Changes to the UK Cartel Offence—Be Careful What You Wish For

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I. Introduction

Earlier this year, the UK Competition and Markets Authority (the CMA) announced that three men had appeared before court charged with committing the criminal cartel offence.[1] The charges relate to a suspected cartel (which is still under investigation) in the supply of galvanised steel tanks for water storage. Mr Peter Snee, former managing director of Franklin Hodge Industries, pleaded guilty in February (although this was not announced until June because of reporting restrictions). Mr Clive Dean, former director of Kondea Water Supplies, and Mr Nicholas Stringer, former director of Galglass, appeared in July but have entered no plea. The cases will be heard in January 2015. The CMA is also pursuing a criminal investigation into a suspected cartel in the construction industry.[2] It expects to publish an update on this case in March 2015. Both investigations were inherited from its predecessor, the Office of Fair Trading (the OFT).

There is an irony in the timing of these announcements. They suggest that the OFT had finally been getting to grips with the cartel offence in 2013 and 2014, just as the law was being changed as part of wide-ranging reforms to the UK competition regime.

II. The OFT's track record in criminal cases

To recap, the most serious forms of cartel activity were criminalised in the UK under the Enterprise Act 2002. Criminalisation was a key element of the changes introduced at the time, and was motivated by a recognition that sanctions imposed on individuals can have a stronger deterrent effect than corporate fines.[3] However, between 2002 and 2014, the OFT made just two serious attempts to enforce the cartel offence, and did not win a single contested case.

Key Points

- The UK Government has removed the requirement to show 'dishonesty' from the criminal cartel offence.
- In reforming the law, the Government introduced a number of new safeguards, in the form of legal exceptions and defences.
- Recent announcements about ongoing cases suggest that the reforms could make it more, not less, difficult to bring prosecutions.

- The first case was *Marine Hose* in 2008.[4] This case concerned an international bid-rigging cartel in the supply of specialist hoses used to transmit petroleum products from offshore facilities and vessels. The cartel was investigated by the European Commission and US Department of Justice, and three UK nationals pleaded guilty to criminal cartel activity in the USA.[5] Not wanting to serve prison sentences in the USA, they all entered plea agreements with the Department of Justice, allowing each of them to return to the UK, to plead guilty and serve custodial sentence there. Messrs Whittle, Allison, and Brammar are still the only individuals to have been convicted of the UK criminal cartel offence.
- The second case involved executives of British Airways, suspected of fixing fuel surcharges with their counterparts at Virgin Atlantic Airways.[6] That case collapsed in 2010 shortly before trial, when it was discovered that the OFT had not disclosed potentially relevant material to the defendants.

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1 A summary of this case is published on the CMA's website https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage accessed on 3 November 2014.

2 A summary of this case is published on the CMA's website https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry accessed on 3 November 2014.

3 The possibility of criminal sanctions has consistently been recognised as a key driver of compliance with competition law. See, for example, the OFT's Report into *Drivers of Compliance and Non-compliance with Competition Law* (OFT1227), May 2010; and *The Deterrent Effect of Competition Enforcement by the OFT*, a Report by Deloitte (OFT962), November 2007.

4 *R v Whittle, Brammar and Allison* [2008] EWCA Crim 2560.

5 See http://www.justice.gov/opa/pr/2008/July/08-at-663.html accessed on 3 November 2014.

6 *R v George, Crawley, Burns and Burnett*. A summary of this case is published on the OFT's website http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/criminal-cartels-completed/fuel-surcharges-proceedings accessed on 3 November 2014.

Bringing criminal prosecutions is not easy. It is even harder for a competition authority when it is carrying out a civil investigation into the same conduct at the same time. As well as different standards of proof and rules of evidence, the two processes are fundamentally different. In criminal cases, the authority acts as a public prosecutor, bringing cases before the criminal courts. In civil cases, it acts as investigator, judge, jury, and executioner.

Whichever case the OFT decided to bring as its first contested prosecution, there were likely to be teething problems. Not only was the OFT expected to develop new skills on the job, the law was itself untested. A well-resourced defendant might exploit all types of different legal uncertainties to try to avoid conviction. As it turned out, the OFT picked the fuel surcharge case. This was a bad choice for a whole variety of reasons, not least because much of the evidence brought against the defendants had been provided by the only other party to the alleged cartel (Virgin Atlantic), an immunity applicant with strong incentives to confess, and perhaps even exaggerate.[7]

After that case collapsed, the OFT carried out a drains-up review of its policies and procedures in criminal cases, known as the Project Condor Board Review.[8] The published Report reaches a number of conclusions and recommendations about the enforcement of criminal cartels. It recognises that the OFT picked the wrong case, stating: 'The case was very complex and the OFT found itself on a considerable learning curve. With the benefit of hindsight it was not ideal as the OFT's first contested criminal case'. It makes observations about the legal uncertainties and practical difficulties involved in bringing a criminal cartel prosecution. It also includes a commitment by the OFT to learn from its experience, in order to strengthen its criminal cartel enforcement in future.

III. The question of dishonesty

What the Condor Report did *not* say is that the OFT found it difficult to being prosecutions because it had to show that suspects had acted dishonestly. Wind forward two years and the OFT changed its tune. In 2012, the OFT's Senior Director of Cartels and Criminal Enforcement stated:

> [T]o date there has only been one successful criminal cartel prosecution and two prosecutions in total. Given its importance to the regime, this naturally raises the question as to why. I can answer that in one word: 'dishonesty'.[9]

At the same time the OFT submitted a detailed response to the Government's consultation on the proposed reforms to the UK competition regime in support of removing dishonesty from the criminal cartel offence, despite widespread concern among business and practitioners.[10]

The question of whether an individual needed to act dishonestly in order to be criminally liable became one of the most controversial aspects of the 2013–2014 reforms. Before 1 April 2014, a person was guilty of a criminal offence in the UK only if he acted dishonestly.[11] The test for dishonesty was famously set out by the Court of Appeal in *R v Ghosh*,[12] a case that involved various offences under the Theft Act 1968, including attempts to obtain money by deception. The court held that dishonesty should be assessed 'according to the ordinary standard of reasonable and honest people'. This involves an objective test (would a reasonable and honest person consider the behaviour dishonest) and a subjective element (must the defendant have realised that what he was doing was dishonest by the standards of reasonable and honest people). Dishonesty is now an established concept under criminal law, and there is no principled reason why it could not be applied in the context of a criminal cartel.

So why did the Government decide to remove dishonesty from the offence? The change was, at least in part, opportunistic. The 2013–2014 reforms were far reaching, covering almost every aspect of the regime. The reforms began life as part of the Government's much publicised 'bonfire of quangos' announced in 2010, intended to reduce the number of Government and quasi-Government organisations. The idea at the time was that merging the OFT and Competition Commission to form

7 Further, in *R v George, Crawley and Others*, 7 December 2009 (unreported), Owen J held that the OFT's role as public prosecutor combined with the co-operation obligations under the OFT's corporate leniency programme sometimes required the OFT to seek the disclosure of legally privileged materials from leniency applicants, prompting a change to the OFT's leniency policy.

8 Project Condor Board Review, December 2010, published on the OFT's website http://webarchive.nationalarchives.gov.uk/20130301193757/http://oft.gov.uk/shared_oft/board/2010/Project_Condor_Board_Review.pdf accessed on 3 November 2014.

9 Speech to the Law Society on 11 December 2012, *UK cartel enforcement – past, present, future*, published on the OFT's website http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/speeches/2012/1112.pdf accessed on 3 November 2014.

10 The OFT's response to the Government's consultation, June 2011 (chapter 5), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312068/L-O-competition-regime-for-growth.pdf accessed on 3 November 2014.

11 Specifically, under Section 188, Enterprise Act 2002, a person was guilty if he dishonestly agreed with one or more other persons to implement arrangements that, if operating as intended, would result in the most serious forms of cartel activity (price fixing, output restrictions, market sharing, or bid rigging).

12 [1982] EWCA Crim 2.

a single authority would save costs. It is old news that the reforms ceased to have anything to do with cost savings almost as quickly as the process of consultation began. They nevertheless presented an opportunity to change many other things about the regime that the OFT and Government did not like.

One of those things was the OFT's perceived failure to enforce the criminal cartel offence. The Government (egged on by the OFT) said that it was simply too difficult to bring prosecutions as the law stood, and so the threshold for criminal liability should be lowered. Changing the test for criminal liability should make it easier for the new authority to bring prosecutions, where the OFT had struggled. Explaining its reasons, the Government stated:

> The Government considers that removing the 'dishonesty' element from the criminal cartel offence will improve enforceability, and increase deterrence, bringing levels closer to what was intended when the offence was introduced. While levels of prosecution were never expected to be high, they were certainly expected to be higher than they have been to date.[13]

This argument has always been difficult to understand. There is no clear evidence that dishonesty had proved to be a stumbling block to prosecutions, and it is not a complaint that was made by the OFT in the Project Condor Review. As the Government itself acknowledged in 2011, proving dishonesty in a cartel case 'is yet to be properly tested'.[14] In its 2012 decision document, it accepted that there was a 'lack of live evidence of difficulties arising during the course of a jury trial in a contested case'. It nevertheless concluded that it was 'more likely than not that the inclusion of the 'dishonesty' element in the cartel offence is in fact inhibiting the OFT prosecuting cases'.[15]

Even if true, the test of dishonesty did not appear in the legislation by accident. It was included specifically to help juries to identify unlawful conduct without the need to consider the economic effects of business agreements. The 2001 Government White Paper explained that the test of dishonesty would avoid 'the real difficulties involved in requiring a prior determination regarding a breach of either Article 81 or Chapter I by a jury'.[16]

Put simply, dishonesty provided a way of differentiating conduct that no one would consider criminal, from conscious attempts to defraud. Consider the following example. Company A develops a new patented technology for the design of widgets. Company B develops a complementary technology for the design of blodgets. Both A and B decide to form a short-term joint venture to design and manufacture computer chips based on the new widget and blodget technologies. Each of A and B grants an exclusive licence to the joint venture and agrees not to develop rival chips using the same technology. This arrangement may well be pro-competitive and is likely to qualify for exemption from Article 101 TFEU. It is nevertheless an agreement that would 'limit or prevent production by A in the United Kingdom of a product' and also 'limit or prevent production by B in the United Kingdom of a product' for the purposes of the cartel offence. It is the dishonesty requirement that prevents the individuals arranging this joint venture from committing a criminal offence.

There are two other important reasons for limiting the criminal cartel offence to dishonest conduct.

- First, the criminal cartel offence is already an inchoate offence. The offence is committed when two or more individuals agree to do something that, if implemented as they intend, would amount to a cartel. They do not need to implement the cartel for an offence to be committed, just reach an agreement. The requirement to show dishonesty meant that innocent discussions about a possible agreement (that was perhaps not implemented because the individuals later realised it would be unlawful) would not be criminalised.[17]
- Second, in common with other dishonesty offences, a person cannot become a victim of a criminal cartel without some willing action on their own part. If I hit you on the head and steal your wallet, I commit an offence purely through my own actions. In contrast, if you willingly send me your money as payment for goods that I never deliver, you suffer loss through your own actions: sending me the money. This would be a crime if I had deliberately set out to deceive you. But if I had no intention of deceiving you, it would not be a crime, just incompetence. The difference is whether I acted dishonestly. The same principle applies to cartels. You do not become the victim of a cartel and suffer loss until you walk into a shop and willingly buy the product that is overpriced. If the price is higher than your willingness to pay, you do not buy the product and suffer no loss. Can the sale of goods at a particular price really be a crime unless

13 *Growth, Competition and the Competition Regime, Government Response to Consultation*, March 2012, paragraph 7.7.

14 *A Competition Regime for Growth: a Consultation on Options for Reform*, March 2011, paragraph 6.15.

15 *Growth, Competition and the Competition Regime, Government Response to Consultation*, March 2012, paragraph 7.8.

16 *Government White Paper: a World Class Competition Regime*, July 2001, paragraph 7.32.

17 The 2001 White Paper stated (at paragraph 7.31): '*A defendant could use as his defence the claim that he honestly believed he was acting in accordance with Article 81 or Chapter I*'. [Emphasis added.].

I colluded with a rival to raise prices in order to deceive you?

IV. Safeguards under the new offence

Whatever the merits of these arguments, the question of dishonesty is now water under the bridge. The Government decided fairly quickly that the dishonesty requirement would be removed. However, it was then faced with the question what, if anything, to insert in its place. It still needed a way of distinguishing innocent commercial agreements from hard-core cartels. Various proposals for safeguards were put to consultation and, in the end, the Government adopted most of them.

First, the Act contains new statutory exclusions.[18] An individual will not be guilty of an offence where customers are given relevant information about the potentially unlawful agreement in advance, through either notification or publication. The notification exclusion applies where customers are informed of the arrangements before entering a supply agreement or, in the cases of bid-rigging, by the time the bid is submitted. The publication exclusion applies where sufficient information is published in the London Gazette, the Edinburgh Gazette, or the Belfast Gazette. An exclusion also applies where the arrangements were entered into in order to comply with a legal requirement.

Second, there are new defences.[19] The first applies where an individual had no intention of concealing the nature of the arrangements from customers or the CMA at the time of the making the agreement. Another applies where, before entering into the arrangements, the individual took reasonable steps to obtain legal advice.

Third, the CMA must now publish guidance on the principles it will apply when determining whether to initiate proceedings under the criminal cartel offence.[20] The published guidance[21] states that the CMA will consider whether to bring a prosecution in accordance with the CPS Code for Crown Prosecutors. This includes an evidential assessment and a public interest assessment. The evidential stage requires an assessment of whether 'there is sufficient evidence to provide a realistic prospect of conviction'.[22] If that test is satisfied, the CMA states that 'A prosecution will usually take place unless there are public interest factors tending against prosecution which outweigh those tending in favour'. These factors include: the seriousness of the offence; the level of culpability of the suspect (including the suspect's involvement in the cartel, his objective, whether the agreement was concealed, and any evidence of deception); the impact of the cartel on the community; and whether prosecution would be proportionate to the likely outcome.

Many questions continue to be asked about how these safeguards will apply in practice. For instance, what are 'reasonable steps' to obtain legal advice? Does the individual have to follow the advice he receives? How much information would need to be notified to customers for the exclusion to apply? How can a suspect prove a negative (that he had no intention of concealing the nature of an arrangement)? Put another way, is it appropriate to deprive someone of their liberty—purely as a matter of economic regulation—where that person testifies under oath that he had no to intent conceal, but cannot *prove* the absence of a subjective intent? And who reads the London Gazette?

Another compelling criticism of the new offence is the conflict of interests it has created between the individual and his employer. The individual will want to disclose as much information as possible, to protect himself from prosecution, whereas the company may not want to disclose information about its commercial agreements, perhaps in fear that they will then be investigated under Article 101 or Chapter 1 (where publication is no defence). Ultimately, the decision as to what information is or is not published is likely to be outside the individual's control.

With all of these uncertainties, it is clear that, whatever case the CMA chooses as its first prosecution under the new regime, it will have to tackle a whole new set of unprecedented legal issues.

V. Conclusion

Understandably, and perhaps rightly, the main focus of commentators has been on the position of the individual. Is it fair to criminalise agreements that were not entered into dishonestly? Will the new exceptions and defences really provide sufficient protection for regular businessmen? Will the new law have a stifling effect on beneficial commercial agreements? And will in-house lawyers now find themselves inundated with fail-safe requests for competition advice about every type of agreement that a business considers entering?

But what about the CMA? It is far from clear that the CMA will find life easier under the new law. In order to bring a prosecution today, the CMA will have to overcome all of the old difficulties faced by the OFT (apart from the need to prove dishonesty), as well as navigating

18 Enterprise Act 2002, Section 188A.
19 Enterprise Act 2002, Section 188B.
20 Enterprise Act 2002, Section 190A.
21 Cartel Offence Prosecution Guidance (CMA9), March 2014.
22 Code for Crown Prosecutors, paragraph 4.4.

through new legal and practical challenges. This is the irony. These new problems come just as the OFT seemed to be getting on top of things. As to dishonesty, presumably Mr Snee thought there was enough evidence that he had acted dishonestly in order to plead guilty. Similarly, one can assume that the CMA thinks there is enough evidence of dishonesty against Mr Dean and Mr Stringer, in order to bring charges against them.

And spare a thought for Mr Snee and his colleagues. I have no idea whether they entered a cartel agreement or not, or (if they did) whether they were dishonest. But they might be wondering why anyone investigated today will get to tie the CMA up in a new set of legal knots, whereas they could be facing jail for an offence that the OFT said was too difficult to enforce.

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