

Advanced EU Competition Law Conference

Criminal enforcement of competition law: The UK experience

**Matthew O'Regan, Barrister,
St John's Chambers**



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1. The United Kingdom criminalised hard core cartel behaviour in 2002, when s.188 of the Enterprise Act created the 'criminal cartel offence'.¹ In 2013,² the offence was revised, with the removal of the requirement for a defendant to have acted dishonestly and the introduction of a number of new exclusions and defences.
2. There have been few prosecutions since June 2003, when the offence came into effect. There are doubtless a number of reasons for this, even though:
 - a. judicial support for the offence appears to be high (judging by sentencing remarks³ and the Court of Appeal's judgment in the *Marine Hoses* case⁴); and

¹ These notes set out the position in England and Wales. To date, all prosecutions under the criminal cartel offence have been brought in England. The legal position on prosecutions (although not the substantive law) is different in Scotland and Northern Ireland.

² Enterprise and Regulatory Reform Act 2013, s.47.

³ See sentencing remarks of HHJ Goymer in *R v Snee*, considered in paragraph 37 below.

⁴ *R v Whittle and others* [2008] EWCA Crim 2560, considered in paragraphs 28 *et seq* below.

- b. public support for the criminalisation of cartel conduct also appears to be high, judging by the results of research by the University of East Anglia⁵ into public attitudes to price fixing, which found that:
 - i. 79% believed price-fixing is harmful and should be punished; and
 - ii. 76% supported criminalisation, even if they did not consider price-fixing to be as serious as crimes of violence and theft (but about the same as fraud).
3. However, there is still a worrying lack of awareness amongst businesses: research undertaken in 2014 for the Competition and Markets Authority⁶ found that
- a. businesses generally considered price fixing and market sharing as “morally wrong” and 85% thought compliance was the “right thing to do”);
 - b. awareness of competition law was generally low (less than 23% had a good understanding of competition law);
 - c. only 30% knew market sharing was illegal and only 55% knew price fixing was illegal;
 - d. 57% had never heard of the CMA (!); and
 - e. the lack of knowledge was worse in SMEs than in larger businesses.
4. Today I will:
- a. outline the offence, in both its original and current form;
 - b. review investigations and prosecutions since 2003;
 - c. consider the future of the offence.

The criminal cartel offence

5. The criminal cartel offence is to be found in s.188 of the Enterprise Act 2002.

The offence

6. As originally formulated, an individual was guilty of an offence if he

⁵ Stephan, *Survey of public attitudes to price fixing in the UK, Germany, Italy and the USA* (CCP Working Paper, 15-8) (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642181.

⁶ BDRC Continental, *SMEs & Competition Law* (2015), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477543/BDRC_Comp_Law_Qual_Research.pdf and IFF Research, *UK businesses' understanding of competition law* (2015), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses_understanding_of_competition_law_-_report.pdf.

“ *dishonestly* agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements ... relating to at least two undertakings (A and B)”⁷

concerning

- direct or indirect price fixing by A and B (including in relation to rebates, discounts, surcharges etc.) (the agreement must be reciprocal);
 - limiting or preventing supply by A and B (the agreement must be reciprocal);
 - limiting or preventing productions by A and B (the agreement must be reciprocal);
 - dividing supply between A and B (there is no requirement for reciprocity);
 - dividing customers between A and B (there is no requirement for reciprocity); or
 - bid-rigging arrangements, i.e. an agreement that either one party shall not bid or where the winner is pre-determined (there is no requirement for reciprocity).⁸
7. ‘Dishonesty’ under criminal cartel offence was to be established in accordance with the *Ghosh* test applied in English criminal law, under which the concept of dishonesty has two constituent parts, viz. an objective part (was the defendant dishonest by the standards of reasonable and honest people?) and a subjective part (did the defendant realise he was dishonest by this standard?).⁹
8. The CMA’s *Cartel Offence Prosecution Guidance* makes clear that only ‘hard core’ cartels fall within the scope of the offence.¹⁰
9. In 2013, the criminal cartel offence was revised, to remove the requirement (in s.188(1)) for the defendant to have acted dishonestly.¹¹ Now, it need be proved only that the defendant entered into an agreement of the type specified in s.188(1) and (2)¹² and did so knowing how the agreement would be operated.¹³

⁷ Enterprise Act 2002, s.188(1).

⁸ Enterprise Act 2002, s.188(2) to (5).

⁹ *R v Ghosh* [1982] QB 1053 and *R v George and others* [2010] EWCA Crim 1148, in which it was also held that it was necessary to show only that the defendant had entered into the agreement dishonestly and not that there was mutual dishonesty between the defendant and another individual.

¹⁰ CMA, *Cartel Offence Prosecution Guidance* (CMA9, March 2014), paragraphs 2.1 and 2.2, available at <https://www.gov.uk/government/publications/cartel-offence-prosecution-guidance>.

¹¹ Enterprise and Regulatory Reform Act 2013, s.47(2).

¹² Owen, Watkins and Buckley, ‘Individual criminal liability – the cartel offence’ in Kellaway, Thompson and Brown (eds) UK Competition Law – The New Framework (2015), paragraphs 7.29 et seq.

¹³ *Ibid.*, paragraphs 7.48 et seq.

10. It will of course be necessary for the prosecution to prove that an agreement was entered into (a concerted practice, such as an information exchange, would not suffice¹⁴) and that the defendant knew it was of a specified type (i.e. a hard core cartel that appreciably restricts competition by object that did or could have an appreciable restriction on competition).
11. The main reason for removing the requirement for the defendant to have acted dishonestly was said to be that the requirement for the defendant to have acted dishonestly was making the offence too difficult to prosecute, for example where the defendants have not acted out of personal greed.¹⁵

Exclusions and defences

12. With the removal of the need for the defendant to have acted dishonestly, new defences and exclusions were introduced. The intention seems to have been to punish hard-core agreements that are entered into secretly.
13. The Enterprise and Regulatory Reform Act 2013 , s.47(5) introduced three new exclusions from the offence, which are contained in s.188A of the Enterprise Act 2002:
 - a. where customers are given relevant information of the arrangements before the agreement is entered into;
 - b. in the case of bid-rigging, where the person requesting bids is given relevant information before or when a bid is made; or
 - c. where relevant information about the arrangements is published before they are implemented in the London, Edinburgh or Belfast Gazettes.¹⁶
14. 'Relevant information' is the names of the undertakings, a description of the arrangements and the products or services to which they relate: Enterprise Act 2002, s.188A(2).
15. An offence is also not committed where an agreement is made to comply with a legal requirement under UK or EU law: Enterprise Act 2002, s.188A(3).
16. The Enterprise and Regulatory Reform Act 2013, s.47(6) introduced three new defences, which are contained in s.188B of the Enterprise Act 2002:
 - a. where there is no intention to conceal the arrangements from customers;

¹⁴ CMA, *Cartel Offence Prosecution Guidance*, paragraph 4.6.

¹⁵ For discussion, see Owen, Watkins and Buckley, *supra*, paragraphs 7.19 *et seq.*

¹⁶ See also Enterprise Act 2002 (Publishing of Relevant Information under s.188A) Order 2014, SI 2014/535.

- b. where there is no intention to conceal the arrangements from the CMA; or
- c. where, before the making of the agreement, reasonable steps have been taken to disclose the arrangements to professional legal advisers for obtaining legal advice on the arrangements.¹⁷

Penalties

- 17. An individual convicted of an offence is liable on conviction on indictment to up to five years' imprisonment and/or a fine or, on summary conviction, to up to six months imprisonment and/or a fine not exceeding the statutory maximum (which was £5,000 for offences committed before 12 March 2015 and is, for offences committed after that date, an unlimited fine) Enterprise Act 2002, s.190.
- 18. Confiscation proceedings may also be brought under the Proceeds of Crime Act 2002 and individuals who were company directors may be disqualified from acting as a company director for up to 15 years under the Company Directors Disqualification Act 1986, ss.9A to 9E.

Immunity from prosecution: 'no action' letter

- 19. The CMA operates a leniency programme.¹⁸ It considers this to be a "critical feature" of the UK enforcement regime and "a key for its success". The availability of personal immunity for directors and employees involved in cartels encourages them to come forward, so facilitating both criminal and civil investigations: without the possibility of immunity, they would have no incentive to come forward.
- 20. Under the CMA's leniency programme the CMA will grant blanket immunity from criminal prosecution to all current or former employees or directors of an undertaking that qualifies for 'Type A' immunity. Type A immunity is available when a company is the first to report a cartel to the CMA, there is no pre-existing investigation and the CMA does not have sufficient information to establish the existence of the cartel. There is also immunity from director disqualification.
- 21. Where the CMA is already undertaking an investigation, 'Type B' immunity/leniency may be available (at the CMA's discretion) for some or all cooperating current or former employees

¹⁷ It would appear that there is no apparent obligation to follow any advice that may be received, merely that the individual has disclosed 'relevant information' to the legal adviser.

¹⁸ OFT, *Applications for leniency and no-action in cartel cases* (PFT1495, 2013)), available at <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>. This guidance has been adopted by the CMA.

and directors of the applicant undertaking. There is also immunity from director disqualification.

22. If another undertaking has already reported the cartel to the CMA, 'Type C' leniency may be available for subsequent applicants. Criminal immunity for specific individuals may be available at the CMA's discretion.
23. Immunity also extends to disqualification as a company director.
24. An individual may also qualify for immunity if he or she approaches the CMA directly, either because s/he is the first to report the cartel or because her/his information adds significant value to the CMA's investigation and the grant of immunity is in the public interest. The individual must admit participation in the cartel and cooperate with the CMA. Individuals may also qualify for an 'informant's reward' of up to £100,000.¹⁹ However, persons involved in cartels are unlikely to qualify for a reward, unless they played a peripheral role.
25. Immunity is granted through a 'no action' letter. It is conditional upon continued cooperation with the CMA.

Experience to date

26. There have only been four prosecutions since 2003, one of which is on-going. This compares badly with an anticipated six to 10 prosecutions annually at the time the criminal cartel offence was created in 2002.
27. The CMA's *Cartel Offence Prosecution Guidance* makes clear (reflecting the Code for Crown Prosecutors) that a decision to prosecute must satisfy two requirements:
 - a. there is sufficient evidence to provide a realistic prospect of conviction – i.e. there is sufficient admissible, reliable and credible evidence that the offence has been committed, taking account of any likely defences or exclusions that may be raised: see section 4; and
 - b. prosecution is in the public interest: hard core offences are generally serious and justify prosecution, particularly if senior managers or ring-leaders are involved and if the individual is motivated by increasing profits or personal gain by overcharging customers: see section 5.

¹⁹ CMA, *Rewards for Information about Cartels*, available at <https://www.gov.uk/government/publications/cartels-informant-rewards-policy>.

Marine Hoses: R v Whittle, Brammar and Allison (2008)

28. This involved an international price-fixing and bid-rigging cartel, which was investigated by inter alia the U.S. Department of Justice, the European Commission and the OFT. Three British nationals (Mr Brammar and Mr Allison, employees of Dunlop, and Mr Whittle, a consultant who was paid to coordinate the cartel) were arrested in the US and pleaded guilty to offences under the Sherman Act s.1. They were sentenced to imprisonment.
29. However, their plea agreements with the Department of Justice provided that any sentences of imprisonment imposed by the UK courts under the criminal cartel offence would reduce on a day by day basis the period of imprisonment imposed by the U.S. court. Therefore, provided the UK sentences were at least as long as those imposed in the US, the defendants would not be required to serve their US sentences.²⁰
30. Brammar, Allison and Whittle thus pleaded guilty in the UK, as their US plea bargain required them to do. Each was sentenced to a substantial prison sentence and was disqualified from acting as a company director for between 5 and 7 years. Confiscation orders (in aggregate of just over £1m) were made against Brammar and Whittle, with additional sentences of three and four years in default; Allison was ordered to pay prosecution costs.²¹
31. The prison sentences were upheld (although reduced slightly) on appeal: Whittle (2 ½ years), Allison (2 years) and Brammar (20 months).²² These reflected the sentences imposed in the US. Absent the constraints of the US plea agreements, the Court of Appeal may have reduced the sentences further.

Air passenger fuel surcharge (BA/Virgin): R v George and others (2010)

32. BA and Virgin agreed to implement fuel surcharge on passenger flights. Virgin informed the OFT and was granted civil immunity. Its employees (including its Managing Director) were given 'no action' letters.
33. Four current and former senior BA managers were charged and pleaded not guilty. During the trial, it became apparent that the OFT had failed to disclose numerous emails (apparently over 70,000) to the defence, which were discovered in the account of a key

²⁰ The plea agreement in *United States v Peter Whittle* is available at <https://www.justice.gov/atr/case-document/file/484541/download>.

²¹ See <https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation>.

²² *R v Whittle* [2008] EWCA Crim 2560.

witness. The prosecution therefore offered no evidence against the defendants, who were formally found not guilty: the case thus collapsed on procedural grounds.²³

Galvanised steel tanks: R v Snee and others (2014/2015)

34. This concerned price-fixing, customer sharing and bid-rigging between 2005 and 2012.
35. The CMA investigation was extensive: dawn raids at five sites, involving 6 police forces and leading to 4 individuals being arrested; 70 witness statements; over 160 people contacted; 38,000 digital items reviewed for disclosure; and 49,000 pages of disclosure.
36. One individual (an employee of the immunity applicant) received a no-action letter. One individual (Mr Snee) pleaded guilty. He was sentenced to six months imprisonment, suspended for 12 months and 120 hours community service. This reflected an early guilty plea, cooperation with the CMA and personal mitigation.²⁴
37. HHJ Goymer was clear that the starting point was 2 years imprisonment: "*the economic damage done by cartels is such that those involved must expect prison sentences*".²⁵
38. Two other individuals (Mr Stringer and Mr Dean) were acquitted after a three week trial in June 2015.²⁶ They did not deny entering into the agreements.²⁷ Their defence was that they had not acted dishonestly and did not do so for personal gain, but for motives that included protecting jobs and ensuring cut-throat competition did not cause their companies to collapse. The jury was apparently told that the defendants were not motivated by personal greed, but worked hard, led 'unflashy' lives, driving second hand cars and paying off their mortgages.²⁸
39. Did this mean that jury would only find dishonesty if there is personal greed?

²³ *R v George and others* (2010): see <https://www.gov.uk/cma-cases/air-passenger-fuel-surcharge-criminal-cartel-investigation>. For press comment, see 'Collapsed BA price-fixing trial places OFT and Virgin in the dock', *The Telegraph* (11 May 2010), available at <http://www.telegraph.co.uk/finance/newsbysector/transport/7707701/Collapsed-BA-price-fixing-trial-places-OFT-and-Virgin-in-the-dock.html>.

²⁴ See CMA press release, *Director sentenced to 6 months for criminal cartel* (14 September 2015), available at <https://www.gov.uk/government/news/director-sentenced-to-6-months-for-criminal-cartel>.

²⁵ *Ibid.*

²⁶ See CMA press release, *CMA statement following completion of criminal cartel prosecution* (2 June 2015), available at <https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>.

²⁷ Blake, *The UK steel tanks criminal cartel trial: implications for criminalisation and leniency* (13 November 2015), available at <https://www.gov.uk/government/speeches/stephen-blake-on-the-uk-steel-tanks-criminal-cartel-case>.

²⁸ See e.g. 'UK antitrust watchdog loses criminal cartel case', *Financial Times*, (24 June 2015), available at <https://www.ft.com/content/82e7f432-1a7c-11e5-a130-2e7db721f996>.

40. In December 2016, the CMA subsequently imposed civil fines of £2.7 million on three companies. A fourth had immunity. All four companies admitted their involvement.²⁹

Reinforced concrete drainage products: R v Cooper

41. The CMA has been investigating a suspected cartel involving suppliers of precast concrete drainage products. On 7 March 2016, it announced that one individual, Barry Cooper, had been charged under s.188 of the Enterprise Act.³⁰ On 21 March 2016, Mr Cooper pleaded guilty to one charge under the criminal cartel offence.³¹ It would appear that the offence concerned agreement to divide supply, fix prices and divide customers between 2006 and 2013. As the CMA investigation is on-going (although no further charges have yet been brought), Mr Cooper awaits sentencing.

Abandoned investigations

42. There have also been a number of abandoned criminal investigations into suspected cartels:

- a. in the automotive sector (2011): no reason was given for discontinuing the investigation, which also involved the OFT coordinating with other competition authorities;³²
- b. concerning products for use in the agricultural sector (2011): there was insufficient evidence to proceed, even though the investigation did involve the execution of a search warrant at business premises;³³
- c. concerning commercial vehicle manufacturers (2011): there was insufficient evidence to proceed;³⁴
- d. in two unspecified sectors that were closed after the acquittals in *Galvanised Steel Tanks*, presumably because it would not have been possible to demonstrate dishonesty.³⁵

²⁹ Case CE/9691/12 *Galvanised steel tanks for water storage (main cartel infringement)* (19 December 2016). See CMA press release, *CMA fines water tank firms over £2.7 million* (19 December 2016), available at <https://www.gov.uk/government/news/cma-fines-water-tank-firms-over-27-million>.

³⁰ See CMA press release, *Man charged in CMA criminal cartel investigation* (7 March 2016), available at <https://www.gov.uk/government/news/man-charged-in-cma-criminal-cartel-investigation>.

³¹ See <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>.

³² See <https://www.gov.uk/cma-cases/automotive-sector-criminal-cartel-investigation>.

³³ See <https://www.gov.uk/cma-cases/agricultural-sector-criminal-cartel-investigation>.

³⁴ See <https://www.gov.uk/cma-cases/commercial-vehicle-manufacturers-criminal-cartel-investigation>.

³⁵ See Blake, *supra*, note 27. See also Blake, *Criminal cartel enforcement after galvanised steel tanks* (29 September 2015), available at <https://competitionandmarkets.blog.gov.uk/2015/09/29/criminal-cartel-enforcement-after-galvanised-steel-tanks/>.

Company Director Disqualification Orders – *Daniel Aston*

43. In August 2016, the CMA found that two companies, Trod and GB eye, had illegally fixed prices for the online sale (on Amazon Marketplace) of posters. The two companies had agreed to use automatic repricing software to ensure that one did not undercut the other. Trod was fined £163,371. GB eye was granted immunity.³⁶
44. In December 2016, Trod's former managing director, Daniel Aston, gave legally binding undertakings under s. 9B of the Company Directors Disqualification Act 1986 not to act as a company director for five years.³⁷ Breach of the undertaking is a criminal offence: CDDA s.13.
45. Mr Aston had been personally involved in the breach of competition law, so making him unfit to be a company director. He was not prosecuted in the UK, but has been indicted in the US in relation to similar anti-competitive conduct. Trod has admitted its involvement in that offence and has agreed to pay a fine of \$50,000.³⁸

Current and future enforcement

46. There are a number of on-going criminal investigations. Only one, *Pre-cast concrete drainage products* is in the public domain. In March 2016, one individual (Mr Cooper) pleaded guilty in relation to a cartel involving four manufacturers of concrete pipes between 2006 and 2013 and concerning price-fixing and sharing supply and customers. He awaits sentencing.³⁹ The CMA's criminal investigation is on-going and may lead to further individuals being charged. It also has an on-going parallel civil investigation, the progress of which will depend on the criminal investigation. There are other investigations, although nothing is in the public domain.⁴⁰
47. There have not yet been any prosecutions for periods after April 2014, when the dishonesty requirement was removed from the offence. The CMA apparently has on-going investigations, including those in which it has not received immunity applications and is using its own intelligence functions to investigate suspected cartels.

³⁶ Case 50223, *Online sales of posters and frames* (12 August 2016).

³⁷ See CMA press release, *CMA secures director disqualification for competition law breach* (1 December 2016), available at <https://www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach>.

³⁸ *United States v Daniel Aston and Trod Limited*; see generally, <https://www.justice.gov/atr/case/us-v-daniel-william-aston-and-trod-limited>.

³⁹ See paragraph 30 above.

⁴⁰ See Grenfell, *UK competition enforcement – progress and prospects* (9 November 2016), available at <https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-progress-in-enforcing-competition-law>.

48. The Government has provided the CMA with additional funding, which the CMA has invested substantially in its investigative capabilities,⁴¹ including:
- a. establishing a specialist Cartels and Criminal Group;
 - b. creating new roles Directors of Intelligence and of Digital Forensics and Intelligence;
 - c. enhancing its intelligence, investigation and enforcement capacity, including covert surveillance;
 - d. creating multi-disciplinary teams of specialist investigators, case officers, digital forensics and intelligence experts, disclosure and case support experts;
 - e. providing these teams with wider support from economists, lawyers and financial analysts; and
 - f. working in close cooperation with City of London Police and other police forces, including in executing search warrants and arresting suspects.
49. The CMA has recently been actively promoting its cartel enforcement activities, including its leniency programme and its informants reward scheme, under which payments of up to £100,000 may be made.⁴²
50. The CMA remains committed to criminal enforcement. In its current it has stated that it will "*take a pragmatic view about launching criminal cases where the activity occurred before April 2014*".⁴³ It also states that "*we are actively considering the launch of other cases involving cartel activity from April 2014 onwards, on the basis of on-going intelligence work*".⁴⁴ Unlike with its civil enforcement work (where it aims to commence at least six new civil enforcement cases each year⁴⁵), it gives no specific target.
51. Notwithstanding the difficulties in prosecuting pre-April 2014 conduct, the question remains why no other prosecutions have been brought when civil investigations have resulted in the CMA finding the existence of hard-core cartels, including through businesses admitting their involvement and settling with the CMA?

⁴¹ See Blake, *The case for specialist enforcement authorities from the perspective of the UK Competition and Markets Authority* (2 December 2014), available at: <https://www.gov.uk/government/speeches/stephen-blake-explains-the-benefit-of-specialist-cartel-enforcement-authorities>.

⁴² See CMA press release, *CMA launches campaign to crack down on cartels* (20 March 2017), available at <https://www.gov.uk/government/news/cma-launches-campaign-to-crack-down-on-cartels>.

⁴³ CMA, *Annual Plan 2017/2018* (March 2017), paragraph 3.10, available at <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2017-to-2018>.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, paragraph 3.7.

52. It is probably also necessary for the CMA to explain more clearly, both to the public generally and to juries, the benefits of competition and the harm that cartels cause, neither of which is necessarily obvious to the man on the Clapham Omnibus. A senior CMA official recently conceded as much.⁴⁶

Matthew O'Regan
St John's Chambers

May 2017

⁴⁶ Grenfell, *What has competition ever done for us?* (7 March 2017), available at <https://www.gov.uk/government/speeches/what-has-competition-ever-done-for-us>.