

# ENTERPRISE ACT 2002

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 6: Cartel Offence

##### Cartel Offence

401. Sections 188-202 provide for a criminal offence for individuals who dishonestly engage in cartel agreements ('the criminal offence'). The criminal offence will operate alongside the existing regime that imposes civil sanctions on undertakings that breach the competition provisions of CA 1998. The civil regime applies to a much wider range of anti-competitive activities than are targeted by the criminal offence.
402. The proposal to introduce criminal sanctions as a deterrent to individuals engaging in cartel activity was included in the July 2001 White Paper, '*Productivity and Enterprise: A World Class Competition Regime*', and views were invited from consultees on the general concept and on a number of detailed aspects of the proposal.
403. In the light of responses to the consultation and of contacts with the authorities likely to be responsible for the new offence, the Government announced in November 2001 further details of its proposals for the introduction of the criminal offence, as follows:
- the definition of the offence to be based on individuals having dishonestly entered into horizontal agreements (i.e. agreements at the same level in the supply chain) to fix prices, share markets, limit production or rig bids;
  - the investigation to be carried out by OFT investigators under a case controller from the Serious Fraud Office ('SFO'); appropriate investigatory powers to be made available to the OFT;
  - the OFT to be able to issue 'no-action letters' to protect informants from prosecution;
  - for investigations that lead to prosecution, the SFO to be the lead prosecutor; the OFT also to be a named prosecutor;
  - the offence to be triable in either the Magistrates' Courts or the Crown Courts; the maximum penalty for the offence to be five years' imprisonment; fines to be available in addition or as an alternative.
404. Sections 188-202 make the necessary legislative provisions to implement the criminal offence.

##### Section 188: Cartel offence

405. Subsections (1) to (6) define the offence. They provide that an individual will be liable to criminal prosecution if he dishonestly agrees with one or more other persons that two or more undertakings will engage in one or more of the prohibited cartel activities. The offence only applies in respect of horizontal agreements (i.e. agreements

relating to products or services at the same level in the supply chain). The offence is committed irrespective of whether or not the agreement reached between the individuals is implemented by the undertakings, and irrespective of whether or not they have authority to act on behalf of the undertaking at the time of the agreement.

406. The prohibited activities are: price-fixing; limitation of production; market-sharing; and bid-rigging. These activities comprise the most serious forms of anti-competitive activity and as such are a sub-set of the practices for which undertakings may be pursued under the civil provisions of CA 1998.
407. *Subsection (2)* specifies the four categories of prohibited cartel activity: price-fixing, limitation of production or supply, the sharing of markets, and bid-rigging. Price-fixing is defined so as to include the direct or indirect fixing of prices. Examples of indirect price-fixing would be likely to include, but would not be restricted to, agreements about relative price levels or price ranges, rebates, discounts, price-change indices, transport charges or methods of quotation. Market-sharing is defined in terms of customers so as to include the sharing of an individual customer or customers.
408. *Subsection (3)* requires, in the case of price-fixing or limitation of production or supply, that for the offence to be committed the other party must reciprocally have intended that the agreement, if implemented according to the intentions of the parties, should result in one of these activities. This means that agreements are not criminal where the agreement only requires one party to fix prices or limit production or supply as defined. This further requirement does not apply in the case of market-sharing and bid-rigging where the activities are by definition reciprocal.
409. *Subsections (5) and (6)* provide a definition of the activities that constitute bid-rigging for the purposes of the criminal offence. Bid-rigging is the only one of the prohibited activities where for all practical purposes the carrying out of the activity described in this section will in itself invariably indicate a dishonest intention and amount to the commission of the offence. Arrangements of which the person requesting bids is aware are not subject to the criminal offence.

### ***Section 189: Cartel offence: supplementary***

410. This section relates to subsections 1(2)(a)-(d) and 1(3)(a)-(c) of section 183. It provides that, for agreements involving price-fixing, limitation of production and market-sharing, undertakings must be operating at the same level in the chain of supply or production. The criminal offence does not apply to so-called vertical agreements, which relate to intended activity where the two or more parties are operating at different levels in the chain of supply or production (e.g. as producer and distributor or as distributor and retailer).

### ***Section 190: Cartel offence: penalty and prosecution***

411. *Subsection (2)* sets out that the OFT and SFO will be the only named prosecutors for the offence in England, Wales and Northern Ireland. A third party could only bring a prosecution with the OFT's consent. This is designed to enable the OFT to prevent vexatious private prosecutions against recipients of leniency (see below). The Lord Advocate will prosecute the criminal offence in Scotland; no legislative provision is required.
412. The scope of the offence generally extends to agreements that are implemented or intended to be implemented in the UK. This means that in general agreements do not need to have been implemented for an offence to have been committed. *Subsection (3)* provides for the exception to this, which is that agreements reached overseas may only be prosecuted if some subsequent action is taken within the UK to further the agreement. An instruction to others to implement the agreement, delivered into the UK by telephone or electronic mail, might be a sufficient action for this purpose.

413. *Subsection (4)* provides for the leniency process. It provides the OFT with the power to issue an applicant for leniency with a written notice that he or she will not be prosecuted for the particular matter under investigation provided certain contractual conditions set out in the notice are met. These conditions would be likely to include that the applicant: makes an admission of guilt; must not be the lead cartel member; must cease all involvement in the cartel (except as directed by the OFT to avoid arousing the suspicions of the other parties); must co-operate fully with the investigation; and must make a full disclosure. The notice is intended to encourage informants to come forward by providing them with sufficient comfort that they will not be prosecuted. In Scotland, the decision to prosecute rests with the Lord Advocate, who will take into account a report from the OFT.

### ***Section 191: Extradition***

414. This section provides that the criminal offence, or a conspiracy or an attempt to commit it, shall be an extraditable offence to which Schedule 1 to the Extradition Act 1989 applies. That Schedule preserves the old extradition regime under the Extradition Act 1870. This will allow extradition in respect of the offence from the UK to countries with whom the UK signed bilateral extradition treaties before 1989 – this group includes the United States of America. Requests for extradition to other countries with whom the UK has extradition arrangements (including members of the Council of Europe, Commonwealth countries and Hong Kong, and countries with whom the UK signed bilateral treaties since 1989) are considered under the main provisions of the Extradition Act 1989. Extradition from the UK to these countries will apply in respect of the criminal offence without a specific legislative provision. The extradition provisions do not apply retrospectively.
415. Dual-criminality applies (i.e. a request for extradition may only ever be made to a country that has criminal penalties for the same activity). Thus the introduction of criminal penalties in the UK will make it possible for other countries that criminalise the same activity to request the extradition of individuals from the UK. Requests made by the UK for the extradition of individuals from other countries will be governed by the law of those countries.