Implications of the Revised Criminal Cartel Offence for the Insurance Sector

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Introduction

A number of changes to UK competition law came into effect on 1 April 2014. The most visible change was the merger of the two domestic competition authorities, the Office of Fair Trading (OFT) and the Competition Commission (CC), to create a new Competition and Markets Authority (CMA). This produced a large number of consequential changes to institutional arrangements and procedures. The amending statute (the Enterprise and Regulatory Reform Act 2013 (ERRA)) also made various changes to substantive competition law, the most controversial of which turned out to be a small but significant amendment to the criminal cartel offence.

Specifically, the Government's decision to remove the requirement that individuals could be convicted for participating in a cartel only if they could be proved to have acted dishonestly substantially widened the scope of the offence and threatened to criminalise involvement in a range of common commercial agreements, including in the insurance sector. Although amendments to the relevant statutory provisions in the course of the passage of the Enterprise and Regulatory Reform Bill through Parliament did go some way to addressing concerns over this change, the switch in approach from an offence based on a clear *mens rea* to a form-based offence that effectively imposes strict liability on individuals participating in certain types of arrangement, unless an exclusion or defence applies, means that there continue to be significant uncertainties over its practical application. While it appears unlikely that anyone will be prosecuted under the cartel offence for involvement in a legitimate insurance arrangement, the way in which the offence is drafted could still potentially lead to arguments based on the offence being raised in civil proceedings, for example in an attempt to invalidate a contract of insurance.

This article explains how a law that was explicitly designed to criminalise hard-core cartel activity could now catch perfectly legitimate and long-standing arrangements between businesses, including those commonly used for the arrangement of insurance and reinsurance cover, unless certain specific precautions are taken. To help understand this rather surprising outcome, it is first helpful to examine the background and structure of the cartel offence, as originally enacted, and the process of that led up to the recent changes.

The cartel offence

The UK Government first proposed the introduction of a criminal cartel offence for individuals back in 2001, with the stated aim being radically to alter the incentives against engaging in hard-core cartel activity[1] by providing for imprisonment of participating individuals.[2] It was hoped that the ability to impose such sanctions on the people who actually participated in cartel meetings would support the existing civil regime, under which potentially very substantial fines are paid by companies that are found to have infringed competition law.

The cartel offence was duly enacted by s.188 of the Enterprise Act 2002 (**EA02**), which came into force on 20 June 2003. At the time it was introduced, commentators suggested the offence heralded a "*ferocious anti-cartel regime*" and the OFT predicted "*6-10 prosecutions a year*".[3]

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[1] The OECD has defined hard-core cartels as "anticompetitive agreements between competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets" (OECD Report on Hard-core Cartels, 2000, pp.).

[2] See '*A World Class Competition Regime*', Cm 5233, July 2001, available at https://www.gov.uk/government/publications/a-world-class-competition-regime.

[3] *Proposed criminalisation of cartels in the UK*, November 2001, a report prepared for the OFT by Sir Anthony Hammond KCB QC and Roy Penrose OBE QPM.

As originally enacted, s.188 EA02 made it a criminal offence for an individual "dishonestly to agree" with one or more other individuals "to make or implement, or cause to be made or implemented", arrangements falling into a category specified in the section relating to at least two undertakings (referred to in the section as "A and B").[4] If such an agreement is found to have taken place, the maximum penalty that can be imposed on participating individuals is five years' imprisonment and/or an unlimited fine.

The specified arrangements are ones which, if operating as the parties to the agreement intend: (i) directly or indirectly fix the price of a product or service supplied in the UK by A and B (otherwise than to each other);[5] (ii) limit the supply or production of goods or services by A and B in the UK;[6] (iii) divide the supply of products or services in the UK between A and B;[7] (iv) divide customers between A and B for the supply of a product or service in the UK;[8] or (iv) constitute bid-rigging arrangements.[9]

It can be seen from this list that the offence proscribes specific forms of conduct, rather than adopting more general wording that takes account of conduct's effect, such as a restriction of competition. Although the types of arrangement listed in s.188(2) EA02 are ones that experience and economic theory tells us are generally likely to lead to anticompetitive effects that harm consumers, the drafters of the section deliberately avoided any consideration of the latter, to avoid criminal juries being called on to consider potentially complex economic evidence when deciding whether the prosecution has discharged its burden to prove guilt beyond reasonable doubt. It was also important to avoid the offence being treated as part of UK competition law, since this would have raised difficult questions over its interaction with EU competition law.[10] As a result, the cartel offence is deliberately formalistic and the actual or potential impact of the relevant arrangement on competition on a relevant market plays no part in the application of the offence. It is also interesting to note that the word 'competition' does not appear in section 188 at all.

As a result, provided that an arrangement is one that is listed in s.188(2) EA02, as originally enacted individuals agreeing to make or implement that arrangement risked committing a criminal offence if they entered into that agreement dishonestly. The *mens rea* requirement of dishonesty was therefore the key limiting factor in the scope of the offence as originally enacted. Dishonesty was to be established using the concept's ordinary and well established meaning, as set out in *R v Ghosh*[11]. This is a two-stage test involving objective and subjective elements, namely: (i) the defendant's behaviour was dishonest according to the ordinary standards of reasonable and honest people; and (ii) if, according to the first standard, the defendant was indeed dishonest, the defendant himself must have realised that his behaviour was by those standards dishonest.

At the time the Enterprise Bill (which introduced the cartel offence onto the statute book) was debated, the Government stressed the importance of the dishonesty element of the offence in:

- ensuring that the offence did not apply to agreements that would be lawful under the civil competition prohibitions;

[4] Through rather convoluted drafting, the offence applies only if A and B are supplying products or services at the same level of the supply chain (see ss.188(4) and 189 EA02)). As a result, vertical agreements are excluded from the offence.
[5] Section 188(2)(a) EA02.
[6] Subsections 188(2)(b) and (c) EA02.
[7] Section 188(2)(d) EA02.
[8] Section 188(2)(e) EA02.
[9] Subsections 188(2)(f) and 188(5) EA02. Bid-rigging is defined as arrangements under which, in response to a request for bids for the supply of a product or service, or for the production of a product, in the UK, B will not make a bid if A does or A and B will only make bids "arrived at in accordance with the arrangements".
[10] Specifically, Article 3 of Council Regulation 1/2003 prevents member state competition authorities such as the CMA from prohibiting agreements under national competition law if they are compatible with corresponding provisions of EU competition law. This does not preclude national authorities from taking action under national laws that "pursue an objective different from that pursued by" EU competition law. In order to avoid potential conflict between the CMA's cartel enforcement activities and its obligations under Article 3, it was important that the cartel offence could be viewed as pursuing a different objective from Article 101 TFEU, which prohibits anticompetitive agreements between undertakings.
[11] [1982] Q.B. 1053.

- reducing the likelihood that conviction would depend on juries having to consider and take decisions on detailed economic evidence; and
- providing juries with a test that they would recognise and to signal the seriousness of the offence.

The Government was clear at that time that only hard core cartels should be covered by the new offence, noting that it "*had no desire to criminalise involvement in benign agreements which would not be unlawful under existing competition law*".[12] The Government also stated that "*it is critical that the offence is defined in a way which is both clear and easy for business and the courts to understand*".[13] This was reiterated in the House of Commons and House of Lords debates on the Enterprise Bill, for example with Lord McIntosh of Haringey reassuring the House of Lords that "*We are focusing courts and juries on the wrongful nature of cartels…We are focusing on horizontal cartels…Juries will recognise dishonesty of hard-core cartel members and only expect to prosecute serious and clear-cut cases*".[14] It was felt at the time that the dishonesty element was the best way to achieve this.

Background to the changes to the cartel offence

With the benefit of hindsight, the first step towards the expansion of the cartel offence came back in May 2010, when the UK's newly-elected Conservative/Liberal Democrat coalition government promised a 'bonfire of the quangos', ostensibly as part of a range of measures to reduce government spending in the face of a ballooning public deficit. The resulting review, which took place over the summer of 2010, examined over 900 non-departmental public bodies, non-ministerial departments and public corporations to establish whether each should be abolished, merged or retained.[15] The review identified the UK's two competition authorities as prime candidates for merger and therefore the resulting report, which was published in October 2010, included an indication that the Government would consult "in the New Year" on a merger of the OFT's competition functions with the CC.[16]

Because the UK competition regime has grown up around a long-standing dual-agency structure, any merger of the OFT and CC necessitated primary legislation to enact comprehensive amendments of the key UK competition statues, namely the CA98 and the EA02. The legislative changes required by such a merger were largely technical and reasonably straightforward, for example replacing references to the OFT with references to the CMA or setting out the mechanism for stages of a market investigation to take place within the same body rather than being split between two bodies as previously. The need to enact new legislation to implement the merger of the agencies unfortunately created an apparently irresistible opportunity for ministers and their officials to revisit a number of other aspects of the UK competition regime.

The extent of these changes became clear in March 2011, when the Department for Business, Innovation and Skills (BIS) published a consultation document entitled '*A Competition Regime for Growth'* (the Consultation Document).[17] As well as confirming the Government's intention to merge the OFT and CC to create a single CMA, the Consultation Document went on to set out a wide-ranging reform programme that proposed a large number of changes to other aspects of the UK competition regime.

The stated objective for these reforms was "*to make this system even better*" and thereby "*to maximise the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth"*. As such, the reforms were placed firmly within the Government's wider 'growth agenda', with improvements to the operation of the competition regime being intended to stimulate economic growth and thereby help the UK economy recover from the great financial crisis of 2008.

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[12] *A World Class Competition Regime*, Department for Trade and Industry White Paper, July 2001, paragraph 7.33.
[13] *Ibid.*, paragraph 7.33.
[14] House of Lords Committee Stage, 18 July 2002.
[15] See https://www.gov.uk/public-bodies-reform.
[16] Many, but not all, of the OFT's consumer protection functions were duly transferred to other bodies, including local Trading Standards Officers, as a part of a complex reallocation of responsibilities. It is outside the scope of this article to analyse this aspect of the reforms.
[17] Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf.

Although the proposal to merge the OFT and CC had originally been justified by the need to save costs as part of the 'bonfire of the quangos', the Consultation Document instead reflected the view within Government (and particularly within BIS, which is led by the Liberal Democrat Secretary of State Vince Cable) that there was not enough enforcement of competition law and that such enforcement as there was took too long. Reflecting this belief, the Consultation Document stated that Government's overarching objective would be achieved by introducing changes to: (i) improve the robustness of decisions and strengthen the competition regime, (ii) support the competition authorities in taking forward high impact cases, and (iii) improve the speed and predictability for business of decisions.

While the lack of timely enforcement was viewed by BIS as a problem across the competition law regime as a whole, the Consultation Document identified particular problems with the relatively new criminal cartel offence. Specifically, BIS suggested that the intended deterrent effect of the offence had become "*weaker than was intended because there have been so few completed cases to date*". As the Consultation Document noted, since the criminal cartel offence was introduced in 2002 only two cases had reached trial and only one of those had resulted in convictions.[18] The Consultation Document noted that it "has been suggested" that the lack of prosecutions may have been due to the requirement for prosecutors to prove dishonesty on the part of defendants, which could "*artificially limit the scope of cases that can be brought and make those cases disproportionately difficult to prove*".[19]

In the opinion of BIS, the simple and obvious answer to this problem was to remove the dishonesty element of the offence. As a result, although the Consultation Document put forward four options for reform, each option involved deleting the word "dishonesty" from the statutory definition of the offence, with differences between the options being limited to what would replace dishonesty. This is where the difficulties really started, since the dishonesty requirement's focus on the 'guilty mind' of participants had been a key limiting factor in the scope of the offence. While this may have made life harder for the OFT in its role of prosecutor, it also provided a crucial level of reassurance for individuals and businesses entering into legitimate business arrangements that might, because of their form rather than any effect on competition, fall into one of the defined categories set out in s.188(2) EA02.

New exclusions

The Government's preferred option for limiting the offence in the absence of the dishonesty requirement was to redefine its scope so that agreements 'made openly' would not be caught. For example, the offence would not be committed if customers were told about the arrangement to fix prices, limit production or supply or share markets or customers at or before the time of purchase.[20] In the Government's view, this option would decrease the likelihood of defendants seeking to rely on complex economic evidence that juries might find difficult to understand or apply. It would also exclude from the scope of the offence the kinds of agreement that might have countervailing benefits under the civil antitrust prohibitions, with the logic being that parties to agreements with countervailing benefits would not object to their customers knowing about them.

[18] In what remains the only case in which individuals have been convicted under the cartel offence, three men pleaded guilty to participating in a cartel to allocate markets and customers, restrict supplies, fix prices and rig bids for the supply of marine hose and ancillary equipment in the UK. Two of the defendants were imprisoned for three years, and the third defendant imprisoned for two and half years (reduced to between 20 months and 2.5 years on appeal). Because they pleaded guilty, pursuant to a plea bargain originally entered into with the US Department of Justice, there was no trial. The only other prosecution to have proceeded to trial, of four British Airways employees for participating in an arrangement with Virgin Atlantic to fix the price of fuel surcharges in passenger tickets, collapsed on procedural grounds related to the disclosure of evidence.

[19] Consultation Document, paragraph 6.6. While the document does not state who suggested this to BIS, the OFT had been vocal in its criticism of the dishonesty requirement. Although the Consultation Document acknowledged the reasons for including the requirement in the first place, it expressed doubts over whether it was still "the best way" of achieving those aims.

[20] This approach was similar to that already adopted for the bid-rigging element of the offence, which provided an exclusion where the person requesting the bid was informed of the arrangement at or before the time of the bid.

This proposal marked the key change in approach by Government away from defining the offence *positively* by reference to the elements of prohibited cartel behaviour (i.e. individuals involved in cartel agreements tend to act dishonestly) to defining the offence *negatively* (i.e. individuals involved in cartel agreements tend not to tell their customers about them). In other words, once the decision was taken not to limit the offence by reference to the mental state of cartelists, and given that taking account of the effect on competition was ruled out for the reasons set out above, the remaining option was to limit the offence by reference to the type of behaviour that is typically *not* displayed by cartelists.

This approach was inherently flawed, given that the primary element of the offence (the *actus reus*) comprises an agreement to make or implement a wide range of specified arrangements that are not invariably anticompetitive and hence undesirable. Since there could be situations in which such an agreement is not made 'openly' for perfectly acceptable business reasons, for example because its details need to be kept commercially confidential in advance of the launch of a new product, cartelists and legitimate businesspeople may superficially display the same behaviour. Because it is formalistic, however, the offence makes no distinction between situations in which those involved know that what they are doing is likely to be unlawful and therefore wish to hide their tracks and those in which a lack of 'openness' is perfectly legitimate. In so doing, it effectively created a positive requirement for companies to make details of their commercial arrangements widely available, notwithstanding the usual presumption that it is legitimate to keep internal business information confidential unless there is a good reason to disclose it. In so doing, BIS was effectively proposing the creation of a strict liability offence, whereby an agreement to make or implement any of the arrangements specified in s.188(2) EA02 would be unlawful, irrespective of the participating individuals' state of mind or intentions. BIS's argument that a mental element would remain, since the offence would still require proof of an intention to enter into an agreement that operated as intended probably marked the intellectual low point of a long history, since almost any agreement drafted with the intention that it would be legally binding is likely to meet this test and the effect of the removal of the dishonesty element is that a large number of agreements in this category will be caught, as well as the "gentleman's agreements" through which traditional "hard-core" cartels are usually operated.[21]

Despite criticism that removal of the dishonesty requirement was not justified and risked unduly extending the extent of the offence, in March 2012 the Government confirmed in its response to the consultation that the

[21] It remains to be seen how far suspects may seek to interpret this requirement as a genuine *mens rea* test. The requirement that an agreement will be caught if the resulting arrangement is of a type listed in s.188(2) only "if operating as the parties to the agreement intend" may indeed have been originally included in the statute as an additional *mens rea* element, in addition to the more important dishonesty requirement. Its remaining importance following removal of the dishonesty requirement is unclear and it seems to add little, at least as regards an individual making on behalf of an undertaking any agreement intended to be legally binding (rather than "gentleman's agreements"), since in most cases parties to a legally binding agreement (and the representatives of the parties in making that agreement) will intend it to have the outcome specified in the agreement. It is notable, however, that there is a general legal presumption that a *mens rea* is an essential element of any criminal offence, which can be rebutted (i.e. the offence can be made one of strict liability) only by express provision in the statute or by necessary implication. While the courts have been more willing to find that the presumption that a *mens rea* is required can be rebutted when dealing with regulatory offences than they are with respect to acts that may be viewed as 'truly criminal' or 'criminal in the generally accepted sense', it is unclear where the cartel offence falls on this scale. As a result, it appears at least arguable that the revised offence still requires an intention on the part of an individual to do something that is in some sense wrong, rather than to achieve something other than a perfectly lawful arrangement that, for technical reasons, falls within the scope of s.188(2) EA02.

dishonesty element would be removed.[22] This change would, BIS argued, improve enforceability, increase deterrence and bring levels of prosecution closer to levels intended.[23]

In confirming that it would go ahead and adopt this approach,[24] BIS clarified that an agreement would be viewed as having been made openly only if the parties agreed to publish details of the arrangements before they are implemented. In proposing this approach, BIS also concluded that it would be necessary to specify the format for publication "which could be in the London Gazette or a similar publication".[25] This highly formalistic approach was proposed on the basis that it would provide a "more objectively measurable way of proving whether the offence had been committed"[26] and had the "the particular advantage of simplicity".[27] Questions over the workability of this approach or its ability to take account of parties' legitimate concerns to maintain commercial confidentiality in their commercial agreements were simply brushed aside, as were wider concerns over the potential for this approach to render legitimate agreements unlawful.

As a result, when the Enterprise and Regulatory Reform Bill was introduced to Parliament on 23 May 2012, as well as proposing the deletion of the word "dishonestly" from s.188 EA02 the Bill included provision for a new s.188A setting out the circumstances in which the cartel offence would not be committed. (In the Government's terminology, such cases would be excluded from the offence.)

The new s.188A(1) clarified that an individual does not commit the offence if, under the arrangements:

- customers would be given relevant information about the arrangements before they enter into agreements for the supply to them of the product or service concerned;
- in the case of bid-rigging, the person requesting bids would be given relevant information before a bid is made: or
- in any case, relevant information about the arrangements would be published in the manner specified by the Secretary of State before the arrangements are implemented.

"Relevant information" is defined by s.188A(2) EA02 as: (i) the names of the undertakings to which the arrangements relate; (ii) a description of the nature of the arrangements which is sufficient to show why s. 188 EA02 may apply; (iii) the products or services to which they relate; and (iv) any other information specified by the Secretary of State. Although not specified in the Act itself, it was subsequently confirmed in secondary

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[22] *Growth, Competition and the Competition Regime: Government Response to Consultation*, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf (**Government Response**), at p.10. This conclusion was reached notwithstanding that fact that responses to the consultation had, in BIS's own admission, been "mixed", with "businesses, members of the criminal law bar and law firms with competition practices" objecting to the proposed change. BIS also admitted that there was a "lack of live evidence of difficulties arising during the course of a jury trial in a contested case" but concluded that it was "more likely than not" that the inclusion of the dishonesty requirement was inhibiting prosecutions – see Government Response, paragraph 7.8.

[23] It is not without irony that the CMA has recently confirmed that it is currently pursuing two criminal cartel investigations under the old s.188 EA02 (since the relevant conduct occurred before 1 April 2014). This means that it has satisfied itself in each case that it has a reasonable prospect of proving that relevant individuals acted dishonestly when entering into a suspected cartel, notwithstanding the view of its predecessor body that such prosecutions were extremely difficult. In fact, as at the date of writing, one of these investigations, relating to the supply of galvanised steel water tanks, has led to three individuals being charged and one guilty plea – see https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage.

[24] Notwithstanding that fact that responses to the consultation had, in BIS's own words, been "mixed", with "businesses, members of the criminal law bar and law firms with competition practices" objecting to the proposed change. BIS admitted that there was a "lack of live evidence of difficulties arising during the course of a jury trial in a contested case"

[25] The London Gazette, which has been published since 1665, describes itself as the "first official journal of record and the newspaper of the Crown". It is used to publish details of official matters of record such as notices of probate and insolvency.

[26] Government Response, paragraph 7.26.

[27] Ibid., paragraph 7.35. It is worth noting in passing that being simple does not prevent something being wrong.

legislation that the requirement for publication in section 188A(1) EA02 is met only if relevant information is "advertised once" in the London, Belfast or Edinburgh Gazettes.[28]

An additional exclusion was included in the new section 188A for cases in which the agreement is made in order to comply with a legal requirement. This addition was uncontroversial, as it simply carried over an existing principle in civil competition law that an agreement that is entered into in order to comply with a legal requirement is excluded from the CA98's Chapter I prohibition.[29]

New defences

After concerns were raised by the Labour opposition during debates in the House of Commons over the potentially alarming impact of the extension of the cartel offence,[30] the Government finally and somewhat reluctantly agreed to "reflect" on the points raised.[31] The results of this reflection were revealed on 17 October 2012, when the Secretary of State tabled an amendment to introduce new defences aimed at further reducing the scope of the offence back to something that more closely approximated to hard-core cartel activity. In addition, a new statutory requirement was introduced for the CMA, as the prosecuting authority, to issue guidance on how it would exercise its prosecutorial discretion when deciding whether to institute proceedings to reassure parties to benign agreements that they did not risk prosecution.[32] These last-minute amendments were incorporated into the bill without debate, as consideration was curtailed by a programme motion.

As enacted, the resulting section 188B EA02 provides a defence for those charged with committing the offence in any one of the following three situations:

- at the time of making the agreement, it was not the intention of the individual entering into the agreement that the "nature of the arrangements" would be concealed from customers at all times before they enter into agreements for the supply of the product or service to them;[33]
- at the time of making the agreement, the individual entering into it did not intend that the nature of the arrangements would be concealed from the CMA;[34] or
- prior to making the agreement, the individual entering into it took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining legal advice about them before their making or implementation.[35]

As with the publication exclusion, the defences are defined negatively, with those responsible for drafting the law apparently starting from the position of identifying how cartelists typically behave (i.e. they tend to keep their cartel secret from customers and the competition authorities and they tend not to seek legal advice on their cartel arrangements) and then defining the defences to be available where such conduct is absent. While this approach is perhaps understandable, given the self-imposed need to limit the scope of the newly extended offence by reference to factors other than the state of mind of the parties, it creates significant evidential difficulties. For example, how can a defendant prove to the requisite legal standard that he did not intend to conceal an arrangement from customers or the CMA, in circumstances where it may not be usual commercial practice to notify relevant details of such agreements to customers in advance, the individual owes a general

[28] SI 2014 No. 535, The Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014. At the time of writing, no such advertisements have been published in any of the Gazettes.
[29] See s.188A(3) EA02 and paragraph 5, Schedule 3, CA98, respectively.
[30] In a rather neat summary of the opposition's position, Chi Onwurah MP argued that "*[C]artels are like dangerous dogs. They need to be treated with great care and the owners should be held accountable for them. The legislation, however, must not attack the entire dog population. Britain depends on its businesses and their legitimate activities must be supported*."
[31] Comments of Norman Lamb MP, Public Bill Committee Debate, 10 July 2012, reported in Hansard at column 557.
[32] New section 190A EA02.
[33] Section 188B(1) EA02.
[34] Section 188B(2) EA02.
[35] Section 188B(3) EA02.

duty of confidence to his employer and there is no positive obligation on businesses to inform the CMA of their business arrangements?[36]

The third defence also raises many questions as to its practical implementation, particularly since it appears from the wording of the statute that there is no requirement that details of the arrangement were actually disclosed to a lawyer or, if details were disclosed, that the lawyer actually provided any advice or, if advice was provided, that it was actually followed by the individual concerned.[37] There also appears to be no need for the individual specifically to seek advice on whether the arrangement might raise competition law concerns and, on its face, the elements of the defence will be met if, for example, the individual asks for advice on whether the arrangement raises any issues under contract or IP law or simply asks a lawyer to take a quick look at the contract implementing the arrangement to see whether it "raises any issues". This makes the defence potentially very broad indeed. On the other hand, for this defence to be available, it is the *individual defendant* who must have taken steps to ensure disclosure of the arrangement to a legal adviser for the purposes of obtaining advice. Within a corporate setting, legal advice will generally be requested by, and provided to, the employing company rather than individual employees and it is the company, not the employee, who enjoys the protection of legal advice privilege in these circumstances. It is unclear how this will impact application of the defence in practice.

While the potential availability of a defence is clearly helpful, in that this further reduces the potential for legitimate arrangements to be attacked under the cartel offence, taken together the defences provide less protection than do the exclusions. This is because, whereas an entire arrangement is taken outside the scope of the offence if an exclusion applies, a defence applies only to the conduct of the individual who is able to plead it. Although the impact is the same if all of the individuals involved in a (non-excluded) agreement to make or implement a specified arrangement are able to plead a defence, problems may arise if at least one of the individuals is not (for example, if all but one individuals entering into an agreement sought legal advice on an arrangement). In such circumstances, it would appear that an offence will still have been committed, since the remaining individual will have agreed to make or implement an arrangement without having a defence. As well as having potential consequences for that individual, such a situation may also have an impact on related agreements.[38] This is discussed further below.

Prosecution Guidance

Pursuant to its new statutory duty under s.190A EA02, the CMA duly published its final Prosecution Guidance (Guidance) in March 2014.[39] Unfortunately, the Guidance turned out to be a rather high level document that provided relatively limited detail, since the CMA (in its own words) considered that "*it is not appropriate in prosecution guidance for the CMA to attempt to provide further interpretation of the legislation such as the availability or operation of defences to the offence. That is the role of the criminal courts*".[40]

Although, as a result of its taking this position, the CMA carefully avoided making any definitive statement in the final Guidance that individuals who have not been involved in hard-core cartel activity (as opposed to arrangements that technically fall within the scope of the offence) will not be prosecuted, the Guidance does provide some more general reassurance on this point. Specifically, it makes it clear that, in considering the public interest in a prosecution, the CMA "*will focus on those cases where the harmful nature of the individual's behaviour is obvious without the need for any detailed assessment*"[41] The Guidance goes on to note that the CMA will take into account the "seriousness of the offence" and the "degree of harm involved", as well

[36] The much criticised notification regime under the Restrictive Trade Practices Act 1976 was ended with the coming into force of the CA98 in March 2000. Although the CA98 introduced its own notification regime, which mirrored the EU regime at the time, both were ended in May 2004 as part of the so-called modernisation of EU competition law. At the time of writing, the CMA had apparently received no details of any agreements from individuals seeking to avail themselves of the defence in section 188B(2) EA02.
[37] The Guidance states only that arrangements must be disclosed "to obtain advice about them" and the steps must have been "reasonable" and "genuinely be an attempt to seek legal advice" (paragraph 4.24).
[38] For example, in circumstances where one party to an agreement has no defence and is therefore committing an offence by entering into that agreement, is there nevertheless a valid and enforceable agreement between the remaining parties who do have a defence?
[39] Guidance document CMA9, *Cartel Offence: Prosecution Guidance*.
[40] *Cartel Offence: Draft Prosecution Guidance Consultation Document*, paragraph 2.6.
[41] Guidance, paragraph 4.26.

as whether the individual consciously participated in "a hardcore cartel", any "wider impact on the community and markets" and whether prosecution would be proportionate.[42] Taken together, these statements indicate that it is highly unlikely that the CMA will prosecute individuals for agreeing to implement a legitimate business arrangement that happens to fall within one of the categories specified in s.188(2) EA02 but is clearly not a 'hardcore cartel'.

Summary of current position

To summarise the position as of 1 April this year, an individual commits the criminal cartel offence if:

- he or she agrees with at least one other individual (s.188(1) EA02);
- to make or implement, or cause to be made or implemented, an arrangement of a type that is specified in s.188(2) EA02; *unless*
- an exclusion listed in s.188A EA02 applies, i.e.*:*
    - relevant information on the arrangement has been given to customers or published in the London, Belfast or Edinburgh Gazettes; or
    - the agreement is made in order to comply with a legal requirement; or
- none of the defences listed in s.188B EA02 is available ((i) no intention to conceal from the customer, (ii) no intention to conceal from the CMA or (iii) the individual sought legal advice).

There must therefore be (1) an agreement between individuals to make or implement or cause to be made or implemented (2) an arrangement between undertakings that falls within one of the specified categories.

Although it is the agreement between the individuals that is the act that gives rise to criminal liability for those entering into it, the agreement must be to "to make or implement or to cause to be made or implemented" an arrangement between undertakings that falls within one of the categories specified in s.188(2) EA02. There can therefore be no offence if there is no corresponding arrangement between undertakings that falls within one of these categories.

It is important to note that s.188 does not directly create any liability for the undertakings involved in the specified arrangement. While the arrangement could independently give rise to an infringement of civil competition law, as set out in the Chapter I prohibition of the Competition Act 1998 (CA98) and Article 101 of the Treaty on the Functioning of the European Union (TFEU), it need not do so for the offence to be committed by participating individuals.

For obvious reasons, an agreement between individuals to make or implement a cartel arrangement does not need to take the form of a formal, written contract to be unlawful. Rather, the statute requires merely that one individual "agrees with one or more others" to make or implement the arrangement and such agreement may arise informally, provided that there is a sufficient 'meeting of the minds'.[43] The individuals need not be active at the same level of the supply chain (i.e. the agreement need not be a horizontal one) and neither is there any need for the individuals and undertakings to be connected in any way, provided that the agreement between the former is causally connected to the arrangement between the latter and provided that the undertakings themselves are active at the same level of the supply chain. Presumably, this structure is designed to ensure that the offence is wide enough to include situations where a cartel between companies is created or facilitated by a combination of employees of cartelists and third parties.[44] Unfortunately, the structure also contributes to the potential for the offence to affect legitimate commercial arrangements.

[42] *Ibid.*, paragraph 4.32-37.

[43] Indeed, the draftsperson seems to have given no thought to the issues that would arise if the only true meeting of minds between individuals was in the signing of an agreement evidently intended to be legally binding and to have had in mind when drafting only "agreements" of an informal nature, that being the characteristic of nearly all "hard-core" cartels.

[44] As seen, for example, in the *AC Treuhand* cases - Case T-99/04 *AC Treuhand AG v. Commission* and Case T-27/10 *AC Treuhand AG v. Commission*, which confirmed that the Commission was entitled to fine a consultant for facilitating cartels (for example, by organising cartel meetings and exchanging information between cartelists) that affected markets in which it was not itself active.

The impact of illegality

As noted above, the risk of individuals being prosecuted for participation in a legitimate commercial arrangement such as an insurance syndicate is low. As a result, the more important practical question for those entering into such arrangements is whether the fact that an agreement between two individuals to implement an arrangement between undertakings that, on its face, meets the substantive requirements of s.188 EA02 and is therefore potentially criminal could taint contracts giving rise to that arrangement (or indeed any related contracts) with illegality and thereby call the enforceability of those contracts into question, even if they are compatible with *civil* competition law. Alternatively, third parties wishing to bring a financial claim against parties to such an arrangement may seek to rest such an action on a cause of action based on illegality. For example, a borrower who is sued for repayment of a loan from a consortium of banks may have a financial incentive to argue that the bank consortium amounted to an arrangement specified by s.188(2) EA02, that the agreements to implement it were therefore criminal and, as a result, any loans issued by the consortium were void on public policy grounds, even though this seems a very highly unlikely conclusion, when the borrower clearly wanted the commercial advantages of borrowing from a consortium rather than a single lender, whether or not the parties' conduct was sufficiently formal to tick one of the exclusion "boxes".

This is an important question, given the wide range of legitimate commercial practices that could be viewed as giving rise to arrangements that are specified in s.188(2) EA02 and the large number of valuable contracts that emanate from such arrangements. While this may seem far-fetched, experience shows that parties to contracts can go to great lengths to escape their contractual obligations and the obligations of parties such as company administrators to recover sums due to a company may lead to claims based on causes of action that are apparently unlikely to succeed, if the potential rewards are large enough.

The question of how far illegal conduct may undermine related contractual obligations is a complex one and a full exploration of the case law is beyond the scope of this article.[45] Given the importance of this question in this context, it is nevertheless helpful to consider the key principles of the doctrine of illegality. At its most basic, this doctrine provides that a court will not enforce illegal contracts, since this would be contrary to public policy. Put another way, it is contrary to public policy to "recognise a benefit accruing to a criminal from his crime"[46] or to allow a plaintiff to profit from his or her own wrongdoing.

The first question to be asked by a court faced with a defence based on illegality, for example to a claim for damages for breach of contract, is therefore to establish whether the specific contract on which the claim is based is in fact an 'illegal contract'. This will be most clear if such contracts are expressly prohibited by statute. Whether a contract is so prohibited is a question of statutory construction. For example, in *Cornelius v Philips*,[47] the House of Lords ruled that a statutory prohibition on a moneylender entering into "any agreement in the course of his business as a moneylender" from anywhere other than his registered address rendered void any contract to lend money that was entered into elsewhere. In the words of the court, this was "*the ordinary result which follows in law when a statutory prohibition is disregarded*".

As a further step, a contract may be rendered illegal by necessary implication of statute if "*the statutory prohibition ... [is] sufficiently linked to the contract*".[48] The key factor for establishing such a link is whether the object of the statute is such as impliedly to prohibit a contract whose formation, purpose or performance would involve a breach of its provisions.[49] When seeking to establish the object of the statute, it may be relevant to consider whether, for example, the imposition of a licensing requirement (and thereby creating an offence of acting in a certain way in the absence of a licence) is simply a means of raising revenue or to protect the public, with implied illegality being more likely in the latter case than the former.

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[45] In a 1999 Consultation Paper, *Illegal Transactions: the Effect of Illegality on Contracts and Trusts*, the Law Commission described the rules relating to when illegality is a defence to the enforcement of contractual obligations as "numerous and complex".

[46] Lord Atkin in *Beresford v. Royal Insurance Co. Ltd*., [1938] AC 586, at 599.

[47] [1918] AC 199.

[48] Megarry J in *Curragh Investments Ltd v. Cook* [1974] 1 WLR 1559, 1563.

[49] In the words of Devlin J in *St John Shipping Corporation v. Joseph Rank* [1957] 1 QB 267, "did the statute mean to prohibit the contract?" In that case, it was held that overloading a ship so that the loadline was obscured (an offence) did not invalidate contracts for the carriage of goods on that ship.

The leading old authority on this question is *Cope v. Rowlands*,[50] in which Parke B. held that an otherwise valid brokerage contract made by an unauthorised person was illegal and void, since the prohibition on authorised persons acting as brokers necessarily implied a prohibition of "*all contracts which such persons make for compensation to themselves for so acting*". In *Phoenix General Insurance Co of Greece SA v. Halvanon Insurance Co Ltd*,[51] the Court of Appeal followed a similar approach by ruling, albeit with great reluctance, that a prohibition in the Insurance Companies Act 1974 on "carrying out contracts of insurance" without authorisation necessarily prevented the court from enforcing contracts of insurance that were issued by a company that was not authorised to write the insurance concerned, on the grounds that any act to give effect to the contract, such as paying a claim, would inevitably be caught by the statutory prohibition. In the words of the court, "*contracts made without authorisation are prohibited by necessary implication and therefore void*".[52]

This principle is subject to limitations, however, and the courts will allow the public policy in favour of upholding contracts to prevail if there is an insufficient connection between the illegal conduct and the contract for the latter to be tainted by the former. In *Hughes & Others v. Asset Managers plc*, for example, the Court of Appeal ruled that investment agreements entered into by an investment manager who lacked the requisite licence were not void, on the grounds that the prohibition in that case was not directed against the contract in question or against either of the contracting parties but rather against the agent of one of them. In the view of the court, Parliament's intention to protect the investing public by imposing criminal sanctions on those engaging in the business of dealing in securities without being duly licensed did not imply an intention "*that any deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective*". To rule otherwise, would be to "*produce very great hardship and injustice on wholly innocent parties*" and would "*provide a defence against claims for breach of contract in favour of the very people who have ignored [Parliament's] licensing requirements*." It may be seen from this that the state of mind of the parties to a contract may also be a relevant consideration in this weighing up process. It is interesting in this context to note Devlin J's observation in the *St John Shipping* case that courts "*ought to be slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract*" … especially "*in times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent*." The fact that only one party to an agreement may be affected by the illegality may also be a factor in permitting enforcement of a contract by *other* parties, although the case law is mixed on this point.

Applied to the cartel offence, it is clear that the statute expressly prohibits only the agreement between the individuals to make or implement, or cause to be made or implemented, the specified arrangement between undertakings. It follows from this that any contractual expression of that agreement that is entered into by individuals in their own name (for example, an individual Lloyd's member) is void, on the grounds that such agreements are specifically prohibited by the Act. Taking this a step further, it appears likely that any contract that embodies and sets out the terms of the original agreement between the individuals but which is executed by those individuals on behalf of the undertakings that employ them will also be illegal and void, on the grounds that the agreement and the contract are inextricably linked.

It is less clear, however, that the same reasoning will apply to invalidate contracts that give effect to a specified arrangement between undertakings but do not themselves incorporate the terms of the unlawful agreement between individuals. On the one hand, it could be argued that the offence was specifically created to punish participation by individuals in agreements, as distinct from the existing civil competition regime which is focused on the conduct of undertakings. On this basis, the effect of the statute should not go beyond rendering those underlying agreements void and unenforceable. On the other hand, it could be argued that the focus of the offence on agreements by individuals was simply a means to end, namely to provide a further means of stamping out the specified arrangements between undertakings that are specified in s.188(2) EA02, as it is *those arrangements* that restrict competition and thereby harm consumers. It would then follow from the conclusion

[50] (1836) 2 M&W 149.

[51] [1987] 2 WLR 512. Applied by Knox J. in *Re Cavalier Insurance Co. Ltd* [1989] Ll Rep 430, in which the court observed that it could not award damages "*for failure to perform the contract whose performance Parliament has prohibited*" since this would "*[give] effect to exactly what Parliament has said must not be done*".

[52] Per Hobhouse J., who also asked "*how can the insured require the insurer to do an act which is expressly forbidden by statute? And how can a court enforce a contract against an unauthorised insurer when Parliament has express prohibited him from carrying it out?*"

that the object of the statute is to protect the public from such arrangements that, in circumstances where all of the elements of the cartel offence are present, it would be contrary to public policy for a court to uphold any contracts (such as a joint venture agreement) that implement such an arrangement.[53]

Taking this one step further still, the question arises as to whether this principle may be extended to invalidate contracts entered into by undertakings that are parties to such an arrangement in the normal course of their business. There have been cases in which an otherwise legitimate contract has been viewed as unenforceable on the grounds that it is tainted by the illegality of a related contract, even if the parties are not the same.[54] Such cases appear to rely on the party to the related contract having at least a degree of awareness of the illegal nature of the underlying agreement, in the absence of which it is assumed that such contracts would be considered too remote from the original offence to be rendered unenforceable.[55] It therefore seems unlikely that contracts of insurance issued by a Lloyd's syndicate or loan agreements issued by a syndicate of banks would be rendered unenforceable on this basis, even if the syndicates themselves were on their face caught by s.188 EA02, since it is unlikely to cross the minds of those entering into such agreements that the underlying syndicate arrangements might be viewed as technically illegal.

It may nevertheless be possible for a party to a contract that arose from a specified arrangement to seek remedies that do not rely on demonstrating that the contract itself is illegal. For example, it may seek to argue that the contract contained an implied warranty that the underlying arrangement was lawfully constituted and use this as the basis for a claim for damages or restitution.[56] While it is likely that such arguments will be viewed sceptically by the courts, who as noted above will seek to uphold contractual obligations where this is not contrary to statute or overriding public policy, the sums at stake may still make it worthwhile for parties to raise such arguments in the course of proceedings, even if mainly for their nuisance value and hence as a means of improving the terms of any settlement.

The unusually strict nature of the UK's money laundering regime may also create challenges, as it requires specified individuals such as lawyers acting on a transaction to notify arrangements to the authorities if they suspect a client has been involved in a criminal offence and prevents lawyers from receiving or holding 'proceeds of crime', i.e. funds that have arisen from criminal conduct. If involvement in a legitimate commercial practice could be a crime, this has a knock-on impact on professional advisers and, if an

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[53] It may also be possible to argue that the undertakings entering into such arrangements commit an ancillary offence, such as aiding and abetting the entry by employees into unlawful agreements.

[54] See, for example, *Fisher v Bridges* (1854) 3 El & Bl 643, in which a contract of security for the payment of an illegal debt was found to be unenforceable as it "*springs from, and is a creature of, the illegal agreement"*; *Spector v. Ageda* [1973] Ch 30, in which Megarry J ruled that the plaintiff could not recover a loan that was used to repay a loan that itself contravened the Moneylenders Act 1927, on the grounds that the claimant took part in a subsequent transaction with knowledge of the prior illegality; and *Group Josi Re v. Walbrook Insurance Co Ltd* [1996] 1 WLR 1152, in which it was noted that a letter of credit may be unenforceable against a bank where the underlying contract to which it relates was illegal (such an argument was later held to be "at least strongly arguable" in *Mahonia Ltd v JP Morgan Chase Bank* [2003] EWHC 1927).

[55] See, for example, *Armhouse Lee Ltd v. Chappell* The Times 7 August 1996, in which the Court of Appeal accepted that an advertising contract with the operator of a telephone sex line would be enforceable, even if a contract to subscribe to the sex line was not, since the former was "at one remove" from the latter; and *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, where the question was whether a contract of insurance was sufficiently connected with the (illegal) issuance of a false invoice to render it "tainted and unenforceable". The illegality doctrine is an embodiment of the wider *ex turpi causa* principle, under which the court will not lend its assistance to the enforcement of a wrongful act. In *Sea Glory Maritime Co v. Al Sagr National Insurance Co* [2013] EWHC 2116, the High Court ruled that, where illegality arose "*because of an inadvertent breach of the law … there is no 'turpitude' such as to bring the doctrine into play [and as a result] an ex turpi causa defence does not arise*."

[56] Such an argument was deployed in *Sea Glory Maritime Co v. Al Sagr National Insurance Co* [2013] EWHC 2116, in which defendant unsuccessfully argued that the claimant was in breach of a statutory implied warranty of legality. In the case of *Graiseley Properties Ltd & Ors v Barclays Bank plc* [2013] EWHC 67 (Comm), a borrower argued that its derivative agreement with Barclays should be unwound on the grounds that it was based on an implied misrepresentation by the bank that it was not involved in (potentially illegal) manipulation of the LIBOR rate. Although the case was settled shortly before it went to trial, the Court of Appeal ruled on an interim application that this aspect of the claim was arguable and could therefore proceed to trial.

arrangement with which they or their clients are involved falls within one of the categories in s.188(2) EA02, it may be advisable for them to satisfy themselves that an exclusion is available for the practice in question.

Application of the cartel offence in the insurance sector

The general desirability of sharing risk, together with the key role of brokers in matching those requiring cover with those willing to provide it, means that the provision of insurance and reinsurance often requires a degree of direct and indirect cooperation and information exchange between companies that may compete with each other in other respects. While this has periodically led to scrutiny of insurance arrangements under civil competition law,[57] it has generally been recognised that a degree of cooperation and information sharing is necessary and desirable as it produces positive efficiency benefits for consumers.[58]

Unfortunately, for the reasons set out above, such careful balancing of the restrictive effect of co-operation between competitors against its resulting benefits plays no part in the application of the cartel offence, which looks only at an arrangement's form rather than its effect on competition. As a result, even if an insurance agreement that involves a degree of co-ordination or mutual allocation of risk is clearly compatible with civil competition law, it may still raise issues under the cartel offence if it amounts to an arrangement specified under s.188(2) EA02. Although the specified arrangements are intended to describe conduct that is typically viewed as hard-core cartel activity, as noted above the term "cartel" is not used in the section itself. This article will now consider the extent to which this risk is real, rather than theoretical, by reference to three common insurance arrangements: (i) Lloyd's syndicates; (ii) the subscription market; and (iii) co-insurance and co-reinsurance pools and consortia.

Lloyd's Syndicates

A Lloyd's syndicate is a group of individuals and/or corporates (i.e. Members) that come together to underwrite insurance policies that are placed within the Lloyd's market. The syndicate is not a distinct legal entity. It should be noted, however, that around half of Lloyd's syndicates are single member entities (i.e. there is only one member). Since the assessment in this section applies only to syndicates with at least two individual or corporate members, it is not relevant for such single member entities.

Any Member participating in a number of syndicates operates through a Member's Agent, and each syndicate operates through a Managing Agent. The Managing Agent sets the strategy for the syndicate and negotiates and agrees to underwrite specific policies in accordance with that strategy, and evaluates and pays claims. In practice, the Members do not directly agree amongst themselves which risks to underwrite, or the terms or premium for insurance underwritten, as this is done on their behalf by the Managing Agent (or by an active underwriter or coverholder acting on behalf of the Managing Agent).

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[57] Most notably, the European Commission's sector inquiry into business insurance, which concluded in 2007 with a report that raised some concerns over the operation of subscription market - see http://ec.europa.eu/competition/sectors/financial_services/inquiries/business.html. While the report was not followed up by enforcement action, it was followed by voluntary changes to market practices including by implementation of BIPAR principles on placement of risk with multiple insurances (available at: http://www.bipar.eu/en/key-issues-positions/principles/) - see a helpful summary by the Lloyd's Market Association available at: http://www.lmalloyds.com/Web/market_places/legal/Materials/Subscription_Underwriting_and_Competition_Law.aspx.

[58] As recognised, for example, in the Insurance Block Exemption (*Commission Regulation 267/2010/EU on the application of Article 101(3) TFEU to certain categories of agreements, decisions and concerted practices in the insurance sector*), which provides a safe-harbour for common insurance arrangements such as the creation of co-insurance and co-reinsurance pools. The Commission's website helpfully summarises the position as follows: "*The service provided by insurance companies depends on an uncertain factor, i.e. the occurrence of the insured risk. Cooperation amongst insurers can enhance efficiency, for instance by helping insurers to share large and unpredictable risks or to gain better understanding of certain specific risks. Competition concerns arise, however, where such cooperation distorts competition and exceeds what is necessary to achieve substantial efficiency gains.*"

Arrangement

The first question that must be answered for an assessment of whether the creation and operation of a syndicate may be caught by the revised cartel offence is whether it involves an 'arrangement relating to undertakings' of a kind specified in s.188(2) EA02, since without such an arrangement there is no need to consider whether there is a potentially unlawful agreement between individuals to implement it.

Although Members do not actively agree the premium price for any policy, it is in the nature of the syndicate arrangement that each Member will underwrite an agreed portion of each risk at the same price as the other Members, with each Member covering the same share of the risk on a pro rata basis. It could therefore be argued that the syndicate amounts to an arrangement relating to two or more undertakings acting at the same level in the supply chain (i.e. the Members[59]) which, operating as the parties to the agreement intend, would indirectly fix a price (namely the premium) for the supply of a service by those undertakings (as specified by s.188(2)(a) EA02) or divide the supply in the UK of a service (i.e. the coverage of risk) between the Members (as specified by s.188(2)(d) EA02).

Given the role of a syndicate's Managing Agent, the Members do not agree amongst themselves which risks the syndicate will underwrite or the premium it will charge. This may not prevent the syndicate arrangements from being caught by s.188 EA02, however, since the wording of s.188(1) requires merely that there be an arrangement of the kind specified in section 188(2) "*relating to* at least two undertakings", rather than an agreement *between* them. Given how loose this wording is, and the wide range of arrangements that are potentially covered by the concepts of 'fixing a price' and 'dividing the supply of a service', a syndicate could well amount to a specified arrangement under s.188(2)(a) and/or (d) EA02. In addition, it is interesting to note, that, as a matter of law, an agreement between syndicate members may be deemed to exist on the applicable terms of the agency agreement that each has entered into with the Managing Agent.[60] While it is unclear whether such a deemed agreement is sufficient to be viewed as a relevant 'agreement between individuals' for the purposes of s.188(1) EA02, the existence of this principle further strengthens the argument that the arrangements between Members and their agent for establishing and operating a syndicate amount to an "arrangement relating to undertakings" within the meaning of s.188(2) EA02 .

Agreement

Once an arrangement has been found, the cartel offence may be committed if there is an agreement between at least two individuals "to make or implement, or cause to be made or implemented" that arrangement. This is a very wide concept and it is at least arguable that any of the agreements needed to establish and operate a syndicate could in principle be caught by it.

It must be borne in mind that, based on the express statutory wording, the individuals entering into the agreement need not be employed by the undertakings that are parties to the arrangement. It is also important to note that there is no equivalent requirement that the individual parties to the agreement should operate at different levels of the supply chain. The statute requires merely an agreement to make or implement, or cause to be made or implemented, an arrangement. As a result, although - as pointed out above - it may be possible to deem an agreement between individual Members by operation of law, it is not necessary to do so for the cartel offence to apply. Instead, it appears that the relevant agreement could arise, for example, from an employee of the Members' Agent agreeing with an individual Member or an employee of a corporate Member that the Members' Agent will arrange for that Member to join a syndicate. Alternatively, a relevant agreement could arise when an individual employed by a Managing Agent agrees with a Member how the syndicate will operate.

There may be scope to argue that an individual employee of an undertaking is not really "agreeing with" an employee of another undertaking to implement an arrangement between their employers when they act to implement a normal business arrangement in the course of their employment, for example by executing a contract. This is because, when doing so, they are simply acting as the agents of their employers who (as principals) are in reality the ones doing the agreeing. Accepting the validity of such an approach would require further debate over its extent, however, to establish when employees should no longer be viewed as acting in the

[59] It should be noted that, for competition law purposes, even individual Members can be "undertakings".
[60] See *North Atlantic Insurance Co Ltd v Nationwide General Insurance Co Ltd* [2004] Lloyd's Rep IR 47, applying *The Satanita* [1896] AC 59.

course of their employment. Otherwise, this approach might create a significant loophole by which employees of undertakings that were involved in actual hard-core cartel activity could use this argument to avoid prosecution.

Assuming that such an agency argument does not work, there appear to be ample opportunities for the creation and operation of a syndicate to lead to one or more relevant agreements. On this basis, both primary requirements of the cartel offence are capable of being met and participating individuals would arguably be committing a criminal offence unless an exclusion applies or a defence is available.

Exclusion

As noted above, under s.188A(1)(a) the offence is not committed if customers are given relevant information about the specified arrangement before they enter into agreements for the supply to them of the affected product or service. For this to be met in the case of syndicates, before signing up to a policy a prospective policyholder would need to be told: (a) the names of the Members of the syndicate; (b) a description of the syndicate "which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) applies"; and (c) the services provided by the syndicate. Of these, (a) seems to be the only requirement that may present difficulties over and above additional administration and paperwork, since the membership of the syndicate is not typically disclosed to policyholders. It should, however, be possible to argue that the fact that information on the membership of a syndicate is available on request to the market (and therefore to the broker instructed by the customer to arrange insurance) means that this requirement is met, even without active provision of this information.[61] We understand that, in practice, the Lloyd's broker will be aware of, or can readily discover the identities of, the Members of each syndicate and, assuming that this knowledge can be imputed to the insured syndicates, this should fall within the exclusion.

As far as the other potential exclusions are concerned, it would be unattractive and commercially impractical for details of each syndicate, including the names of its Members, to be published in a Gazette. While the Lloyd's Act 1982 does require that Members carry out insurance business through a Members' Agent,[62] it does not appear arguable that all aspects of the arrangements implemented by a syndicate are actually a legal requirement. On this basis, neither of these exclusions is likely to be available in practice.

Defences

Even if no exclusion applies, it should be possible for an individual involved in the setting up and operation of a syndicate to rely on one or more of the defences provided by s.188B EA02. In particular, it should be possible to argue that the defence in s.188B(1) is available on the grounds that "he or she did not intend that the nature of the arrangements would be concealed from customers".

It appears that, in using the term "nature of the arrangements" in s.188B(1), the statutory draftsman has deliberately chosen a looser term than "relevant information". On the assumption that it is possible to provide information on the "nature of the arrangements" without giving all "relevant information", this defence appears to require little more than the policyholder being made aware that the insurance is being provided by a Lloyd's syndicate. It is hard to imagine that anyone seeking commercial insurance coverage on the Lloyd's market would be unaware of this fact, let alone that anyone could be viewed as concealing this fact from potential policyholders.

Notifying the CMA of each syndicate is less attractive, due to the additional administrative burden this would impose, although it would in principle be possible. While it may be relatively straightforward for Lloyd's to notify the CMA annually of the membership of all syndicates that will operate for the coming year, it is not clear whether that would be sufficient, or whether details of each policy would have to be notified.

Although it is helpful and reassuring that a defence should be available for individuals involved in the creation and operation of Lloyd's syndicates, a defence may not provide the same level of protection as an exclusion. This leaves a degree of uncertainty over whether it could be argued that an offence might still in principle be

[61] The fact that Lloyd's does not currently supply details of the Members of the syndicate to the public at large, even on request, could weaken this argument.
[62] Section 8(2) of the Lloyd's Act 1982.

committed in circumstances where the availability of a defence is never tested. While it is highly unlikely that the CMA would prosecute such individuals, as there clearly would be no public interest in it doing so, this unsatisfactory situation leaves some residual uncertainty over the scope for the legality of agreements relating to the creation and operation of a Lloyd's syndicate, and potentially even contracts of insurance underwritten by the syndicate, to be called into question in private litigation.[63]

The Subscription Market

The 'subscription market' refers to the provision of insurance by informal, ad hoc combinations of insurers, each of which underwrites its own policy which covers a proportion of a particular risk. The insurers may be Lloyd's syndicates participating in the Lloyd's market or other insurers (e.g. participants in the 'companies market'). The process of subscription is broker-led, with the broker (as agent for the insured) and lead insurer agreeing terms, premium and the percentage of the risk that the lead insurer will underwrite. The broker then approaches other insurers to underwrite the balance of the risk. While the insurers in the following market can propose their own terms and premium, in practice they will frequently follow the terms and premium set by the lead insurer.

Arrangement

As already noted, in order to assess whether the operation of the subscription market may be caught by the cartel offence, it must first be established whether it gives rise to arrangements of a type specified in s.188(2) EA02. It is certainly helpful that each insurer enters into a separate bilateral agreement with the policyholder, via the broker, for the amount of risk that the insurer independently decides to cover, rather than this being agreed between insurers. On this basis, while the concept of "arrangement" is probably broad enough to cover the process by which the broker brings together a specific combination of insurers to cover the insured's risk, it is less clear that this arrangement is one that would 'divide the supply of insurance services between the insurers' (i.e. the form of arrangement specified by s.188(2)(d)). Although the insurers know that they will be sharing a risk, simply by virtue of their participation in the subscription market, there is no active division of that risk between them, in the sense of them collectively sharing the risk according to agreed portions.

There appears to be more of a risk that a subscription could be viewed as an arrangement that would "directly or indirectly fix a price" for the supply of the insurance, given the potential for following insurers to underwrite their agreed risk at the same premium as the lead insurer. Insurers participating in this kind of arrangement will be aware that it is likely to result in a number of insurers underwriting the same risk at the same price – the lead insurer will know as a matter of market practice that other insurers may well follow its terms and each insurer that follows the leader's terms will know if it is underwriting the risk at the same price as the lead, as this information will be on the slip. On the other hand, it is important to note that the outcome of the subscription process is largely brought about by the broker, as the policyholder's representative, and it is his decision whether to ask followers to match the leader's terms (and, ultimately, it is the policyholder's decision whether to accept terms offered by any insurer). The fact that the broker unilaterally initiates the subscription by each follower, and each follower can decide whether to accept or reject the proposal, may be viewed as introducing sufficient uncertainty into the process to prevent it being viewed as one of price-fixing under s.188(2)(a) EA02.

Notwithstanding the following insurers' freedom to determine their own rates, and the fact that this practice is likely to be the most efficient and indeed competitive means of arriving at the right price for a given risk, the fact that s.188(2)(a) covers both direct and *indirect* price-fixing could be sufficient for operation of the subscription market to be viewed as caught under this subsection. While this may appear to be rather an extreme conclusion, it is interesting to note the response when the CBI raised concerns with BIS that extension

[63] It is interesting in this context to note that on 30 May 2014 the Loan Market Association (**LMA**) issued a 'Notice on the Application of Competition Law to Syndicated Loan Arrangements' – available at http://www.lma.eu.com/uploads/files/LMA_Notice%20on%20the%20application%20of%20competition%20law%20to%20syndicated%20loan%20arrangements.pdf. This noted that caution should be exercised over "*interaction between members of a syndicate related to the establishment or flexing of terms*" and that "*As a general guiding principle … members should seek, and keep a record of, the prior consent of the borrower to any proposed contact with competitors whether in contemplation or following the appointment of the lead arranger/underwriter and formation of the banking group*" on the basis that this should "*provide important protection and exclude UK criminal prosecution should the contact be questioned*".

of the cartel offence could endanger subscription underwriting at Lloyd's in a April 2012 Working Paper. In a response produced in June 2012, and seen by the authors, BIS confirmed that, in its view, "premium fixing in underwriting situations" might well come within the scope of the offence. According to BIS, this was perfectly justified as such conduct could "be presumed likely to have a harmful effect on competition".[64]

Agreement

If the provision of insurance cover through subscription is viewed as an arrangement within the meaning of s.188(2), an individual may commit the offence by agreeing with at least one other person to make or implement, or cause to be made or implemented, that arrangement. Such agreements are most likely to arise through the process by which the broker obtains cover from a specific insurer, on the grounds that the accumulation of such bilateral contacts (each of which would give rise to an agreement to provide insurance) gives rise to the overall arrangement. On this analysis, the relevant individuals would be the broker's employee and the employees of each insurer or each syndicate's underwriter.

Exclusion

If subscription insurance arrangements fall within the scope of s.188(2) EA02, it is quite likely that they would be excluded under s.188A(1)(a), on the grounds that the broker (i.e. the agent of the customer) will be in possession of the necessary "relevant information" that must be disclosed to customers to qualify for this exclusion (the names of the undertakings to which the arrangements relate,[65] the nature of the arrangements and details of the services) before the insurance contract is entered into. There may be room for debate around this issue, including around the question of timing as, although the broker clearly knows this information in advance, there may be cases where the broker does not communicate it to the insured before the insurance is arranged, rather than in the cover note that is sent to the policyholder only after the insurance is in place. If the courts do take their usual view that the broker is the agent of the insured, and therefore the insured is deemed to have the broker's knowledge, then they should not think that the precise timing is crucial in these circumstances.

The safer course, however, would be for brokers always to ensure that they have specifically passed all relevant information to the insured, before the insurance is put in place, thus ensuring that the information was deemed to be "given to the customer" as required by s.188A(1) EA02 and avoid the potential consequences if the offence is unwittingly committed.

Defences

As with the operation and creation of syndicates, as a last resort it should be open to individuals employed by brokers, syndicates and underwriters operating on the subscription market to argue that they never intended to conceal the "nature of the arrangements" (i.e. the provision of insurance through the subscription market) from the insured and, on this basis, that the defence provided by s.188B(1) EA02 is available. Given the strength of

[64] This approach is consistent with that taken by the European Commission following its business insurance sector inquiry – see footnote 38 above. It is worth noting that a later Ernst & Young report (*Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market* – available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3113422), which was commissioned by the Commission as a follow-up to its own inquiry, concluded that ad hoc subscription markets should not in fact raise any competition concerns. The report found that, while pricing is typically aligned with the premium of the leader, the alignment reflects intensive competition in the market for the selection of the leader and so for the corresponding initial determination of premiums. The rationale for using ad hoc co-(re) insurance agreements was most often stated to be service and cost efficiency. Other reasons included that it helped to satisfy the needs of both customers and underwriters for risk diversification.

[65] This assumes that the "undertakings to which the arrangements relate" for these purposes include only the insuring syndicates and corporate insurers but not a syndicate's Members, on the grounds that their involvement is sufficiently remote from the subscription arrangement. This may not be sustainable, however, given that it is the Members themselves who provide the cover. Since policyholders are not given the names of individual Members, as opposed to the names of the syndicates through which Members are providing cover, this exclusion would not be available if the "undertakings to which the arrangements relate" are viewed as including Members.

this argument, there should be no need to consider the application of the alternative defences (i.e. lack of concealment from the CMA and seeking legal advice), which are in any event unattractive and impractical in this context.

Co-insurance pools and consortia

More formal combinations of insurers, such as co-insurance or co-reinsurance pools and consortia, may in principle fall within the scope of the offence, for similar reasons as apply to the other arrangements analysed above. While the type of arrangement falling within these categories may vary considerably, pools and consortia generally have in common that they will at least to some extent directly or indirectly fix the premium between insurers, and/or divide supply between insurers.

For example, under an insurance pool members will enter into a pool members' agreement which sets out each insurer's level of participation. Members then delegate authorities to enter into policies to a third party underwriting agent, which may be specifically set up for the purpose. Typically, as with syndicates, each pool member enters into a separate agreement with the agent, and there is no direct agreement between the pool members. Pool members may meet from time to time to agree budgets and business plans proposed by the agent. Alternatively, a consortia may involve insurers combining their underwriting capacity for a particular type of insurance. While each member will typically retain a right to refuse to participate in a risk that other members wish to cover, it will be at least implicit that members underwriting a risk together through the consortia will do so on the same terms.

Certain types of insurance pools and consortia are regarded as generally compatible with civil competition law rules, since the customer may benefit from paying a single price to be insured by a large pool of insurers, who are able to spread the risk between them. Such arrangements should provide customers with competitive premiums and sometimes (for very large potential liability items) may be the only option for certain types of coverage. The Commission has recognised this by including co-insurance and co-re-insurance pools within the protective scope of the Insurance Block Exemption.[66] Unfortunately, as already noted, application of the offence takes no account of whether an agreement is protected by a block exemption or delivers any countervailing consumer benefits or efficiencies.

Arrangement

It is likely that the arrangement between member insurers to set up a pool or consortium for the sale of insurance in the UK would be viewed as an arrangement which would "directly or indirectly fix a price … of a service" (s.188(2)(a) EA02)[67] and/or "divide between A and B the supply … of a service" (s.188(2)(d) EA02). As such, these arrangements would in principle fall within the scope of the offence.

Agreement

As before, the creation and operation of such an arrangement would necessarily involve a number of agreements between individuals (e.g. between an employee of a member insurer and an employee of the operator or between the employees of different member insurers). Any of these could in principle be viewed as being entered into to "make or implement or cause to made or implemented" the arrangement.

Exclusion

Given that both of the first two requirements are likely to be met, the application of an exclusion is of critical importance. Fortunately, it should be relatively straightforward to ensure that those wishing to obtain coverage from a pool or consortium are made aware of the identities of its member insurers before they enter into a contract of insurance. As noted above, they may not be aware of the identity of the members of a syndicate participating in a consortium but we understand that the broker almost certainly will and his knowledge should

[66] Articles 5 – 7 (see also footnote 43 above).

[67] Although insurers participating in a pool will not expressly agree the price of any risk, as this is done on their behalf by the pool operator, they will know that it is an inherent feature of the pool arrangement that each will underwrite a risk at the same price. This may be sufficient, given that s.188(2)(a) applies to the direct or indirect fixing of a price.

be deemed to the insured. Operators of pools and consortia should nevertheless check whether this step is included in their procedures.[68] Although needlessly burdensome, this option is certainly preferable to advertising the creation of every pool and consortium in the London Gazette.

Defences

Given the likelihood that pools and consortia will be excluded from the offence, by virtue of their membership being known to policyholders, it is unlikely that consideration of defences will be necessary. Should this be required, it should be open to individuals employed by insurers and operators to argue that they never intended to conceal the "nature of the arrangements" (i.e. the provision of insurance through the subscription market) from the insured and, on this basis, the defence provided by s.188B(1) would be available.

Conclusion

Notwithstanding the issues highlighted above, huge swathes of the insurance market will not be within the scope of the cartel offence, for example because a policy is underwritten by only one insurer or by a syndicate with a single corporate member. Even if an insurance arrangement does arguably fall within the scope of the offence, in most cases exclusions or at least defences should be available to any charge that the cartel offence has been committed. The prospects of such an outcome may be increased by ensuring that certain safeguards are met, particularly that policyholders know the identity of their insurers and ideally the members of insuring syndicates. Even if an offence were committed, and no exclusions or defences applied, the risk of prosecution is extremely small.

It is nevertheless bizarre that, theoretically at least, the potential remains for an individual to commit a crime by carrying out his employer's instructions to make a lawful agreement, which is itself compatible with civil competition law, on behalf of the employer in precisely the manner his employer intends. At least, as a result of the (admittedly hasty and imperfect) revisions to the scope of the offence during the passage of the Enterprise and Regulatory Reform Bill through Parliament, the scope for this has been reduced and therefore the worst consequences have been avoided. So far, there appears to have been no private litigation before the English courts in which the arguments based on the cartel offence have been deployed. This may, however, be due more to the lack of a situation in which such arguments were worth making, rather than the inability of parties to plead them.[69] It is perhaps fortunate that, at least for the moment,[70] the UK lacks a highly aggressive claimant culture such as that seen in the US, in which law firms are incentivised to bring high value claims on speculative and tenuous legal principles in the hope of a settlement and large financial award for the lawyers involved.

What is clear is that the changes to the cartel offence have made the law significantly more complex and less certain. After taking up so much of the time of officials, parliamentarians and lawyers in private practice, as well as incurring fees for companies wishing to avoid unintentional liability, it is far from clear that the new offence is any easier to prosecute than the old. In fact, the breadth of the new defences may well make it much harder. The answer to this question will become clear over time, once the CMA starts prosecuting conduct that took place after 1 April. Insurers and their employees can, however, take comfort in the fact that there is practically zero risk that individuals involved in legitimate activity on an insurance market will be prosecuted for acting in the normal course of their jobs.[71]

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[68] Consortia often publish their membership online, but it cannot be said with certainty that this alone would bring the consortia within the exclusion.

[69] Although a party seeking to plead illegality based on the cartel offence would need to demonstrate that the elements of the offence are present, it appears likely that, in the context of a civil claim, it would only need to do so to the civil standard. i.e. the balance of probabilities. This point is not generally addressed in the existing cases, since in such cases the offence was either one of strict liability and clear on the facts (e.g. writing insurance without authorisation) or the offence was admitted.

[70] Changes currently before Parliament, in the form of the Consumer Rights Bill, will enable opt-out collective claims in competition damages actions. It remains to be seen how far the safeguards in the Bill will prevent the sort of class actions that are common in the US. In the meantime, US claimant firms are becoming more active in the English courts.

[71] While recent investigations and prosecutions in the UK financial services sector have displayed a degree of populism or political motivation, the UK still lacks the highly politicised enforcement environment seen in some

countries. As a result, it is unlikely that an over-zealous prosecutor would decide to ignore the CMA guidance and bring a prosecution in such circumstances simply as a means of gaining a higher public profile.