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Provisions of UK Enterprise and Regulatory Reform Act Take Effect

New competition provisions may make it easier to prosecute cartel offences, but add additional exclusions and defences.

On 1 April, the competition provisions of the UK's Enterprise and Regulatory Reform Act (ERRA) came into effect. The ERRA introduces amendments to the Enterprise Act 2002 (EA), substantially altering the way in which cartel offences will be investigated and prosecuted in the future and making it easier to prosecute individuals criminally. Furthermore, as part of the government's strategy to promote long-term economic growth by, amongst other things, strengthening and streamlining existing tools for combating anticompetitive behaviour, the ERRA also abolished both the Office of Fair Trading and the Competition Commission. Their main functions were transferred to a single entity—the Competition and Markets Authority (CMA).[1]

As a result of these changes, agreements that may have been deemed noncriminal under the old provisions of the EA may qualify as violations. Companies and individuals will need to consider, for the first time, ways to protect their employees and themselves from criminal liability under the new regime, including implementing and/or enhancing compliance training, reviewing internal policies and procedures and disclosure practices, and obtaining legal advice on complying with the ERRA.

Background

The concept that cartel behaviour should be prohibited and punished has been a part of UK law since the Competition Act 1998 (CA), when UK legislation was harmonised with applicable EU Treaty competition rules. The CA introduced civil penalties on undertakings in relation to the so-called Chapter I prohibition against a variety of restrictive practices.

However, the ERRA has brought about changes to two particular aspects of UK regulation that go even further than the EU Treaty rules. First, any (civil) penalties imposed by the competition authorities could only be levied against companies, with no recourse being available against the individuals who entered into the anticompetitive agreements. Second, it was not a criminal offence in the UK to be connected to cartel behaviour, unlike in the United States, where there has been a cartel offence since the Sherman Antitrust Act was passed in 1890 and even earlier in certain states.

Although the EA sought to address some of the perceived deficiencies of the CA by criminalising dishonest agreements between individuals that amounted to cartel behaviour, in practice, it had very little impact because proving dishonesty has been very challenging. There have only been two prosecutions under the EA since it came into force. The first was a case involving marine hoses in 2008, in which there was a guilty plea, and the second was the prosecution of four airline executives that collapsed in 2010.

1. View more information about the ERRA at https://www.gov.uk/government/publications/enterprise-and-regulatory-reform-act-2013-a-guide.

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No “Dishonesty” Requirement

One of the ERRA’s most far-reaching changes is that there does not need to be “dishonesty” for a cartel offence to have been committed. Accordingly, for conduct taking place after 1 April, the prosecution no longer needs to prove dishonesty to secure a conviction if a company or individual was **knowingly** involved in one of the categories of a criminal cartel agreement (price fixing, limitation of supply or production, market sharing, and bid rigging[2]). This amendment should dramatically reduce the burden on the prosecution and lead to a much higher conviction rate.

Exclusions and Defences

Although “dishonesty” as an element of the offence has been removed, statutory exclusions and defences for individuals have been added. The ERRA introduces a new twofold structure. The first part identifies those circumstances in which a cartel offence will not be committed. These are essentially where customers are informed of the agreement or it is made public. The second part sets out the following three possible defences:

1. At the time of making the arrangement, the individual did not intend to conceal it from customers.
2. The individual did not intend the nature of the agreement be concealed from the CMA.
3. Before making the agreement, the individual took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice before making or implementing the agreement

The legal advice defence is particularly noteworthy, because it appears to suggest that an individual would avoid conviction in the event that he or she had obtained legal advice before entering into the agreement. Moreover, there seems to be no requirement for the legal advice to be followed in order for this defence to have effect, which would appear to mean that the simple act of obtaining legal advice about the proposed arrangement should suffice. However, only time will tell whether or not this is how the defence will work in practice.

Conclusion

The abolition of the requirement to prove dishonesty is likely to cause alarm to those who now run a much higher risk of being convicted of a cartel offence when engaging in prohibited behaviour. Although only individuals are capable of being prosecuted for the cartel offence, the potential damage done to companies—such as reputational harm or loss of contracts, not to mention civil penalties—should not be ignored when considering the overall impact of this change. Furthermore, although introducing various new exemptions and defences may be seen by some as a *quid pro quo*, it is difficult to see how, in practice, companies will be willing voluntarily to disclose confidential commercial matters that could potentially harm their businesses.

These developments will have significant implications for major companies in every industry, and internal practices and policies will need to be amended accordingly.

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2. Enterprise Act § 188(2).

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