



## **Aspects of the Section 188 Cartel Offence** **Adrian Darbishire, CLT Conference, 27 February 2007**

**Please note:** This presentation was accurate at the time it was prepared (February 2007). However, as a result of the decision of the House of Lords in *Norris* [2008 UKHL 16], certain qualifications are necessary to the section dealing with the inference of dishonesty and the offence of conspiracy to defraud.

If you wish to discuss any aspect of the current law relating to cartel offences, including domestic and overseas leniency regimes, please do not hesitate to contact Adrian Darbishire, who will be pleased to talk to you.

'People of the same trade seldom meet together.. but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible to prevent such meetings by any law consistent with liberty and justice.'

Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations*, 1776.

'I've had a team of researchers working furiously for days now and I can confidently report to you that there are no jokes about anti-trust law. Literally, none at all.'

Alberto R. Gonzales, Attorney-General of the United States,  
ATD Award Ceremony, 19 May 2005.

### **A Cartel Offence**

The Adam Smith quotation dates back 230 years<sup>1</sup>; there is nothing new in suppliers of goods and services attempting to maximise profits by fair means or foul. Generally speaking, the Enterprise Act (EA) cartel offence merely creates a new offence in relation to some of the many foul means open to such suppliers. Cartel behaviour for these purposes is no more subtle than cheating customers by agreeing with your competitors to fix prices between you, or to carve up the market in one way or another. It has been going on for hundreds of years.

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<sup>1</sup> The second quotation is intended simply as a warning.

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Despite Adam Smith's scepticism, legislation providing for civil remedies against companies which engage in cartels has been successfully and routinely operated throughout the developed world for at least 50 years.

Criminal prosecution of individuals for anti-competitive conduct is not a new idea. Anti-competition offences were introduced in the United States in 1890, under a statute known as the Sherman Act. (The act was chiefly aimed at monopolistic suppliers who abused their market power; some of these monopolies were trusts -which was then a more flexible legal entity than a corporation- such as the Standard Oil Trust, the first target. The original targets of the act explain why the Americans confusingly describe as 'anti-trust law' what the rest of the world calls competition law. Cartels, therefore, are one aspect of 'anti-trust' or competition law.)

The Sherman Act, as supplemented by other legislation, is still the principal instrument by which anti-competitive conduct is prosecuted. It provides:

15 U.S.C. §1: Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court<sup>2</sup>.

15 U.S.C. §2: Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Sherman Act got off to a slow start, being little used until the second half of the 20th century. However, particularly since the reform of the leniency regime in the early 1990s, it has enjoyed recently a golden era. The American model is an example and an exhortation to the rest of the developed world, and it is no exaggeration to describe the attorneys of the Anti-Trust Division (ATD) of the Department of Justice as missionaries, preaching the joys of criminal enforcement. Senior staff travel the world giving slick presentations, trumpeting their latest successes, and throwing out the truly extraordinary sums recovered in fines from the offending organisations.

They have two messages in truth. One is to legislators and enforcement authorities: see what we are doing, see how easy it is; you can do this too, it's fun. The other is to any business people

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<sup>2</sup> In 2004 the maximum penalties were increased to ten years' imprisonment, \$1m fine for an individual and \$100m for a corporation.

who may be tempted to engage in collusive behaviour which touches, even peripherally, on US consumers. The message to them is 'watch out: we will find you, we will seize you and we will throw you into Federal prison.'

### **New Criminal Offence**

So much for the American approach. What of the position here? Most of Europe lags far behind. No-one has yet been charged under the EA and in fact, with the exception of a single prosecution for fixing the price of home heating oil in Western Ireland which is not yet finally concluded, there have been no successful prosecutions in Europe for a cartel offence at all. This is new territory. Precisely how the EA offence will be employed remains to be seen.

Some things are clear. First, this offence is not aimed at technical breaches of competition law. It is likely that the authorities in this country will only prosecute conduct which is plainly unlawful. Unlike health and safety breaches, pollution offences or other regulatory infringements, this is not an offence which would be easy to commit by accident or inadvertence. This offence is aimed at deliberate wrongdoing.

However, deliberate wrongdoing and serious wrongdoing are not the same thing. While cartels have been described by the ATD as 'the Supreme Evil of Antitrust', many of those who have participated in cartel behaviour did not regard what they were doing as in the least evil, or even seriously wrong. Like many other unpalatable aspects of corporate life, such as petty dishonesty, bullying or sexual harassment, collusive behaviour is hugely influenced by the 'corporate culture', which makes that which is plainly wrong nevertheless acceptable by being tolerated and connived at. The expense claim for a Saturday night taxi home from a restaurant, a Friday lunch with an old friend put through as marketing, 'throwing a sickie' to watch a football match are all examples of deliberate dishonesty, though are absolutely endemic and in many commercial environments barely attract a raised eyebrow. Such tolerance may explain the extent to which respectable individuals within companies readily involve themselves in dishonest collusive contact, often with no prospect of significant personal gain.

### **The Enterprise Act 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.
- (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.

### **Basic Principles**

The offence refers only to individuals, not to companies. It is not possible for a company to commit the cartel offence. That is important because, plainly, companies will be the principal beneficiaries from this conduct and it was certainly open to Parliament to create criminal liability for companies, as exists in the US.

Second, the offence requires proof of an agreement between at least two individuals, who will almost inevitably be employees or directors of the relevant undertakings. In EU competition law the term undertaking means pretty much any organisation through which trade may be carried on. So any company, trust, partnership, sole trader is caught by the term undertaking. For simplicity I'm going to use the term 'company', but we are in fact dealing with pretty much any trading entity, whatever its legal status. As the undertaking is not the defendant, legal personality is irrelevant.

It is important to note that the offence is only concerned with arrangements between two

undertakings. That means that abuse of market power by a single company is not an offence under section 188. Behaviour by monopolies, such as predatory pricing to keep out new entrants, or use of improper means to coerce customers to accept unfavourable terms, may well be anti-competitive, unlawful and actionable. It is not an offence under section 188.

So we are concerned with offences committed by an individual, which concern an arrangement between two companies. The third general restriction is that the two companies must be at the same level in the supply chain. That is, we are concerned with horizontal arrangements rather than vertical arrangements. So arrangements with customers to the terms on which A will supply B with something, or not supply C with something, cannot fall within the section, even if they are intended to have and actually have some anti-competitive effect. In essence, the arrangement has to be between two companies engaged in, or potentially engaged in, selling or providing the same thing.

### **The Conduct**

Within that, what kind of conduct is prohibited? Despite the rather convoluted wording of the act the answer is the usual things. They fall naturally under three heads:

- Price-Fixing
- Bid-Rigging
- Volume (Market Share) Allocation

These are generally recognised as the key heads of cartel behaviour, and are criminal *per se* under the US legislation (so that no restraint of trade needs to be proved.) The same applies under this act, in the sense that there is no requirement to show that the arrangement had any actual or intended anti-competitive effect, and it is not a defence to show that it would not have done so.

I am going to use a few examples from behaviour which has been the subject of enforcement from competition authorities in the past to illustrate the conduct under each head. NB: These examples, whether they come from the US or the UK, include conduct which, whilst undoubtedly anti-competitive, has not been proved to be dishonest. Thus, although these are examples of the kind of conduct the act is designed to prevent, it cannot be taken in any case that any of the individuals responsible would have been guilty of the section 188 offence had it been in force at the relevant time. As you will see, some of these cases seem to provide a basis upon which a jury might be permitted to consider the question of dishonesty, but that is as far as we can go.

### **Price-fixing**

'If you don't like it, then find another auction house.'

As good an example of price-fixing as any is the Christies/Sotheby's cartel of the mid-1990s. In short, the chairmen of each of the two companies, which dominated the fine art auctions market, sat down together and agreed between them a new pricing strategy: a vendor's commission, the terms and conditions of advances for auction sales, commission payments, even credit terms. To make it more effective they agreed to regular exchange of information, to prevent either party from cheating on the deal. They even agreed that neither party would claim publicly to be

the market leader in any segment of the market, presumably to reduce the temptation for the other to discount in the sectors in which it was weaker. The effect, for those who wanted to sell a Rembrandt or a Fabergé egg, was that the global market for auction services, dominated by these two suppliers, was rigged.

A particular feature of the agreement was that the new seller's commission, would be absolutely non-negotiable. That is the great reward that being a member of a cartel brings. Sir Anthony Tennant's note of the agreement with his counterpart Alfred Taubman was eloquent: 'If anyone wants to bargain on [the] new scale, they will tell them to go elsewhere'. The CEO of Christie's at the time, Christopher Davidge, explained in his evidence at trial that he understood that meant:

'if people didn't accept the fixed nature of the commission rates, that they wouldn't be willing to bargain and that [the] reply to [the] clients of Christie's and Sotheby's would be 'I am sorry, that is our rates and you have [to] accept it. If you don't like it, then find another auction house'<sup>3</sup>

Alfred Taubman, who had bought Sotheby's in 1983, was fined \$7m and sent to prison for a year in 2002 for his part in the cartel. It was in relation to Taubman that the sentencing judge, confronted by a mass of evidence presented in mitigation about his charitable donations, dryly remarked that 'the fact that a man gives money to the poor, does not entitle him to rob from the rich'. Sir Anthony Tennant has not set foot in the US for many years.

In a more mundane but much more typical market, while Alfred Taubman and Sir Anthony Tennant were meeting in panelled rooms in St James' and penthouses on Park Avenue, pretty much every company supplying concrete reinforcing bars in Italy, and their trade association, was busy fixing the price at which they would be supplied. They met and they agreed how much would be charged as a base price, and how that price would vary according to the precise size of the bar. They did so for ten years, helped by the trade association which assisted in policing the cartel, by the end of which participants in the cartel were supplying 80% of the entire national market<sup>4</sup>.

It is a feature of successful cartels that they control not just an element of the price, but the price in its widest sense: base price, add-ons, discounts, terms of business. Such a degree of control is not necessary to commit the offence. It may be possible to commit the offence by an arrangement in relation to one element of the price only, perhaps even a small one. For example, it was widely reported in June 2006 that British Airways and Virgin were the targets of a criminal investigation by the OFT in relation to fuel surcharges applied to passenger air travel. Fuel surcharges were an interim charge introduced by every airline in the world to reflect dramatic increases in their costs. It remains to be seen whether the OFT will regard alleged collusive conduct in relation to a small element of a competitively-reached price, introduced across the industry as a measure to meet a specific short-term cost increase, as capable of amounting to price-fixing and worth prosecuting under section 188. Presumably the OFT hold or held the view that it might be though, or they would not have launched the investigation.

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<sup>3</sup> Case Summary, Appellee Brief, USA v Alfred Taubman, [www.usdoj.gov/atr/cases/f11300/11329.htm](http://www.usdoj.gov/atr/cases/f11300/11329.htm)

<sup>4</sup> EU Case 37.956, Decision 17 December 2002

## Bid-Rigging

'Dear Competitor, Your bid for this job will be...'

Bid-rigging is simply defined. In short, an arrangement between two potential suppliers of something, either that one company will not bid at all for a particular contract of supply, or as to the price at which a bid will be made. The only qualification on that it is intended by the 'bidders' that the arrangement should be secret from the potential customer.

A typical UK example of bid-rigging is a series of OFT civil actions against roofing contractors in 2004-2005. The first concerned nine West Midlands roofing contractors, who were fined by the OFT in 2004<sup>5</sup>. The companies were rigging bids, mainly for local authority contracts to repair flat roofs. The particular form of this bid-rigging was the 'cover bid'. The arrangement was that one company would submit a winning bid, at a predetermined price, while others would submit 'cover bids' as instructed by the pre-determined winner. The instructions were recovered by the OFT; they are not subtle. For example, in relation to a job worth no more than £20,000, a typical fax of instructions to a cover bidder from its competitor (in this case from the chosen winner company, Howard Evans) read:

'FOR THE ATTENTION OF ALAN  
COMPANY GENERAL ASPHALT [sic]  
FAX NO. 0121-643-7134  
FROM JOHN ROPER  
NUMBER OF PAGES INCLUDING THIS ONE ONE  
Re:- SMALL HEATH LOWER SCHOOL  
YOUR PRICE £48,980.00 +VAT

INCLUDING PROVISIONAL SUMS.  
REGARDS  
JOHN'

The consequence would then be bids received from three competing suppliers, in this case they were:

Howard Evans	£47,632.00
General Asphalt	£48,981.25
Brindley	£49,963.00

The local authority's surveyor's response to each of the 'bidders' was perhaps understandable, if restrained:

'The priced schedule of works for each of the tenders received had a remarkably close similarity between the pricing of all items and each of the priced schedules. This was considered most surprising bearing in mind the nature of works and experience of the market place for such projects.'

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5 CA98/1/2004; Decision: [www.of.gov.uk/NR/rdonlyres/B3D62D34-1534-42A3-A090-0BBB1CF269F1/0/westmidlandsroofing.pdf](http://www.of.gov.uk/NR/rdonlyres/B3D62D34-1534-42A3-A090-0BBB1CF269F1/0/westmidlandsroofing.pdf)

Most surprising, indeed. There are two quite interesting things about the flat-roofing cartels. The first is that, on the strength of the OFT's reports, it appears that the conduct of at least some participants was plainly fraudulent. After all, it is a term of the invitation to tender for most such contracts that any collusion was forbidden, even if such deception weren't obviously dishonest. In some cases cover bidders not only had no interest in the work, they were actually incapable of doing it, yet they submitted cover bids on the instruction of their 'competitors'. Prosecutions for conspiracy to defraud, obtaining property by deception and false accounting have been mounted on much scantier evidence.

The second thing worth noting is the effect of the OFT's leniency policy. In the West Midlands case, for example, the principal participant in and beneficiary from the bid-rigging was a company called Briggs. Whilst the fines imposed on the other 8 contractors amounted to just over £330,000 in total, the fine on Briggs alone should have been £638,000. Instead, as Briggs' was the whistleblower, the resultant fine was £nil.

## Volume Allocation

'You wait all day for a bus from Leeds to Holt, then one comes.'

The three cartel areas overlap, in the sense that a single agreement may well encompass more than one offending arrangement. A really well-run cartel will dictate who offers the good or service, at what price, and to which segment of the market. Thus every transaction in the marketplace is conditioned by the cartel. I include under this heading arrangements to limit supply and arrangements to divide up supply or customers, what are often called 'market- and customer-allocation agreements.'

An arrangement to allocate volume on its own, without any price-fixing element, is more difficult to prove. Unlike a price, presence in a marketplace, whether geographically or by product, is relatively fixed. An understanding as to supply may often be reached tacitly, and does not need close monitoring. In fact the situation may not strike suppliers or customers as out of the ordinary; it may simply be accepted that X. Co. supplies the North of England, Y. Co. supplies the South. There may in fact be a long-established *understanding* between the (potential) competitors, such as 'We've never tried to break into the Spanish market, they haven't tried to develop their presence here; we all just get along and don't rock the boat.' It is unlikely that such an 'understanding' could constitute an agreement to bring into being or implement an arrangement to limit supply in a criminal case.

However, there are many examples of clear supply limiting arrangements. At one extreme, in the vitamins cartels of the 1990s, hugely valuable global markets were carved up and compliance by cartel members was closely policed. It was recognised that price-fixing agreements were inherently more stable if supported by volume-allocation agreements. The arrangements may become highly sophisticated. In the lysine cartel the members produced global volume allocation agreements, which included allocation of a share of the expected market growth for the year to each cartel member. Any company which sold more than its allocated share for a given market would be required to buy that amount of lysine from any of the firms which had come in under budget (at a

fixed price, obviously)<sup>6</sup>. Such collateral provisions police the price-fixing which is at the heart of the arrangement.

There is of course no requirement that criminal supply-limiting arrangements should be on a global or even national scale. In 2000 senior managers from the Arriva and First Group bus companies met in a Yorkshire hotel and reached an agreement in relation to a number of local Leeds bus routes, which would be more profitable if there were mutual withdrawals<sup>7</sup>. The two companies basically agreed to carve up the Leeds to Holt bus service. Sexy it isn't, but the collusive conduct still merited fines of almost £1m for the two companies concerned, reduced to £200,000 in recognition of their co-operation<sup>8</sup>.

### Dishonesty

The section 188 offence requires dishonesty, though dishonesty is not an element of the US offence. What is dishonesty in criminal law? In fact the issue of dishonesty rarely proves legally problematic; in most cases the jury is simply told to consider whether they are sure that the defendant was acting dishonestly<sup>9</sup>. The surrounding circumstances of the conduct will answer the question: secret meetings, fabricated documents, failures to report contact with competitors, lies to colleagues, lies to regulators will all go to the issue. In the commercial context, doing something which you know to be forbidden, in the expectation that it will increase the profit of your employer at the expense of your customers, will provide a solid basis for a finding of dishonesty. Conduct which is entirely open is unlikely to be dishonest; whenever there is some element of secrecy, the prosecution case will usually be somewhat stronger. As was recently observed in the appeal of *Norris*<sup>10</sup>:

64... [S]ecrecy, which almost always must have as its object misleading customers into believing that they are paying a market or near market price, instead of one rigged by suppliers in the market, is and was at the material time clearly capable of being regarded by an English jury as dishonest and, on that account, a criminal conspiracy to defraud. The test of dishonesty for a jury, is the well established and well-known test articulated by *Lord Lane in R v Ghosh* [1982] QB 1053), at 1064, namely whether a jury would consider the conduct in question as dishonest 'according to the ordinary standards of reasonable and honest people'; and, if so, whether the proposed defendant 'must have realised that what he was doing was by those standards dishonest'.

There will be scope for some defendants to argue that, for example when acting on the instructions of senior colleagues, they 'just assumed it was alright'. But it has always been expected that prosecutions under s.188 will be few, and will be reserved for the most egregious examples. If the cases to prosecute are carefully selected, it is unlikely that dishonesty requirement will prove a

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6 See DOJ account of the cartel at [http://pages.stern.nyu.edu/~wgreene/firmsandmarkets/lysine\\_cartel.pdf](http://pages.stern.nyu.edu/~wgreene/firmsandmarkets/lysine_cartel.pdf)

7 <http://www.ofc.gov.uk/NR/rdonlyres/78788D8D-9361-4687-924D-EECC93ACB64C/0/leedsbus.pdf>

8 OFT Decision CA98/9/2002

9 For the full textbook direction in more difficult cases see [www.jsboard.co.uk/criminal\\_law/cbb/mf\\_04b.htm#34](http://www.jsboard.co.uk/criminal_law/cbb/mf_04b.htm#34)

10 *Norris v USA & Others*, [2007] EWHC Admin 71. Mr Norris was formerly Chief Executive Officer of Morgan Crucible PLC, a leading international manufacturer of carbon products. He is alleged to have run an international price-fixing cartel in relation to various carbon products.

major impediment to its successful employment.

### **Borderline Conduct**

What kind of conduct will be not be covered? First, you need an agreement. 'Agreement' is not a term of art in criminal law, and the existence of one does take a bit of proving. It's not something which can simply be inferred from the fact that A and B acted in a mutually profitable manner, or even apparently acted in concert. The fact that the pricing of A and B goes more or less in step is not itself proof of any agreement. It is not unlawful for a company simply to match the prices of a competitor, providing that is not done as part of a dishonest agreement. Civil competition law recognises that there is a distinction between an agreement between competitors and 'concerted practice' falling short of an agreement, though both are prohibited<sup>11</sup>. But where competitors are privately signalling intended pricing actions, that will give rise to a strong suspicion of a collusive agreement. The absence of any evidence of such signalling of course goes the other way.

Second, as suggested above in relation to volume allocation, it not always easy to draw the line between refraining from disturbing a stable marketplace, for example refraining from starting a price war, or electing not to enter another market segment, and agreeing to allocate customers. Once again, absolutely central to the regulator's assessment will be the presence and nature of collusive contact between competitors: any communication between competitors as to the structure or likely future shape of supply to the market will attract suspicion.

### **Keeping Legal**

For the concerned company, at the heart of competition training is discipline in competitor contact, stressing that staff should never: discuss any aspect of pricing with competitors, disclose pricing intentions, communicate confidential financial information, or privately inform competitors of intended changes in supply. If that discipline is followed, individuals will find it almost impossible to commit the section 188 offence.

### **Extradition**

Jurisdiction for the cartel offence generally depends on where the consequences of the conduct are felt, not where the conduct occurred. Proceedings are currently underway which will result in requests from the USA for the extradition of individuals based in the UK for cartel offences, even though the relevant conduct of the individuals took place entirely within the UK and was prima facie in breach of section 188. The tension between jurisdiction local to the conduct, and the jurisdiction of the requesting state is a live legal issue<sup>12</sup> but, for the moment, all business people should consider themselves at risk of extradition to any country which has criminal cartel provisions and where their cartel conduct may have effect. Price-fixing arrangements between multinationals will usually have multinational consequences. In such circumstances, extradition to any of the affected countries which have such legislation is a possibility, and that includes extradition to the UK from anywhere the corresponding offences exist.

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<sup>11</sup> See e.g. *JJB Sports plc v OFT* [2004] All ER 23

<sup>12</sup> See especially *Birmingham & Others v SFO* [2006] EWHC 200 (Admin)

The judgment in *Norris* has confirmed that an individual may be extradited to the USA for a cartel offence committed even before section 188 came into force, assuming that the conduct amounted to conspiracy to defraud. There is no significant class of cases which would amount to an offence under section 188 and yet not the offence of conspiracy to defraud. *Norris* is therefore good authority for the proposition that extradition to the USA is legally possible for a cartel offence committed post 20 June 2003. Such extradition is more than just legal possibility, it is a real risk for anyone based in the UK who engages in cartel conduct which impacts, even marginally, on US consumers. As I said at the start, the Anti-trust Division of the US Department of Justice is coming to get you. It is impossible to improve on their own words:

[T]he most significant trend in the evolution of international anti-cartel enforcement since 1999 has been the more vigorous prosecution of foreign nationals who violate U.S. antitrust laws. For example, in 1999, few would have predicted the elimination of the 'no-jail' deal for early cooperating foreign nationals...or the real possibility of the extradition of an antitrust defendant. In March 1999, no foreign national had served time in a U.S. jail as a result of his or her participation in an international cartel. Today, twenty foreign nationals from Japan and multiple European countries, including France, Germany, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom have served time in U.S. jails as a result of the Division's international cartel investigations. [On 1 March 2006] cases against four additional foreign nationals from Korea were filed that include agreed-upon jail recommendations. Also, in 2005, the first extradition order for a foreign national indicted on a U.S. antitrust charge was obtained from a foreign court.<sup>13</sup>

The 'ultimate goal' of the ATD is 'treating similarly situated foreign cartel members no differently than their U.S. co-conspirators'. In future, so far as the ATD are concerned, all such persons will go to jail. The reference above to the order of a foreign court is in fact a reference to the case of *Norris*<sup>14</sup>. Mr *Norris* is likely to be the first of many.

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<sup>13</sup> 'Charting New Waters in International Cartel Prosecutions', Department of Justice (ATD), 2 March 2006, <http://www.usdoj.gov/atr/public/speeches/214861.htm>

<sup>14</sup> *Supra*.