<u>UK NATIONAL REPORTs</u>

<u>*LIDC 2003/2004 - QUESTION 4 : FUNDAMENTAL ISSUES*</u>

1. OFFENCES

(A) ***In your national law, are there criminal or administrative sanctions for breaches of competition rules?***

There are both criminal and administrative or civil sanctions for breaches of UK competition rules. Broadly speaking, there are civil sanctions for undertakings and criminal sanctions for individuals.

Civil Sanctions: Undertakings

The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed. Companies, firms, businesses, partnerships, trade associations and non-profit making organisations are all undertakings. An individual can also qualify as an undertaking, although an individual acting as an employee would not. A parent company and its subsidiaries will be treated as a single undertaking if they operate as a single economic unit.

There are civil sanctions for undertakings which breach the Chapter I Prohibition or the Chapter II Prohibition of the UK Competition Act 1998. These civil sanctions are described in detail at paragraph 2.2 (A) below.

Articles 81 and 82

Article 81 of the EC Treaty prohibits agreements between undertakings which, to an appreciable degree, may affect trade between EC Member States and which have as their object or effect the distortion or prevention of competition within the EC. Some agreements can be caught by both Article 81 of the EC Treaty (if trade between EC Member States can be affected) and the Chapter I Prohibition of the UK Competition Act 1998.

Article 82 of the EC Treaty prohibits the abuse of a dominant market position which may affect trade within the EC. Some agreements can be caught by both Article 82 of the EC Treaty (if trade between EC Member States can be affected) and the Chapter II Prohibition of the UK Competition Act 1998.

<u>Modernisation and Article 81</u>

It should be noted that the European Commission has recently adopted a package of proposals to modernise the enforcement of EC competition law. The aim of the modernisation rules is to let the Commission concentrate on serious cases and to increase the role of the national authorities in the enforcement of EC competition law. The new rules will actually come into force on 1 May 2004 (which is the same date as the EU accepts 10 new members). The core features of the reform are:

- shifting from a system of authorisation under which all agreements have to be notified to the European Commission in order to obtain approval towards a directly applicable system. This puts more responsibility in the hands of companies who will need to ensure themselves that their agreements do not restrict competition or, in case they do, that these restrictions qualify for exemption under Article 81(3); and

- making the provisions of Article 81(3) directly applicable, thus allowing joint enforcement of the rules governing restrictive practices by the European Commission, the national competition authorities and the national courts.

<u>Consistency with EC competition law</u>

The Chapter I Prohibition is modelled on Article 81 of the EC Treaty, whereas the Chapter II Prohibition is modelled on Article 82 of the EC Treaty. Section 60 of the UK Competition Act 1998 states that the UK competition authorities (the Office of Fair Trading ("OFT"), the Competition Commission, the Competition Appeal Tribunal ("CAT") and the domestic courts) must handle cases in such a way as to ensure consistency with the existing jurisprudence of EC competition law. Section 60 of the Act therefore places a dual obligation on the UK competition authorities in considering and dealing with the Chapter I and Chapter II Prohibitions. First, they must ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court of Justice ("ECJ") or any relevant decision of the ECJ. Secondly, the UK authorities must have regard to any relevant decision or statement of the European Commission. The obligation to ensure consistency applies only to the extent that it is possible, having regard to any relevant differences between the provisions concerned. This means that there will be certain areas where the Community principles will not be relevant. For example, the Community single market objectives designed to establish a European common market would not be relevant to the domestic prohibition system. OFT Guidelines (in particular in relation to "Appeals under the Competition Act 1998") make it clear that Section 60 of the Act does not apply to UK procedural matters. See also other differences set out at (i) and (ii) below.

The Chapter I Prohibition

The Chapter I Prohibition of the Competition Act 1998 prohibits anti-competitive agreements which could affect trade within the United Kingdom. Section 2(1) of the Act largely mirrors Article 81 of the EC Treaty and provides that:

- agreements between undertakings, decisions by associations of undertakings or concerted practices which
- may affect trade within the United Kingdom

and

- which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom
- shall be prohibited unless they are excluded or exempted.

Section 2(2) of the Act gives a non-exhaustive list of examples of agreements that will breach the Chapter I Prohibition. These include agreements which:

(a) directly or indirectly fix prices or any other trading conditions - this is the classic "cartel", where, for example, all suppliers of a product agree not to supply at less than a set price or to raise prices simultaneously;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions, for example, refusing to grant the normal volume discounts to companies because of their trading practices; and

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which are not connected with the subject of the contract - for example, *"you can only buy my new invention if you also buy an obsolete model from us!".*

Any agreement which fits the above criteria will breach the Chapter I Prohibition unless it is excluded or exempted under the Act. The following points are worthy of note:

(i) in accordance with EC jurisprudence, the effect on competition must be "appreciable". OFT Guidelines indicate that unless the parties to an agreement have a share of more than 25% of the market, then, unless the agreement concerned is a price-fixing agreement, a market sharing agreement or one that is part of a network of similar agreements, the agreement will not be "appreciable". This contrasts with the equivalent rules under EC law where the thresholds are 15% for a vertical agreement, 10% for a horizontal one and 5% where the market is characterised by a network of similar agreements.

(ii) OFT Guidelines exclude vertical agreements (i.e. agreements between parties at different levels of production or distribution) from the Chapter I Prohibition, as long as they do not contain price-fixing provisions. There are differences between the treatment of vertical agreements under EC competition law and UK competition law. The most significant differences between the scope of the UK Exclusion Order and that of the EC Block Exemption on Vertical Restraints are that:

- the EC Block Exemption on Vertical Restraints applies only to agreements where the market share of the supplier (or buyer in the case of an agreement with an exclusive supply obligation) does not exceed 30% of the relevant market. There is no market share cap in order to benefit from the UK Exclusion Order; and
- the EC Block Exemption on Vertical Restraints contains a number of "hardcore" restrictions which, if included in the vertical agreement, have the effect of taking the agreement outside its scope. The only equivalent in the UK Exclusion Order relates to price-fixing agreements.

(iii) Other agreements are also excluded from the Chapter I Prohibition. These include:

- an agreement which would result in a merger or joint venture within the merger provisions of the Fair Trading Act 1973;
- an agreement which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation;
- an agreement which is the subject of a direction under section 21(2) of the Restrictive Trade Practices Act 1976;
- an agreement made by an undertaking entrusted with the operation of services of general economic interest or of a revenue producing monopoly, insofar as the Prohibition would obstruct the performance of those tasks; and

- land agreements to the extent that the agreements are land agreements.

(iv) The OFT is also able to grant block exemptions from the Chapter I Prohibition in the same way that the European Commission can do so in respect of Article 81 of the EC Treaty. In addition, if an agreement has been granted an exemption by the European Commission or if it falls within the scope of an EC block exemption, it will be deemed to benefit from a "parallel exemption" from the Chapter I Prohibition.

The Chapter II Prohibition

The Chapter II Prohibition prohibits the abuse of a dominant market position which may affect trade within the UK. Section 18(1) of the Act largely mirrors Article 82 of the EC Treaty.

"Dominance" will be assessed by reference to a number of factors. One potential indicator of dominance is a market share of more than about 40%. Other factors (such as the size and strength of competitors and barriers to entry) will also be taken into account. In order to assist in the assessment of dominance and the interpretation of the Competition Act, the UK authorities will refer to and follow the existing jurisprudence of EC Competition Law, as discussed above.

Section 18(2) of the Act gives a non-exhaustive list of types of abusive behaviour by undertakings in a dominant position:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development;

(c) applying dissimilar conditions to equivalent transactions with other trading parties; and

(d) product tying.

There are no exemptions available in respect of the Chapter II Prohibition. There are, however, specific exclusions for conduct

- to the extent that it would result in a merger or joint venture within the merger provisions of the Fair Trading Act 1973;
- which would result in a concentration with a Community dimension and thereby be subject to the EC Merger Regulation;
- which is carried out by an undertaking entrusted with the operation of services of general economic interest or of a revenue producing monopoly, insofar as the Prohibition would obstruct the performance of those tasks;
- to the extent to which it is engaged in order to comply with a specified legal requirement;
- which is necessary to avoid conflict with international obligations and which is also the subject of an order by the secretary of state; and
- where there are compelling reasons of public policy and it is also the subject of an order by the Secretary of State.

A dominant undertaking which is in breach of the Chapter II Prohibition will be subject to the same penalties as a company in breach of the Chapter I Prohibition. The sanctions are described in detail at paragraph 2.2 (A) below.

Concurrency

The Chapter I and Chapter II Prohibitions of the Competition Act 1998 apply equally to the utilities sector as to other sectors of the economy. The utility regulators have concurrent powers with the OFT to apply the Chapter I and Chapter II Prohibitions. Seven regulators have concurrent powers: the Director Generals of Telecommunications, Electricity Supply, Electricity Supply for Northern Ireland, Water Services, Gas Supply and Gas Supply for Northern Ireland and the Rail Regulator. The utility regulators have broadly the same powers as the OFT and can impose the same penalties (sanctions are described in detail at paragraph 2.2 (A) below).

When utility regulators exercise their powers under the Competition Act they may, but will not be obliged, to have regard to their statutory duties (e.g. to act so as to secure reasonable demands for the utility service are met and that licensees can finance their activities) but must regard their competition law functions as paramount. Regulators do need to have regard to industry-specific legislation when applying the Competition Act 1998, though. For example, the OFT Guideline on "The Application of the Competition Act in the Energy Sector" makes it clear that undertakings' behaviour in the gas and electricity markets, including that of dominant companies, is regulated by specific Acts of Parliament that have created a licensing regime. These Acts and licences regulate and attempt to prevent various types of anti-competitive behaviour that may have detrimental effects on gas and electricity customers. This includes restrictions on some undertakings' level and structure of charges and the prevention of unduly discriminatory behaviour by network operators and dominant suppliers. The Gas Act 1986 and the Electricity Act 1989 set out the factors that GEMA, the UK regulator of gas and electricity markets, should consider when deciding whether to use its powers under those Acts to address anti-competitive behaviour. Since the passage of the Competition Act 1998, GEMA should not take enforcement action under those sector specific Acts if it is satisfied that it would be more appropriate to address the relevant issue under the Competition Act 1998, though.

Mergers

The Fair Trading Act 1973 contains the main legislation on the control of mergers involving one or more UK businesses. It applies to a merger situation where a merger test is also met.

Currently, a merger may be referred to the Competition Commission for a detailed investigation if it:-

- creates or strengthens a share of supply of more than 25% in the UK or a substantial part of it (the share of supply test); and/or

- involves the acquisition of assets with a gross world wide value of more than £70 million (the assets test).

The share of supply test is retained under the Enterprise Act. The assets test is to be replaced by a new test of whether the target has a UK turnover of more than £70 million (the "turnover test"). This change is due to come into effect in the summer of this year and will catch some transactions involving service and Internet-based companies which are not presently subject to the UK's merger control rules.

The OFT will have a duty to refer a merger satisfying the share of supply test and/or the turnover test to the Competition Commission which has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services (the Secretary of State for Trade and Industry will only be involved where a case raises defined public interest issues - currently, national security or cases involving certain government contractors). Fees of £5,000 to £15,000 are payable following a decision on whether or not to refer a transaction to the Competition Commission. In future, small and medium sized enterprises are exempted from the requirement to pay a fee.

When investigating a merger, the Competition Commission can require any person to attend a meeting with them to give evidence orally and can require any person to produce any document specified by them. Section 85(7) of the Fair Trading Act 1973 makes it clear that any person who does not attend such a meeting or produce specified documents without a reasonable excuse may be punished by the High Court in England and Wales and the Court of Session in Scotland in the same manner as if the defaulter has been guilty of contempt of court. Also, any person who wilfully alters or destroys any document which he has been asked to provide to the Competition Commission will be liable to a fine and/or a term of imprisonment of up to 2 years (please see section 85(6)(a)).

There is no legal duty to pre-notify mergers in the UK, although in practice many are brought to the attention of the OFT on a voluntary basis. There are therefore no penalties under UK law for consummating a non-notified merger, unlike under the EC Merger Regulation. However, if there is a Competition Commission investigation and the Commission considers that a merger is likely to have serious anti-competitive effects and submits an adverse report, it must indicate what steps should be taken to alleviate those effects. The steps normally considered include divestiture (if the merger has already been completed), or a prohibition on completing the merger or the giving of undertakings (such as agreeing to a price cap). If a merger has been completed and the OFT orders divestment, the purchaser must identify a new purchaser for the relevant business or assets within a specified period of time. Importantly, the purchaser would have to accept whatever price was on offer (this is known as a “fire sale”) and, in addition, would probably have to obtain the OFT’s prior approval of the new purchaser.

Market Investigations

When the relevant provisions of the Enterprise Act come into force this summer, the OFT will have new wide powers to investigate markets. The OFT will be able to investigate markets where it has “reasonable grounds” for suspecting any feature of that market restricts competition in the UK or any part of it. Where it appears that effective competition is lacking on a market, the OFT will be able to refer the matter to the Competition Commission for investigation.

Following a finding that competition is lacking on a market, the OFT has a number of alternative remedies available to it. Orders may be made to terminate agreements; to prohibit refusals to supply, tie-in transactions and discrimination; to control prices charged to customers; and to prevent the acquisition of businesses. Orders may also be made to divide up a business.

An important aspect of the work of the OFT is that it may continue to monitor undertakings given, and the industry to which they relate, for many years after the Competition Commission’s Report. If an undertaking is broken it is possible for the OFT to make a second reference to the Competition Commission under the Fair Trading Act 1973 and a second reference may also be made where a company asks to be released from undertakings given after an earlier report. Section 93A of the Fair Trading Act 1973 gives anyone harmed by the breach of an undertaking a right to bring civil proceedings against the person responsible.

The OFT is given power under the Fair Trading Act 1973 to require information from firms when conducting market investigations; these powers have been extended by section 66 and 67 of the Competition Act 1998. Where the OFT is considering whether to make a reference to the Competition Commission or whether to propose that undertakings should be accepted in lieu of a reference, under section 44 of the Fair Trading Act 1973, it may require any person who supplies or is supplied with the goods or services in the UK to provide him with information about his business. The information that may be required is specified in section 44(2) of the Fair Trading Act 1973 (and includes giving estimates, forecasts and providing specified documents) and the OFT is given power to enter premises in order to obtain it, to require any person on the premises to given an explanation of relevant documents and to take copies. Any person found to have tampered with documents which he has been asked to provide will be liable to a fine and/or a term of imprisonment of up to 2 years (section 46(4)). Fines can also be imposed for failing to comply with a request for information (section 46(2)). In practice, firms are normally prepared to provide the OFT with information without it having to exercise these powers.

Criminal Sanctions: Individuals

There are criminal sanctions for individuals which breach the cartel offence of the UK Enterprise Act 2002. These criminal sanctions are described in detail at paragraph 2.1 below.

The Cartel Offence

The Competition Act 1998, like the EC Treaty, sets its sights on businesses. The Enterprise Act 2002 however looks to individuals.

The new "cartel offence" is set out in Part 6 of the Enterprise Act 2002 (sections 188 - 202). This offence, applicable only to individuals, is committed where the defendant dishonestly agrees with one or more persons to make or implement or cause to be made or implemented certain activities.

The activities covered by the offence are price-fixing, bid-rigging, market-sharing, limiting or preventing supply and limiting or preventing production. The offence only applies to agreements affecting undertakings in a horizontal relationship and not to those in a vertical relationship. There is no requirement for the activities to actually occur, so long as there is evidence that the defendant and the other parties intended those effects to have been achieved. It is therefore not open to the defendant to plead that the agreement was unsuccessful in its objects.

(B) ***According to which criteria does the legislator decide whether an offence is going to be administratively or criminally punished?***

The Enterprise Act 2002 is silent as to when the OFT should launch an investigation against an undertaking under the Competition Act 1998 or when the OFT should launch an investigation against individuals for committing the cartel offence under the Enterprise Act 2002 or when, indeed, the OFT should launch an investigation under both the Competition Act 1998 and the Enterprise Act 2002.

Although the cartel offence is in theory triable by a magistrates court, it is unlikely that anybody will be tried there as the maximum penalty is only 6 months imprisonment and a fine of £5,000 (which is unlikely to reflect the seriousness of the offence in the prosecutor's view). Prosecutions are to be brought in England and Wales by the Serious Fraud Office and in Scotland by the Lord Advocate. The Serious Fraud Office has indicated that it is unlikely to investigate any matter which involves sums of less than £1 million. Whilst it is not clear how this limit will apply to dishonestly sharing customers or markets, it effectively means that any cartel offence will go to the Crown Court and be tried by a judge and jury.

(C) ***Are criminal and administrative offences absolutely distinct or are there mixed offences?***

There are no mixed offences. There are civil sanctions for undertakings which breach the Chapter I Prohibition or the Chapter II Prohibition of the Competition Act 1998. There are criminal sanctions for individuals which breach the cartel offence of the Enterprise Act 2002. Undertakings can also be guilty of criminal offences, though - criminal sanctions for undertakings is discussed at section 2.1 below.

2. SANCTIONS

2.1 Criminal Sanctions

(A 1) Corporate Liability

Is the criminal liability of undertakings autonomous or does it stem from the criminal liability of an individual?

Under UK law, an undertaking is subject to the criminal law in the same manner as any other person. There are some offences which an undertaking is deemed unable to commit such as offences for which the only penalty is imprisonment (e.g., murder). Those offences apart, an undertaking may be liable as an employer or principal for the wrongful acts or omissions of its servants or agents in the course of their employment or the undertaking may be liable because the offence was committed by those who are the embodiment of the undertaking itself, such that their act is the act of the undertaking.

The following are examples of criminal acts that can be committed by an undertaking in relation to UK Competition Law.

Criminal Offences for Undertakings under the Competition Act 1998

There are criminal sanctions for non-compliance with powers of investigation under the Competition Act 1998. Undertakings as well as individuals may commit offences; the penalties for undertakings are fines, the penalties for individuals in some cases include imprisonment. The relevant offences are set out in sections 42 to 44 of the Competition Act and fall into five main categories: (i) failing to comply with a requirement to provide specified documents or specified information or preventing entry to premises; (ii) intentionally obstructing an officer investigating without a warrant; (iii) intentionally obstructing an officer investigating with a warrant; (iv) intentionally or recklessly destroying, disposing of, falsifying or concealing documents, or causing or permitting those things to happen; and (v) knowingly or recklessly supplying information which is false or misleading in a material particular either directly to the OFT, or to anyone else, knowing it is for the purpose of providing information to the OFT.

The Competition Act provides for various defences to these penal provisions. If an undertaking or person is charged with not producing a document, it is a defence to show that the undertaking or the person did not have it in its/his possession or control and it was not reasonably practical for it/him to get it. A similar defence applies to failure to provide information. In relation to all requirements under sections 26 and 27 (written notice and investigation without a warrant) there is a general defence if the investigator failed to act in accordance with the relevant section. This shows the importance of ensuring that all the procedural steps are properly taken; there is no such defence in relation to investigations with a warrant, although it is possible in theory to appeal against the issuing of the warrant itself. In practice, such an appeal is unlikely to be successful as there is careful scrutiny by a judge of the prosecution application for a warrant.

Criminal Offences for Undertakings in relation to the Cartel Offence

An undertaking can theoretically be guilty of the criminal offence of conspiracy to commit the cartel offence provided there is an individual in the conspiracy. The conspiracy offence is an agreement between at least two persons, e.g. a company and another undertaking to commit an unlawful act (the cartel offence). There are two distinct forms of conspiracy under English law, namely common-law conspiracy to defraud and conspiracy to commit a criminal offence (i.e. statutory conspiracy) contrary to section 1 of the Criminal Law Act 1977. These two forms of conspiracy overlap, and many conspiracies to defraud also amount to statutory conspiracies, in which case the Criminal Justice Act 1987 (section 12) allows the prosecution to charge either offence. However, the prosecution should usually use the statutory conspiracy charge. The sanction for a conspiracy is as for the underlying offence.

What are the elements constituting the actus reus and mens rea of the offence?

As discussed above, undertakings can commit criminal offences when not complying with powers of investigation under the Competition Act 1998.

Lord Denning stated in the Court of Appeal's decision in <u>*Bolton (Engineering) Company Limited v. TJ Graham & Sons Limited [1957]*</u> (1 QB 159):

"Some of the people in a company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will of the company. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of those managers is the state of mind of the company and is treated by the law as such".

The requisite mens rea can therefore be sought in the relevant agent and any such requirement is no obstacle to corporate liability. Thus, an undertaking can be held to be liable for offences involving an intent to deceive: <u>*DPP v.Kent and Sussex Contractors Limited [1944]*</u> 1 All ER 119 An undertaking can clearly have the requisite mens rea for some of the offences set out in sections 42 to 44 Competition Act 1998 described above, including intending to falsify or conceal documents and knowingly supplying false or misleading information.

Offence	Mens Rea	Actus Reus	Sanction on summary conviction	Sanction on conviction on indictment
S 42(1) Competition Act	Not applicable	Failing to comply with a requirement imposed under the investigation powers	Fine of up to the statutory maximum (currently £5,000)	Unlimited fine
S 42(5) Competition Act	Intent	Obstructing an officer carrying out an on-site investigation *without* a warrant	Fine of up to the statutory maximum	Unlimited fine
S 42(7) Competition	Intent	Obstructing an officer carrying out an on-site	Fine of up to the statutory	Unlimited fine and/or upto two

Offence	Mens Rea	Actus Reus	Sanction on summary conviction	Sanction on conviction on indictment
Act		investigation *with* a warrant	maximum	years' imprisonment
S 43 Competition Act	Intentionally or recklessly	Destroying, disposing of, falsifying or concealing of a document the production of which has been required or cause or permit its destruction etc	Fine of up to the statutory maximum	Unlimited fine and/or up to two years' imprisonment
S 44 Competition Act	Knowingly or recklessly	Providing information that is false or misleading in a material particular	Fine of up to the statutory maximum	Unlimited fine and/or up to two years' imprisonment

Can one set of facts lead to a joint conviction of a corporate body and an individual?

Yes. One set of facts can, in certain circumstances, such as the five offences set out in sections 42 to 44 of the Competition Act, lead to a joint conviction of an undertaking as well as an individual. As discussed above, an undertaking can be convicted at the same time as individuals for the actions of directors and managers who represent the directing mind and will of the undertaking and control what it does.

How can a corporate body be punished (fine, confiscation, trading ban, closing down, dissolution….) and how is this implemented?

Sections 42 to 44 of the Competition Act set out the penalties that can be imposed on undertakings where the actions of directors and managers represented the directing mind and will of the undertaking and controlled what it did. These sections need to be read in conjunction with the OFT Guidelines entitled "Powers of Investigation" which discussed levels of fines which can be levied for offences. The relevant penalties for breaching sections 42 to 44 of the Competition Act are set out in the table above.

(A 2) Individual Liability

Are criminal rules aimed at specific individuals (directors etc.)?

There are criminal sanctions for individuals who breach the cartel offence in the UK Enterprise Act 2002. The criminal sanctions apply to an individual who dishonestly agrees with one or more persons to make or implement or cause to be made or implemented the following activities: price-fixing, bid-rigging, market-sharing, limiting or preventing supply and limiting or preventing production. The criminal sanctions are effectively aimed at directors and senior employees, as these officers are most likely to have the power to enter into the types of activities specified above on behalf of their employers' business.

Offence	Mens Rea	Actus Reus	Sanction on Summary Conviction	Sanction on Conviction on indictment
The Cartel	Dishonesty	Agreeing with one or	Six months'	Five years'

Offence (Section 188 Enterprise Act)		more persons to price-fix, bid-rig, market share, limit or prevent supply or limit or prevent production	imprisonment and a fine of up to the statutory maximum (currently £5,000)	imprisonment and/or an unlimited fine

How can an individual be punished and how is this implemented?

Under section 190 of the Enterprise Act 2002, the cartel offence can be tried in either the Crown Court or, in theory, in the magistrates court. As discussed above, in practice it is unlikely that anybody charged with the cartel offence will be tried in the magistrates court and instead any cartel offence is likely to be tried by a judge and jury in the Crown Court ("trial on indictment").

On indictment, the maximum sentence is five years' imprisonment or an unlimited fine or both. On summary conviction, the maximum sentence is six months' imprisonment or a fine at the statutory maximum (currently £5,000), or both.

There is no possibility of a private prosecution being brought for the cartel offence (for example, by or on behalf of consumers who have suffered as a result of a price-fixing arrangement). Indeed, prosecutions cannot even be instigated in the normal way by the Crown Prosecution Service. Section 190(2) of the Act states that proceedings for the cartel offence in England, Wales and Northern Ireland may only be instituted by the Director of the Serious Fraud Office ("SFO") or by (or with the consent of) the Office of Fair Trading. In Scotland prosecutions can only be brought by the Lord Advocate.

Do corporate bodies have a civil liability regarding fines or other penalties imposed on individuals?

The cartel offence itself can only be committed by an individual. Even though the individual will almost certainly commit the activities in relation to the activities of an undertaking, the undertaking is incapable of committing the cartel offence itself. Undertakings do not have any responsibility in relation to fines or any other penalties imposed on individuals found to have committed the cartel offence.

(B) Are there any cases of criminal sanctions which have been used against corporate bodies and/or individuals for breach of competition rules?

The cartel offence of the Enterprise Act 2002 has not yet come into force and therefore criminal sanctions have not yet been imposed under its provisions. The DTI's current implementation schedule (www.dti.gov.uk/enterpriseact/implementation.htm) anticipates that the commencement order for the cartel offence (which will take the form of a statutory instrument) will come into effect from Summer 2003.

No Action Letters

The most effective weapon against cartels is inside information. The US competition authorities, the European Commission and the OFT operate leniency regimes to encourage undertakings participating in cartels to provide information and co-operation relating to their involvement in these cartels in return for immunity (if the first party disclosing details and fully co-operating with the relevant competition authorities) or more lenient penalties. The Enterprise Act also extends a separate leniency regime to individuals in relation to the new cartel offence.

An individual can apply for leniency (in the form of "no-action letters", which in effect will provide immunity from prosecution). Such no-action letters are likely to be issued by the OFT in return for compliance with an investigation. Recipients of (although not applicants for) no-action letters will be required to admit participation in the criminal cartel. The OFT has made it clear in its Guidelines that:

- approaches may be made by or on behalf of individuals on a hypothetical basis;
- the OFT will state at the outset whether it may be prepared to consider offering no-action letters; and
- those who do not need no-action letters because they are not at risk of prosecution will receive confirmation of this fact in writing.

Paragraph 3.1 of the OFT Guidelines on "No-action Letters" states that for an individual to obtain a "no-action letter", he will need to co-operate fully with the OFT and "where appropriate, any other competition authorities". This may be acceptable in relation to UK regulators or to the EC Commission which do not have criminal powers of enforcement. It is questionable, however, whether co-operation with authorities with criminal powers of enforcement such as in the US should be a pre-requisite of leniency. It may also be that leniency or immunity from prosecution is not available in another jurisdiction. The precise intention of the OFT in relation to co-operation with other competition authorities is not clear and the issue is not deal with in the Guidelines other than in paragraph 3.1. In particular, there is no guidance as to how the OFT would deal with a multi-jurisdictional case. For example, what procedure would the OFT adopt if an individual has sought leniency in the US in respect of a cartel also implemented in the UK?

Conspiracy to Defraud

The SFO has launched an investigation (which is still ongoing), though, into the price-fixing of drugs sold to the UK National Health Service. In June 2002 the SFO carried out a series of dawn raids at the premises of six pharmaceutical companies and at the homes of a number of directors and senior officials of these pharmaceutical companies. The relevant companies were: Generics UK Limited, Kent Pharmaceuticals Limited, Regent-GM Laboratories Limited, Goldshield Group Plc, Norton Healthcare Limited and Ranbaxy (UK) Limited. The SFO suspects that the companies were engaged in price-fixing in the supply of penicillin-based antibiotics and warfarin, the blood thinning drug, between 1 January 1996 and 31 December 2000. The extent of the fraud is unofficially estimated to be £400 million. The SFO stresses, though, that no arrests have been made and that the investigation is complex and will continue for some time.

This is the first dawn raid by the SFO in connection with a suspected cartel and it is thought that the investigation is being pursued by the SFO in order to bring criminal proceedings against the individuals for conspiracy to defraud the NHS. If the individuals are eventually convicted, they could potentially face up to 10 years imprisonment, as opposed to the five years maximum prison sentence under the Enterprise Act for individuals found to have dishonestly engaged in cartel activity.

While in theory undertakings could be prosecuted for conspiracy to commit a cartel offence it is unlikely that this will happen. At the time that the Enterprise Act was passing through Parliament the EC Commission expressed concerns about the cartel offence. The ECJ decision of case 14/68 1969 ECR I *Walt Wilhelm -v- Bundeskartellamt* provides that in the event of a conflict between EC and national law, EC law must take precedence. This view is restated in the EC Commission Notice on Co-operation between National Competition Authorities and the European Commission. However, under UK national law a criminal case must usually take precedence over a civil one. Thus the cartel offence could be said to put the UK in breach of its EC Treaty obligations in Article 10. The OFT argued that there was no conflict as the cartel offence can only be committed by individuals and Article 81 involves undertakings. Therefore, the SFO investigation to the pharmaceutical companies mentioned above could be problematic under this ground.

Extradition

In October 2001, Sotheby's was fined £12 million by the European Commission for its role in the illegal price-fixing arrangements between Sotheby's and Christie's (in which the two auction houses conspired to fix commissions). In April 2002, Alfred Taubman (the former owner and chairman of Sotheby's) was sentenced in New York to a year in prison and was fined US$7.5 million for his part in these arrangements. Mr.Taubman was even required to pay for his own incarceration (at an estimated cost of US$20,000). The former chairman of Christie's, Sir Anthony Tennent, meanwhile, did not go to jail because indulging in cartel activity was not a criminal offence in the UK at the time. The absence of a criminal regime for anti-competitive conduct in the UK also meant that the US could not request his extradition. Once the cartel offence of the Enterprise Act comes into force later this year, an individual such as Sir Anthony participating in a cartel can be extradited to any other country which has criminal sanctions for participating in cartels.

The most likely countries to request (and be granted) extradition from the UK will be the US and Canada, which have fully developed criminal sanctions for cartel participation. The UK, meanwhile, will be able to request extradition from other countries, such as Germany, in relation to its investigation of criminal cartels. The criminalisation of cartels in the UK will enhance the prospects for "mutual legal assistance" to be provided reciprocally by the UK and other countries in relation to the investigation of criminal cartels. Although international treaties on the provision of mutual legal assistance in criminal investigations (such as the European Convention on Mutual Assistance in Criminal Matters) do not specifically require dual criminality prior to the offering of assistance, assistance is often proscribed or may be offered only on a discretionary basis where the activity in question is not a criminal offence in the requested country. The table below sets out jurisdictions where cartels or other anti-competitive activity may be a criminal offence for ease of reference.

Jurisdiction	**Scope of law**	**Activity level**
United States	Contracts or conspiracies in restraint of trade. Fines and imprisonment.	**High:** Large fines and long prison sentences handed down in recent years.
Canada	Bid-rigging and conspiracies preventing competition. Fines and imprisonment.	**High**: Several recent large fines and imprisonment.
Japan	Serious cartel cases. Fines and imprisonment.	**High:** A number of recent cases of imprisonment.
Germany	Bid-rigging. Fines and imprisonment.	**Low:** Only one fine/imprisonment.
France	Fraudulent involvement in anti-competitive practices. Fines and imprisonment.	**Low:** One imprisonment to date.

Ireland	Anti-competitive agreements. Fines and imprisonment.	**Low:** No fines or imprisonments.
Norway	Participation in cartel activities. Fines and imprisonment.	**Low:** Fines only to date.
Austria	Wilful use of a cartel. Fines and imprisonment.	**Low:** No prison sentences handed down yet.
Denmark	Anti-competitive agreements or practices. Fines only.	**Low:** Limited fines.

2.2 Administrative Sanctions

(A) What are the administrative sanctions available (fine, professional ban etc.)?

Articles 81 and 82

Agreements which breach Article 81 are rendered void and unenforceable in whole or in part (if severance is possible). The European Commission can order termination of conduct which breaches Article 82. Fines can be levied on undertakings which breach Article 81 and 82 of up to 10% of world-wide group turnover and injured parties can claim injunctive relief from infringements and/or damages for losses resulting from an undertaking's breach of Article 81 or 82.

The Chapter I Prohibition

Agreements which breach the Chapter I Prohibition are rendered void and unenforceable in whole or in part (if severance is possible). Fines can be levied on companies of up to 10% of UK group turnover (for a period corresponding to the length of the infringement up to a maximum of 3 years) and injured parties can claim injunctive relief from infringements and/or damages for losses resulting from a company's breach of the Chapter I Prohibition.

The Chapter II Prohibition

The OFT can order termination of conduct which breaches the Chapter II Prohibition. Fines can be levied on companies of up to 10% of UK group turnover (for a period corresponding to the length of the infringement up to a maximum of 3 years) and injured parties can claim injunctive relief from infringements and/or damages for losses resulting from a company's breach of the Chapter II Prohibition.

Directors Disqualification

In addition to the criminal powers to prosecute individuals for the cartel offence, the Enterprise Act 2002 also amends the Company Directors Disqualification Act 1986 and introduces a new ground for the disqualification of a director. A director of a company can be disqualified for up to 15 years where a company of which he is a director commits a breach of the competition rules relating to restrictive agreements or to an abuse of a dominant market position and the director's conduct makes him or her unfit to be concerned in the management of a company. The High Court or the Court of Session in Scotland makes the relevant disqualification order against the director.

Section 204 amends the Company Directors Disqualification Act 1986 by inserting a new section 9A into that Act ("Disqualification for competition infringements"). Under the new section 9A, the High Court or the Court of Session in Scotland must make a disqualification order against a director where the company of which he was the director commits a breach of competition law and the court considers that his conduct as a director "makes him unfit to be concerned in the management of a company".

As to the director's conduct (which may take the form of an omission to act), there are certain things that the court must have regard to in determining whether the director is unfit.

The court must have regard to whether:

- the director's conduct contributed to the breach of competition law (whether or not he knew that the conduct constituted a breach of competition law);
- where it did not so contribute, he had reasonable grounds to suspect that the company's conduct was in breach and he did nothing to prevent it; or
- he did not know, but ought to have known, that the company's conduct was in breach.

The court may have regard to the conduct of the director in connection with any other breach of competition law.

The maximum period of disqualification under a Competition Disqualification Order ("CDO") is 15 years. During the period in which a person is subject to a CDO, it is a criminal offence for him or her to be concerned in the management of a company.

The OFT may, instead of applying for a CDO, accept a Competition Disqualification Undertaking (CDU). A CDU has the same effect as a CDO, but is a binding commitment given to the OFT by the person, rather than an order issued by the court.

(B) Who can impose them? Following what procedure? Can administrative decisions be appealed?

The Chapter I Prohibition and the Chapter II Prohibition

Sections 32 to 41 of the Competition Act 1998 deal with enforcement. The OFT and sectoral regulators (for telecommunications, gas and electricity, water and rail) are given powers to order the cessation of infringements and to impose penalties. In the case of infringement, the OFT may give directions to bring the infringement to an end; may request market conditions to be modified; and may require an infringing undertaking to pay a penalty as described in paragraph 2.2 (A) above.

Where the OFT suspects an infringement of the Act, it will first carry out an investigation pursuant to section 25 of the Act. If, as a result of the investigations, the OFT proposes to adopt a decision that there has been an infringement of the Chapter I or Chapter II Prohibitions, section 31 of the Act requires the OFT to give written notice to the person or persons likely to be affected and give that person or persons an opportunity to make representations. This written notice is the equivalent of a statement of objections in EC Law. The OFT must, on request, give the parties an opportunity to inspect the OFT's file on the proposed decision, excluding confidential information or internal OFT documents. At the end of this procedure the OFT may adopt a decision that there has been an infringement of the Chapter I or Chapter II Prohibition.

A full right of appeal is available against OFT decisions that the Chapter I or Chapter II Prohibitions have been breached. This right of appeal is before a specialist competition law body - the CAT. The Act deals with appeals in sections 46 to 49 and in Schedule 8. The CAT itself has published "A Guide to Appeals under the Competition Act 1998". The rules of the CAT are based on five principles: first, early disclosure of each party's case and of the evidence relied on; secondly, active case management by the CAT to identify the main issues early on and to avoid delays; thirdly, strict timetables; fourthly, effective procedures to establish contested facts; and fifthly, the conduct of oral hearings within defined time limits.

The powers of the CAT are extensive: they are set out in paragraph 3 of Schedule 8 to the Competition Act. They include the power to adopt interim measures, to confirm or set aside the decision that is the subject of appeal, to remit the matter to the OFT or sectoral regulator, to impose or revoke or vary the amount of penalty and to grant or cancel an individual exemption.

Directors Disqualification Order

A Directors Disqualification Order is made on the application of the OFT or of a "specified regulator", i.e. those for telecommunications, gas and electricity, water services, rail and civil aviation. The breaches of competition law envisaged for a Directors Disqualification Order are infringements of the Chapter I Prohibition or Chapter II Prohibitions of the Competition Act 1998 or of Articles 81 and 82 of the EC Treaty.

As an alternative to making a competition disqualification order, the OFT or a specified regulator can accept a competition undertaking from the director concerned, under which he undertakes not to do the things he would have been prohibited from doing had the order been made (new section 9B of the Company Directors Disqualification Act 1986).

If a director defends himself in the High Court or the Court of Session in Scotland (rather than accepts a competition order at an earlier stage), but a disqualification order is still made against the director, then the director does have a right of appeal. The relevant appeal court is the Court of Appeal.

(C) Are there any cases of administrative sanctions against undertakings for breaches of competition rules?

The Chapter I and Chapter II Prohibitions came into force on 1 March 2000.

The following are a list of important fines levied against undertakings for breaching the Competition Act:-

1. Argos and Littlewoods were fined a record £22.65 million in February 2003 by the OFT for fixing the price of toys and games together with Hasbro in breach of the Competition Act 1998. Argos, Littlewoods and Hasbro entered into agreements to fix the prices of Hasbro toys and games between 1999 and May 2001, breaching Chapter I of the Competition Act from 1 March 2000 when it came into force. Argos was fined £17.28 million, reflecting its high turnover, and Littlewoods was fined £5.37 million. Hasbro was granted full leniency, and so its potential penalty of £15.59 million was reduced to zero, because it provided crucial evidence that initiated the investigation and co-operated fully. In November 2002 Hasbro was, however, fined £4.95 million for entering into price-fixing agreements with 10 distributors in a separate case.

2. The OFT fined Aberdeen Journals Limited £1.3 million for breaching the Chapter II Prohibition by predatory pricing. Predatory pricing occurs when a dominant undertaking incurs losses with the intention of removing a rival and/or deterring other potential competitors. The OFT found that Aberdeen Journals was dominant in the

market for the supply of advertising space in local newspapers and that the company had deliberately incurred losses in an attempt to expel the Aberdeen & District Independent.

3. John Bruce (UK) Ltd of Sheffield, Fleet Parts Ltd of Warrington and EW (Holdings) Ltd (trading as Truck and Trailer Components) of Crowley were fined a total of £35,000 in May 2002 for price-fixing in respect of automatic slack adjusters, which are brake safety devices for buses, trailers and trucks in breach of the Chapter I Prohibition.

4. Napp Pharmaceutical Holdings Limited was found to have supplied a morphine product to patients at excessively high prices while discounting it for hospitals in breach of the Chapter II Prohibition. Napp was eventually fined £2.2 million by the OFT.

5. Arriva Plc and First Group Plc were found guilty of concluding a market sharing agreement in breach of the Chapter I Prohibition. The two companies were fined £318,000 and £529,000 respectively, but these were eventually reduced to nothing in the case of Arriva Plc and £203,000 for FirstGroup Plc due to their assisting the OFT's inquiry by providing evidence of their cartel activities.

3. EFFICACY OF SANCTIONS

(A) ***Has any research been carried out regarding the efficacy of criminal and/or administrative sanctions? If yes, what were the conclusions and recommendations?***

This Report concentrates on two comprehensive and important studies regarding the efficacy of criminal sanctions. These are the OECD's Report entitled "Hard Core Cartels" and published in 2000 and a Report prepared for the OFT in 2001 entitled "Proposed criminalisation of cartels in the UK" by Sir Anthony Hammond QC, the former Treasury Solicitor and Roy Penrose OBE, the former Director General of the National Crime Squad ("the Hammond-Penrose Report") which followed the UK Department of Trade and Industry's White Paper published in 2001 entitled "A World Class Competition Regime" ("the White Paper").

OECD Report

The Competition Law and Policy Committee of the OECD focussed on the impact of a number of specific recent cartels (the Global Graphite Electrode Cartel, the Global Lysine Cartel, the French TGV Cartel, the Spanish Sugar Cartel and the Global Vitamins Cartel) on the world economy in order to determine the harm caused by cartels on the world economy. The OECD Report also found that in the US alone, just ten recently condemned international hard-core cartels:

- Cost individuals and businesses many hundreds of millions of dollars annually in the US alone.
- Affected over $10 billion in US commerce, with overcharges of over $1 billion in the US alone.
- Caused even more harmful economic waste estimated at over $1 billion in the US alone.

The OECD recognised that, to calculate the global harm of all cartels, these striking numbers would have to be increased by:

- The harm these cartels had done outside the US.
- The harm done by other successfully challenged international and domestic cartels.
- The harm done by much larger numbers of undiscovered and unproven hard-core cartels.

The OECD Report makes observations on the differing treatment of cartels in different OECD Member States. The Report does not offer a conclusion as to whether fines for companies or criminal sanctions for individuals are better for deterring hard core cartel activity. Instead, the OECD Report contains a detailed Hard Core Cartel Recommendation.

The Recommendation recognises both the important of halting hard core cartels and the need for co-operation in doing so. Thus, the Recommendation call upon Member States to take two sorts of actions - one relating to individual enforcement programmes and the other relating to co-operation.

First, the Recommendation encourages each OECD Member State to ensure that its competition laws effectively halt and deter hard core cartels (without specifying what those laws should consist of). Member States are urged to ensure that their sanctions and investigatory powers are adequate and that their exclusions and authorisations of what would otherwise be hard core cartels are both necessary and no broader than is required to achieve their overriding policy objections.

Second, the Recommendation urges each OECD Member to review all obstacles to law enforcement co-operation against hard core cartels. The OECD Report points out that the US competition authorities strongly believe that the absence of assistance from foreign authorities in sharing or securing evidence has impeded its ability to prosecute international cartels in several instances. The OECD Recommendation reminds Member States that:-

(a) they have a common interest in preventing hard core cartels;

(b) whilst there should be effective safeguard for confidential information, information sharing with foreign authorities has been beneficial where it has been possible; and

(c) most countries' laws continue to prevent their competition authorities from such information sharing.

The Recommendation falls short of calling upon OECD Member States to share all confidential information contained in its competition authority's file; instead, it leaves it to each country to decide what forms of co-operation are suited to its needs and to the common interest in more effective action against hard core cartels. The OECD Report suggests that further consultation is needed on ways to protect companies' legitimate business interests whilst enabling competition agencies to gather and share confidential information with foreign competition authorities in appropriate circumstances.

The Hammond-Penrose Report and the White Paper

This Report was commissioned by the OFT to consider how the proposed regime of criminal sanctions for cartel perpetrators could best operate in practice. Its main provisions are incorporated into the cartel offence provisions of the Enterprise Act 2002. The Report and the

White Paper also consider the effectiveness of criminal sanctions more generally and look at other jurisdictions where criminal sanctions have been introduced.

Why fines are insufficient

The Report and the White Paper both concluded that for most forms of anti-competitive behaviour, large fines against undertakings act as an effective deterrent. However, for cartels it concluded that there is good evidence that current levels of fines are not sufficient. Cartels all result in higher prices and consumers paying more than they should. One option would be to increase the maximum levels of fines significantly - perhaps six to ten times the existing maximum fines. They concluded that such a fine would not be proportionate as a large percentage of companies convicted of price-fixing would go into liquidation if fines were imposed at that level. It would also be unfair as in many cases the cartel will only have covered one part of the firm's business and only a small number of directors or senior employees may have been involved. Huge fines would be likely to damage innocent employees, shareholders and creditors who have done nothing to harm consumers or break the law.

The possibility of criminal fines (rather than jail sentences) were also discussed. The White Paper points out that some countries impose criminal fines against individuals and that this would improve the deterrent effect of the UK competition regime. In practice, however, it believed that if the government could only fine individuals for participation in cartels this would still not provide adequate protection against cartels. This is particularly the case as firms could still find ways to cover the costs for individuals fined - the New Zealand Government is currently trying to outlaw exactly this type of behaviour.

The White Paper points out that competition between firms is much more ingrained in the US than in the UK, in part because of the fact that criminal penalties for individuals for participation in cartels have been on the US statute books since 1890, and because the criminal penalties have been applied actively. During the 1990s, the US Department of Justice successfully prosecuted thirty-five people a year on average. This raises the profile of competition law within the business community and, as a result, directors and executives understand the harm that cartels can cause, and the risks associated in engaging in them. Other countries also have criminal sanctions against individuals involved in hard-core cartels. These countries include Canada, Japan, Austria, France, Norway and Ireland. It would be interesting to hear the views of relevant delegates on how criminal sanctions work in practice in those countries. Certainly there have been no prosecutions so far in Ireland.

The White Paper considers at length the question why fines don't provide an effective deterrent against cartels. The key conclusions are:

- If fines are to deter firms and their executives effectively, they need to be set at a level which is greater than the expected gains from participating in a cartel.
- US evidence suggests that cartels often raise prices by around 10%. Increasing prices will have some dampening effect on demand - so a member of a cartel may increase its profits by a smaller proportion. Conservatively, they may do so by around 5%. If the cartel operates for around 6 years as the average US cartel is thought to do, then the total benefit may be approximately 30% of annual turnover.
- The Competition Act 1998 theoretically allows fines to be imposed at this level - up to 10% of annual UK turnover going back up to three years. However, the maximum fine is never likely to be imposed and not all cartels are caught - in the US, optimistic estimates suggest that only one-sixth of cartels are detected.

In conclusion, faced with very high benefits arising from engaging in a cartel, mere fines (as opposed to imprisonment of individual directors and senior executives) are unlikely to act as a meaningful deterrent.

Appropriate Sentences

The Hammond-Penrose Report considers at length what the appropriate maximum sentence should be for those involved in cartels in the UK. The Report points out that hard core cartels are serious conspiracies which defraud business customers and consumers and have wide economic impacts and that the offence merits a strong sentence. Basically, cartels should be seen as a form of organised theft and a similar penalty should be imposed.

The Report looks at what it considers comparable offences and the maximum sentences associated with them. Insider dealing and obtaining property by deception are considered to be comparable offences where the maximum penalty is five years imprisonment. The Report points out that comparable offences in Japan and Canada carry a maximum sentence of five years and that the Republic of Ireland is also proposing to increase the maximum sentence for its cartel offence from two to five years.

The Report also points out the need to have available the covert surveillance powers associated with an arrestable offence (as defined in the Police and Criminal Evidence Act 1984), which carries a maximum sentence of five years and the desirability of sending a strong signal to the courts that hard core cartels are very serious offences, which can have important deleterious economic consequences.

The Report recommends that the maximum penalty for individuals found guilty of having committed the cartel offence should be a custodial sentence of not less than five years imprisonment and/or unlimited fines (these are the penalties now contained in the Enterprise Act 2002). The Report concludes that if the maximum penalty were set at less than five years imprisonment, it would not accurately reflect the UK Government's view of the seriousness of the offence and that a shorter maximum sentence would hamper powers of investigation (as a maximum sentence of at least five years is necessary for the offence to be classified as an arrestable offence under the Police and Criminal Evidence Act 1984).

(B) ***Is the use of criminal sanctions a way of reinforcing the efficacy of implementation of competition rules, or is the use of administrative sanctions preferable? What are the points in favour of the latter?***

ARGUMENTS IN FAVOUR OF CRIMINALISATION

There are good arguments in favour of the UK's new approach of criminal sanctions for individuals who dishonestly agree to price-fix, bid-rig, market-share and limit or prevent supply and/or production.

(1) The threat of imprisonment for individuals should focus the minds of directors and other senior officials and make them feel more responsible for the implementation and enforcement of competition law compliance programmes. Whilst a company can weigh up the risks of breaching the Competition Act 1998 or the EC Treaty against the likely profits resulting from participation in a cartel, few company directors or employees will be willing to risk substantial jail sentences for their company's benefit. It is worth noting that competition between firms in the US is much more ingrained than in the

UK, at least in part it is thought because there have been criminal penalties for participation in cartels for over a century.

(2) The option of increasing fines on undertakings significantly rather than imposing criminal penalties on individuals would be unfair. As discussed in 3(A) above, in many cases the cartel will only have covered one part of the undertaking's business and only a small number of directors or senior employees may have been involved. Huge fines could send a company into liquidation and damage innocent employees, shareholders and creditors who have done nothing to harm consumers or break the law.

(3) As discussed at 3(A) above, a conservative estimate of the total benefit to an undertaking of actively participating in a cartel is on average somewhere around 30% of annual turnover. Faced with such high benefits arising from engaging in a "successful" cartel, mere fines (as opposed to imprisonment of individuals responsible) are unlikely to act as a meaningful deterrent.

(4) Hard core cartels can be seen as conspiracies to defraud customers and consumers and therefore a prison term can be seen as an appropriate sentence. If one views cartels as a form of organised theft from customers and consumers the UK's maximum penalty of five years imprisonment could even be seen as reasonably lenient.

ARGUMENTS AGAINST CRIMINALISATION

The arguments against the UK's introduction of the criminal cartel offence are that the civil sanctions available to the UK competition authorities under the UK Competition Act 1998 were sufficient and that the new cartel offence under the Enterprise Act 2002 is unnecessary and, indeed, problematic for the reasons set out below.

(1) The Chapter I and Chapter II Prohibitions of the Competition Act 1998 only came into effect on 1 March 2000 and, therefore, that it is too soon to assess their impact on the UK's competitive culture. Companies are still adjusting their compliance regimes and training their staff in relation to that Act. Criminalisation of cartel offences under yet another competition act (the Enterprise Act 2002) would not appear to be the right step for the UK at this stage.

(2) There will be conflicts in operating a civil and criminal system in parallel. The cartel offence under the Enterprise Act involves a criminal burden of proof (beyond a reasonable doubt). An individual believed to have committed the cartel offence will have rights under the Police and Criminal Evidence Act 1984. The individual must be cautioned and given a right to representation by a lawyer. Interviews must be tape recorded. In addition, the chain of evidence in relation to exhibits in a criminal case is important. Original documents will be taken away and they must be strictly accounted for at all times until they are produced at the criminal trial.

Investigations relating to the Chapter I and Chapter II Prohibitions of the Competition Act 1998 and Articles 81 and 82 of the Treaty, meanwhile, are subject to a civil burden of proof (on the balance of probabilities) and subject to a civil procedure. It is accepted practice in England and Wales that the liberty of the defendant in a criminal trial outweighs any interests of the defendant in a criminal trial outweighs any interest in a linked civil action. If there are two sets of proceedings the criminal proceedings will go first and the civil case will follow later. However, in cases involving EC law, the EC case must go first before the national case. There will, therefore, now be a conflict between EC law and the cartel offence contained in the Enterprise Act 2002.

(3) It is possible for undertakings to apply for leniency under the Competition Act 1998 and the EC Treaty and in the right circumstances escape all liability for fines. The leniency policies of the EU and the UK, like of the US, encourage whistle blowing on cartels. The new Enterprise Act will however make this more difficult for the undertaking, as an individual can also apply for leniency (in the form of "no-action" letters, as discussed above).

There will be difficulties under the new laws where an undertaking wishes to apply for leniency under the Competition Act or the EC Treaty in relation to its financial liabilities. It would normally expect that all of its employees including directors would assist to the upmost of their ability. However, an individual who may be open to criminal liability is extremely unlikely to come forward. He is far more likely to want to keep quiet. In order to achieve leniency, the undertakings must give full and complete information to the authorities and co-operate at all stages in the investigation. Normally a director would be under a fiduciary duty to his company to assist in an application for leniency, but where he is likely to incur criminal liabilities under the Enterprise Act, his common law rights against self-incrimination will override the fiduciary duties to the company. It also means that if the authorities conduct an investigation without notice at the premises of the company (a "dawn raid"), individuals who may have committed a criminal offence under the Enterprise Act will need to be represented separately from the company at that dawn raid. The European Commission has already expressed its concern that the Enterprise Act criminal offence will prevent it co-operating fully with the UK authorities in relation to competition investigations.

4. At about the same time that the Enterprise Act became law, the EU modernisation proposals were adopted. The aim of the modernisation rules is to let the EC Commission concentrate on serious cases. The modernisation process will increase the role of the national authorities in enforcement of EC law. However, where there is a case involving Article 81 and national law, Article 81 is to take precedence over national law. In so far as that means the Competition Act is concerned this really is not a problem. The Competition Act is based on the EC Treaty, and the financial penalties for infringement are similar, although fines under EC law will generally be higher than those under the Competition Act. However, where there is an infringement by the company of Article 81 and a criminal prosecution of an individual (potentially involving a prison sentence of up to five years) under the Enterprise Act it is not at all clear how the precedence of EC law will work in practice.

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