



The OFT is ready to tackle anti-competitive behaviour

Cartels are generally regarded as the most damaging form of anti-competitive behaviour. When competitors agree not to compete with each other - and go to elaborate lengths to conceal their agreement - markets are distorted and consumers lose out.

Combating this unlawful collusion is one of the OFT's main priorities, and with the introduction last June of the Enterprise Act 2002, its enforcement powers have significantly strengthened.

A cartel agreement can cover a range of business practices, from price fixing to restricting output levels. In the case of bid rigging competitors agree which cartel member will win a particular contract.

Criminal offence

The Enterprise Act makes it a criminal offence for an individual to dishonestly agree with one or more other persons that two or more undertakings will engage in the most serious cartel activities, namely price-fixing, market-sharing, bid-rigging or limiting production or supply. The maximum penalty on conviction is five years' imprisonment and/or an unlimited fine.

This new offence complements the civil sanctions already available to the OFT

under the Competition Act 1998 (CA98). Undertakings which infringe the CA98 prohibitions on anti-competitive agreements and abuse of dominant market position can be fined up to 10 per cent of their turnover for each year of infringement up to a maximum of three years.

Simon Williams, the OFT's Director of

'If just one colluder waivers, the entire venture can quickly unravel'

Cartel Investigations Branch (CIB) comments:

'Combating these illegal agreements is a challenging activity demanding effective legal powers and penalties. With the introduction of the Enterprise Act and increased investigatory powers, we are now able to target both the undertakings engaged in cartels and the leading figures within them.'

When it comes to investigating the new offence, the Enterprise Act gives the OFT a broad range of powers. These include the power to compel persons to answer questions and provide

information or documents relevant to any cartel investigation, and to enter premises under warrant to take possession of relevant documents.

Surveillance

The Enterprise Act also amends the Regulation of Investigatory Powers Act 2000 (RIPA) and the Police Act 1997 to allow the OFT to conduct intrusive surveillance of residential premises (including hotels) or private vehicles when investigating the criminal cartel offence, and to covertly install cameras or listening devices for this purpose. Such use of surveillance requires the personal authority of the Chairman of the OFT and the prior approval of the Office of Surveillance Commissioners. It must also be necessary to prevent or detect the cartel offence and proportionate to what is sought to be achieved by carrying it out.

Beyond the Enterprise Act, the OFT has joined the list of public authorities permitted to authorise the use of directed surveillance (such as watching a person's office) or informants under RIPA. These powers can be used for cartel investigations under both the Enterprise Act and CA98. The OFT is also authorised to obtain access to

communications data – for example, obtaining records of telephone numbers called – for investigations under the Enterprise Act.

The OFT exercises its new criminal investigation powers in close cooperation with the Serious Fraud Office, which prosecutes the criminal offence in England, Wales and Northern Ireland, and with the International and Financial Crime Unit (IFCU) of the Crown Office in Scotland. Memoranda of Understanding with these bodies setting out the basis for criminal investigations were signed last year.

The criminal sanction applies to individuals who make or implement or cause to be made or implemented agreements between undertakings at the same level in the supply chain, known as horizontal agreements. Vertical agreements, for example between manufacturers and distributors, do not fall within the scope of the offence. An individual involved in dishonest cartel activity after 20 June 2003, when the competition provisions of the Enterprise Act came into force, is at risk of prosecution.

Process

Where the OFT receives information that criminal cartel activity has occurred, CIB conducts initial enquiries. If these uncover sufficient evidence to justify further investigation, the OFT can continue to investigate or the case can be referred to the SFO or IFCU. This decision will be made in close cooperation with the SFO and IFCU.

Once a referral has been accepted, a criminal case team will be formed, involving OFT staff where appropriate. Cases will be tried either in a magistrates' court or before a jury in the Crown Court (the Sheriff's Court or the High Court in Scotland).

Simon Williams, himself a former SFO case controller, comments:

'The offence is committed if the individual acts dishonestly, a concept which is well understood in criminal law. Individuals may be convicted regardless of whether the agreement they entered into was actually implemented, or whether they had authority to act on behalf of the undertakings involved.'

For a cartel to survive, its members must stick together and observe a strict code of confidentiality. If just one



Simon Williams

colluder wavers, the entire venture can quickly unravel.

No action letters

The Enterprise Act exploits this instability by allowing the OFT to grant 'no-action' letters to individuals who blow the whistle on cartels and cooperate fully with an investigation. This takes the form of a 'no-action' letter guaranteeing immunity from prosecution being brought in England, Wales or Northern Ireland if certain conditions are met. While such guarantees of immunity cannot be offered to individuals in Scotland, cooperation with the OFT will be taken into account by the Lord Advocate in deciding whether or not to prosecute.

In order to benefit from a 'no-action' letter, an individual must admit to the cartel offence, refrain from further participation in the cartel (except as directed by the investigating authority), provide the OFT with all the information they have on the cartel's activities and maintain continuous and complete cooperation throughout an investigation. 'No-action' letters will not be offered to individuals who have coerced others into becoming cartel members.

A comparable leniency programme

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under the CA98 regime has proved enormously successful, and almost half of the OFT's civil cases now result from leniency applications.

Civil and criminal investigations

Cartel members may find themselves subject to parallel civil and criminal investigations if they have not applied for civil leniency or a criminal no action letter.

'When we first receive information about alleged cartel activity, we may not be in a position to know whether to investigate using our CA98 or Enterprise Act powers,' Simon Williams explains.

'It is possible that the OFT will open a CA98 case while an SFO-led criminal investigation is also under way. In such circumstances, the two investigation teams will maintain an on-going dialogue and are permitted by law to disclose certain evidence to each other.

'To ensure that a civil investigation does not prejudice the outcome of possible criminal action, all OFT enquiries and evidence handling procedures will be in accordance with the standards required by criminal law. If it seems likely that criminal action will be taken, we will suspend a civil investigation until the outcome of that action is known.'

Fines

Since its formation as a specialist unit in 2000, CIB has investigated a large number of cases of suspected cartel activity under the CA98 and imposed significant financial penalties.

The first cartel to be penalised under CA98 involved two national bus companies, Arriva and FirstGroup, whose subsidiaries in Leeds and Wakefield were found to have entered into unlawful agreements to share bus routes. Most recently, nine roofing contractors were fined a total of more than £300,000 for setting tender prices for the supply of repair, maintenance and improvement (RMI) services for flat roofs in the West Midlands area.

According to Simon Williams, the message to would-be cartel members is clear. 'There are now serious personal consequences for anyone engaging in dishonest cartel agreements – including fines and prison time.'