for agreements made in compliance with a legal requirement under UK law or any applicable EU law.

The exclusion of agreements that are made openly reflects the Government's intention to target only the most serious cartels, but the legislation appears to leave much to the discretion of the prosecutor in this regard. It is debatable whether secrecy alone makes conduct so serious as to warrant a criminal sanction, and it will be interesting to see how juries respond when faced with the prospect of convicting a defendant for conduct that was secret but arguably not "dishonest." It is possible to imagine scenarios, for example, where arrangements have not been disclosed publicly but there is no evidence of covert activity; or where the defendant admits the facts but argues, supported by expert evidence, an honest motive such as the saving of employees from redundancy. Hopefully, in applying its prosecutorial discretion, the CMA will focus on conduct that can properly be described as criminal, for example where there was a clear intention to deceive. The Guidance states that "the greater degree of evidence of clandestine conduct and of conscious participation in a hardcore cartel, the more likely it is that a prosecution will be required. Conduct such as deliberate concealment, covert behaviour or misrepresentation are likely to be relevant." Other relevant factors include whether the individual's conduct was contrary to the firm's compliance policy and whether

there were any attempts to report the arrangements to senior management.

In addition to the exclusions in section 188A, section 188B provides the following defences to the cartel offence:

1. At the time of making the agreement, the individual did not intend that the nature of the arrangements would be concealed from customers or from the CMA; or
2. The individual took reasonable steps, before making the agreement, to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice on them before their implementation.

The Guidance stipulates that "professional legal advisers" is intended to cover both external and in-house legal advisers who are appropriately qualified. For this defence to succeed, an individual must have made a genuine attempt to obtain legal advice about the arrangement, including making full disclosure of all relevant facts to the professional legal adviser.

The cartel offence was amended to address the Government's concerns that the dishonesty element made the offence difficult to prosecute and that it put the UK at odds with international best practice on the definition of hard-core cartel offences. However, although the removal of the dishonesty element makes the offence easier to prove, it remains to be seen whether this will lead to a significant increase in the number of successful prosecutions. The lack of prosecutorial activity to date can be attributed to a number of factors, many of which remain and may prove to be as much a challenge for the CMA as they have been to date for the OFT. For more detail on these factors, click here.

Further information

The CMA's Cartel Offence Prosecution Guidance can be accessed here.

Further guidance on the exercise of the CMA's powers can be accessed here and here.

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[1] This is a pre-existing exclusion under the Enterprise Act 2002 which has been retained.

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