



Enterprise Act 2002

2002 CHAPTER 40

PART 6

CARTEL OFFENCE

Cartel offence

188 Cartel offence

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

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- (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) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.
- (7) “Undertaking” has the same meaning as in Part 1 of the 1998 Act.

189 Cartel offence: supplementary

- (1) For section 188(2)(a), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by B in the United Kingdom.
- (2) For section 188(2)(b), the appropriate circumstances are that A’s supply of the product or service would be at a level in the supply chain—
 - (a) at which the product or service would at the same time be supplied by B in the United Kingdom, or
 - (b) at which supply by B in the United Kingdom of the product or service would be limited or prevented by the arrangements.
- (3) For section 188(2)(c), the appropriate circumstances are that A’s production of the product would be at a level in the production chain—
 - (a) at which the product would at the same time be produced by B in the United Kingdom, or
 - (b) at which production by B in the United Kingdom of the product would be limited or prevented by the arrangements.
- (4) For section 188(2)(d), the appropriate circumstances are that A’s supply of the product or service would be at the same level in the supply chain as B’s.
- (5) For section 188(3)(a), the appropriate circumstances are that B’s supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by A in the United Kingdom.
- (6) For section 188(3)(b), the appropriate circumstances are that B’s supply of the product or service would be at a level in the supply chain—
 - (a) at which the product or service would at the same time be supplied by A in the United Kingdom, or
 - (b) at which supply by A in the United Kingdom of the product or service would be limited or prevented by the arrangements.
- (7) For section 188(3)(c), the appropriate circumstances are that B’s production of the product would be at a level in the production chain—
 - (a) at which the product would at the same time be produced by A in the United Kingdom, or

- (b) at which production by A in the United Kingdom of the product would be limited or prevented by the arrangements.

190 Cartel offence: penalty and prosecution

- (1) A person guilty of an offence under section 188 is liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both;
 - (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.
- (2) In England and Wales and Northern Ireland, proceedings for an offence under section 188 may be instituted only—
 - (a) by the Director of the Serious Fraud Office, or
 - (b) by or with the consent of the OFT.
- (3) No proceedings may be brought for an offence under section 188 in respect of an agreement outside the United Kingdom, unless it has been implemented in whole or in part in the United Kingdom.
- (4) Where, for the purpose of the investigation or prosecution of offences under section 188, the OFT gives a person written notice under this subsection, no proceedings for an offence under section 188 that falls within a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice.

191 Extradition

The offences to which an Order in Council under section 2 of the Extradition Act 1870 (c. 52) (arrangements with foreign states) can apply include—

- (a) an offence under section 188,
- (b) conspiracy to commit such an offence, and
- (c) attempt to commit such an offence.

Criminal investigations by OFT

192 Investigation of offences under section 188

- (1) The OFT may conduct an investigation if there are reasonable grounds for suspecting that an offence under section 188 has been committed.
- (2) The powers of the OFT under sections 193 and 194 are exercisable, but only for the purposes of an investigation under subsection (1), in any case where it appears to the OFT that there is good reason to exercise them for the purpose of investigating the affairs, or any aspect of the affairs, of any person (“the person under investigation”).

193 Powers when conducting an investigation

- (1) The OFT may by notice in writing require the person under investigation, or any other person who it has reason to believe has relevant information, to answer questions, or otherwise provide information, with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.

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- (2) The OFT may by notice in writing require the person under investigation, or any other person, to produce, at a specified place and either at a specified time or forthwith, specified documents, or documents of a specified description, which appear to the OFT to relate to any matter relevant to the investigation.
- (3) If any such documents are produced, the OFT may—
 - (a) take copies or extracts from them;
 - (b) require the person producing them to provide an explanation of any of them.
- (4) If any such documents are not produced, the OFT may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.
- (5) A notice under subsection (1) or (2) must indicate—
 - (a) the subject matter and purpose of the investigation; and
 - (b) the nature of the offences created by section 201.

194 Power to enter premises under a warrant

- (1) On an application made by the OFT to the High Court, or, in Scotland, by the procurator fiscal to the sheriff, in accordance with rules of court, a judge or the sheriff may issue a warrant if he is satisfied that there are reasonable grounds for believing—
 - (a) that there are on any premises documents which the OFT has power under section 193 to require to be produced for the purposes of an investigation; and
 - (b) that—
 - (i) a person has failed to comply with a requirement under that section to produce the documents;
 - (ii) it is not practicable to serve a notice under that section in relation to them; or
 - (iii) the service of such a notice in relation to them might seriously prejudice the investigation.
- (2) A warrant under this section shall authorise a named officer of the OFT, and any other officers of the OFT whom the OFT has authorised in writing to accompany the named officer—
 - (a) to enter the premises, using such force as is reasonably necessary for the purpose;
 - (b) to search the premises and—
 - (i) take possession of any documents appearing to be of the relevant kind, or
 - (ii) take, in relation to any documents appearing to be of the relevant kind, any other steps which may appear to be necessary for preserving them or preventing interference with them;
 - (c) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;
 - (d) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form—
 - (i) in which it can be taken away, and

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- (ii) in which it is visible and legible or from which it can readily be produced in a visible and legible form.
- (3) Documents are of the relevant kind if they are of a kind in respect of which the application under subsection (1) was granted.
- (4) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.
- (5) In Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 (c. 16) (powers of seizure to which section 50 of that Act applies), after paragraph 73 there is inserted—

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73B The power of seizure conferred by section 194(2) of the Enterprise Act 2002 (seizure of documents for the purposes of an investigation under section 192(1) of that Act).”

195 Exercise of powers by authorised person

- (1) The OFT may authorise any competent person who is not an officer of the OFT to exercise on its behalf all or any of the powers conferred by section 193 or 194.
- (2) No such authority may be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority.
- (3) No person is bound to comply with any requirement imposed by a person exercising powers by virtue of any authority granted under this section unless he has, if required to do so, produced evidence of his authority.

196 Privileged information etc.

- (1) A person may not under section 193 or 194 be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client.
- (2) A person may not under section 193 or 194 be required to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless—
 - (a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or
 - (b) the OFT has authorised the making of the requirement.
- (3) In the application of this section to Scotland, the reference in subsection (1)—
 - (a) to proceedings in the High Court is to be read as a reference to legal proceedings generally; and
 - (b) to an entitlement on grounds of legal professional privilege is to be read as a reference to an entitlement by virtue of any rule of law whereby—
 - (i) communications between a professional legal adviser and his client, or
 - (ii) communications made in connection with or in contemplation of legal proceedings and for the purposes of those proceedings,

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are in such proceedings protected from disclosure on the ground of confidentiality.

197 Restriction on use of statements in court

- (1) A statement by a person in response to a requirement imposed by virtue of section 193 or 194 may only be used in evidence against him—
 - (a) on a prosecution for an offence under section 201(2); or
 - (b) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it.
- (2) However, the statement may not be used against that person by virtue of paragraph (b) of subsection (1) unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person in the proceedings arising out of the prosecution.

198 Use of statements obtained under Competition Act 1998

In the 1998 Act, after section 30 there is inserted—

“30A Use of statements in prosecution

A statement made by a person in response to a requirement imposed by virtue of any of sections 26 to 28 may not be used in evidence against him on a prosecution for an offence under section 188 of the Enterprise Act 2002 unless, in the proceedings—

- (a) in giving evidence, he makes a statement inconsistent with it, and
- (b) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf.”

199 Surveillance powers

- (1) The Regulation of Investigatory Powers Act 2000 (c. 23) is amended as follows.
- (2) In section 32 (authorisation of intrusive surveillance)—
 - (a) after subsection (3) there is inserted—

“(3A) In the case of an authorisation granted by the chairman of the OFT, the authorisation is necessary on grounds falling within subsection (3) only if it is necessary for the purpose of preventing or detecting an offence under section 188 of the Enterprise Act 2002 (cartel offence).”;
 - (b) in subsection (6) after paragraph (m) there is inserted “; and
 - (n) the chairman of the OFT.”
- (3) In section 33 (rules for grant of authorisations) after subsection (4) there is inserted—

“(4A) The chairman of the OFT shall not grant an authorisation for the carrying out of intrusive surveillance except on an application made by an officer of the OFT.”
- (4) In subsection (5)(a) of that section, after “officer” there is inserted “or the chairman or an officer of the OFT”.

- (5) In section 34 (grant of authorisation in the senior officer’s absence)—
- (a) in subsection (1)(a), after “or by” there is inserted “an officer of the OFT or”;
 - (b) in subsection (2)(a), after “may be,” there is inserted “as chairman of the OFT or”;
 - (c) in subsection (4), after paragraph (l) there is inserted—
 - “(m) a person is entitled to act for the chairman of the OFT if he is an officer of the OFT designated by it for the purposes of this paragraph as a person entitled so to act in an urgent case.”
- (6) In section 35 (notification of authorisations for intrusive surveillance)—
- (a) in subsections (1) and (10), for “or customs” there is substituted “, customs or OFT”;
 - (b) in subsection (10), after paragraph (b) there is inserted—
 - “(ba) the chairman of the OFT; or”;
 - (c) in paragraph (c) of that subsection, at the end there is inserted “or for a person falling within paragraph (ba).”
- (7) In section 36 (approval required for authorisations to take effect)—
- (a) in subsection (1), after paragraph (d) there is inserted “; or
 - (e) an officer of the OFT.”;
 - (b) in subsection (6), after paragraph (g) there is inserted “; and
 - (h) where the authorisation was granted by the chairman of the OFT or a person entitled to act for him by virtue of section 34(4)(m), that chairman.”
- (8) In section 37 (quashing of police and customs authorisations etc.) in subsection (1), after paragraph (d) there is inserted “; or
 - (e) an officer of the OFT.”
- (9) In section 40 (information to be provided to Surveillance Commissioners) after paragraph (d) there is inserted “; and
 - (e) every officer of the OFT.”.
- (10) In section 46 (restrictions on authorisations extending to Scotland), in subsection (3), after paragraph (d) there is inserted—
 - “(da) the OFT.”.
- (11) In section 48 (interpretation of Part 2), in subsection (1), after the entry relating to “directed” and “intrusive” there is inserted—
 - ““OFT” means the Office of Fair Trading;”.

200 Authorisation of action in respect of property

- (1) Part 3 of the Police Act 1997 (c. 50) (authorisation of action in respect of property) is amended as follows.
- (2) In section 93 (authorisation to interfere with property etc.)—
- (a) in subsection (1B), after “customs officer” there is inserted “or an officer of the Office of Fair Trading”;
 - (b) after subsection (2A) there is inserted—

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“(2AA) Where the authorising officer is the chairman of the Office of Fair Trading, the only purpose falling within subsection (2)(a) is the purpose of preventing or detecting an offence under section 188 of the Enterprise Act 2002.”;

- (c) in subsection (3), after paragraph (d) there is inserted “, or
 - (e) if the authorising officer is within subsection (5)(i), by an officer of the Office of Fair Trading.”;
- (d) in subsection (5), after paragraph (h) there is inserted “; or
 - (i) the chairman of the Office of Fair Trading.”

- (3) In section 94 (authorisation given in absence of authorising officer) in subsection (2), after paragraph (f) there is inserted—

“(g) where the authorising officer is within paragraph (i) of that subsection, by an officer of the Office of Fair Trading designated by it for the purposes of this section.”

201 Offences

- (1) Any person who without reasonable excuse fails to comply with a requirement imposed on him under section 193 or 194 is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.
- (2) A person who, in purported compliance with a requirement under section 193 or 194—
- (a) makes a statement which he knows to be false or misleading in a material particular; or
 - (b) recklessly makes a statement which is false or misleading in a material particular,
- is guilty of an offence.
- (3) A person guilty of an offence under subsection (2) is liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both; and
 - (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.
- (4) Where any person—
- (a) knows or suspects that an investigation by the Serious Fraud Office or the OFT into an offence under section 188 is being or is likely to be carried out; and
 - (b) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he knows or suspects are or would be relevant to such an investigation,
- he is guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from the persons carrying out such an investigation.
- (5) A person guilty of an offence under subsection (4) is liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both; and
 - (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

- (6) A person who intentionally obstructs a person in the exercise of his powers under a warrant issued under section 194 is guilty of an offence and liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both; and
 - (b) on summary conviction, to a fine not exceeding the statutory maximum.

202 Interpretation of sections 192 to 201

In sections 192 to 201—

“documents” includes information recorded in any form and, in relation to information recorded otherwise than in a form in which it is visible and legible, references to its production include references to producing it in a form in which it is visible and legible or from which it can readily be produced in a visible and legible form;

“person under investigation” has the meaning given in section 192(2).